

Advisory Opinion #25

Parties: David & Heidi Stapel and Cottonwood Heights

Issued: November 29, 2007

TOPIC CATEGORIES:

B: Conditional Use Applications

A conditional use shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonable anticipated detrimental effects of the proposed use in accordance with applicable standards." Standards for conditional uses must be set forth in ordinances, not established at the time of application.

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

ADVISORY OPINION (REVISED AND RESTATED)

Conditional Use Approvals for Short-Term Rentals

Advisory Opinion Requested by: David & Heidi Stapel

Local Government Entity: Cottonwood Heights

Project: Conditional Use Approvals for Short-Term Rentals

Opinion Authored By: Elliot R. Lawrence, Attorney
Office of the Property Rights Ombudsman

Date of this Revised Advisory Opinion: November 29, 2007

Issue

May the City of Cottonwood Heights reject a conditional use application when a similar application was accepted?

Summary of Advisory Opinion

Both conditional use applications should have been approved, subject to the conditions set forth in the City's ordinances. Utah Law requires approval of an application for a conditional use permit if reasonable conditions mitigate negative impacts of the use. Denying an application on the basis of "facial noncompliance" is prohibited by § 10-9a-507 of the Utah Code, and is inconsistent with the purposes of conditional uses.

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 Ann. § 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.

The request for this Advisory Opinion was received from David and Heidi Stapel on October 16, 2007. As provided in statute, a letter with the request attached was sent via certified mail, return receipt requested, to Liane Stillman, City Manager, at 1265 Fort Union Blvd., Cottonwood Heights, Utah 84047. The return receipt was signed and was received on October 22, 2007, indicating that it had been received by the City. A response on behalf of the City was submitted on October 25, 2007. The Office of the Property Rights Ombudsman issued an Advisory Opinion on November 14, 2007. On November 15, 2007, W. Shane Topham, attorney for the City of Cottonwood Heights, submitted a letter detailing some factual inaccuracies in the previous Advisory Opinion, and requesting that the Advisory Opinion be revised. On November 20, 2007, Todd Barfuss, attorney for the Stapels, confirmed the inaccuracy of some facts contained in the original Advisory Opinion and submitted a letter dated October 22, 2007 to the Cottonwood Heights Board of Adjustment, presenting the Stapels' version of the facts. On November 26, 2007, Shane Topham submitted a letter objecting to the Ombudsman Office's informal review of the contractual aspect of this dispute.

Evidence

The following documents and information with relevance to the issue involved in this advisory opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, submitted by David and Heidi Stapel, and received by the Office of the Property Rights Ombudsman, October 16, 2007.
2. Response submitted on behalf of the City by Wm. Shane Topham of Callister, Nebeker, and McCullough, dated October 25, 2007.
3. Chapter 19.89 of the Cottonwood Heights Code of Ordinances, governing short-term rentals.
4. Section 19.76.320 of the Cottonwood Heights Code of Ordinances, "Short-Term Rentals."
5. A "Settlement Agreement," purportedly entered by the parties with an effective date of October 19, 2007.

Assumed Facts

1. It is assumed that the two conditional use applications do not involve detrimental impacts that could not be addressed by reasonable conditions.

Revisions to Advisory Opinion

This Revised and Restated Advisory Opinion supersedes in its entirety the previously released Advisory Opinion in this matter dated November 20, 2007. The previous Advisory Opinion is withdrawn and of no force or effect.

The Background Section of this Revised and Restated Advisory Opinion contains some revisions to reflect the factual information received by this Office subsequent to the release of the previous Advisory Opinion. Section I of this Revised and Restated Advisory Opinion is unchanged from the previously released Advisory Opinion, except as to footnote 2 (the revisions to Footnote 2 are not material to this Advisory Opinion, changes having been made in the interest of factual accuracy). Section II of the previously released Advisory Opinion, which was an informal opinion of this office, has been removed. This Revised and Restated Advisory Opinion does not contain a Section II.

Background

The Stapels own two residential properties in Cottonwood Heights. The first home is located on Wasatch Boulevard, and the second on Creek Road. The applications were treated separately by the City. In the Spring of 2007, the Stapels applied to use the properties for short-term rentals. At the time of the applications, short-term rentals were allowed as a conditional use in the zones where the homes were located. (*See Cottonwood Heights Code of Ordinances § 19.89.050*). Section 19.76.320 of the City's Code regulates short term rentals, and limits the number of bedrooms to four.

On May 22, 2007, after the applications had been submitted, the City imposed a six-month moratorium on applications for short-term rentals. The City indicates that it is planning to revise its ordinances to prohibit short-term rentals in single family residential zones. In spite of the moratorium, the City processed the Stapel's applications as conditional uses. On June 6, the City's Planning Commission approved the Wasatch Boulevard house as a short term rental, with some conditions. The Commission specifically imposed a condition that the home could have no more than four bedrooms. In the application, the Stapels indicated that the house had eight bedrooms. The Stapels agreed to the conditions (including the bedroom limitation).

On June 20, 2007, the City's Planning Commission denied the application for the Creek Road house. According to the City, the application was denied because the Creek Road house had seven bedrooms, which violated the four-bedroom restriction imposed by § 19.76.320. The Stapels stated that they were willing to limit the available bedrooms in the home to comply with the ordinance.

A neighboring property owner appealed the approval granted for the Wasatch Boulevard home, on the grounds that the four-bedroom limit was violated. The Stapels filed an appeal on the denial of the Creek Road home, on the grounds that the denial was unreasonable because the

Wasatch Boulevard application had been granted under very similar circumstances. The City's Board of Adjustment heard the appeals on August 30, 2007, but has not issued decisions.

In September, the City proposed a compromise to settle the appeals. The City's proposal was basically to allow the Wasatch Boulevard approval to stand, but withdraw the Creek Road application. The City approached the Stapels and their counsel, Todd Barfuss, with a written Settlement Agreement. That Settlement Agreement contemplated a dismissal of all appeals in the matter, including the appeal filed by the neighboring property owner.

Analysis

I. The Creek Road Conditional Use Application was Entitled to Approval Because Reasonable Conditions Mitigate the Detrimental Affects of the Use

The conditional use permit for the Creek Road Short-Term rental should have been approved, because reasonable conditions could mitigate the use. "A conditional use shall be approved 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." UTAH CODE ANN. § 10-9a-507(2)(a).¹ Since the City's ordinance required that short-term rentals have no more than four bedrooms, the conditional use permit should have been approved, with the condition that the Creek Road home comply with that applicable standard.

Section 10-9a-507 requires approval of conditional use permits if reasonable conditions can be imposed to mitigate the detrimental effects of the use. That section also requires that the standards for conditional uses be set forth in a city's ordinances, rather than arbitrarily chosen at the time of the application. The Creek Road home evidently has at least seven rooms that are designated as "bedrooms."² However, the City's ordinance limits the number of bedrooms in a short-term rental to no more than four. It appears that this limit could have been imposed upon the Creek Road home (as it was on the Wasatch Boulevard home)³.

The City denied the Creek Road application because of "facial non-compliance with the four-bedroom limit" (*City's Response Letter*, at 3). By denying the application for "facial non-compliance" without attempting to impose the four-bedroom limit, the City is essentially requiring the applicants to propose their own conditions in advance, and hope that the City will accept them. Such a rejection is prohibited by § 10-9a-507, which allows denial of a conditional use permit only when it is shown that the detrimental effects of the proposed use cannot be

¹ There is a parallel section applicable to counties found at UTAH CODE ANN. § 17-27a-506.

² By reference to *Websters Dictionary* (in accordance to the preamble to chapter 19.04 of the City Code), the City's Ordinance defines a bedroom as a "room furnished with a bed and intended primarily for sleeping."

³ It should be remembered, however, that approval of one application does not necessarily require approval of another, even under identical circumstances. Each parcel and each application is unique. While approval of a past application may be a persuasive argument to approve a similar application, it does not bind a local government to approve a subsequent application.

mitigated by reasonable conditions. Furthermore, summary rejection by the City undermines the purpose of conditional uses, which anticipates case-by-case evaluation to suit specific needs, rather than blanket denials.

The City should have considered the conditional use application, and should have considered imposing a four-bedroom limit on the Creek Road application. This not only follows the standards announced in the City's ordinances, but it also helps to mitigate the impact of the use.⁴ Since the four-bedroom limit is a reasonable condition that mitigates the detrimental effects of the Creek Road home, the City should have approved the conditional use.⁵

Conclusion

Under § 10-9a-507 of the Utah Code, both conditional use applications should have been approved. An application for a conditional use permit shall be approved if reasonable conditions mitigate negative impacts of the use. A four-bedroom limit could have been imposed on the Creek Road House, in the same manner that it was in the Wasatch Boulevard House. Denying an application on the basis of "facial noncompliance" is prohibited by § 10-9a-507, and is inconsistent with the purposes of conditional uses.

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

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, § 13-42-205. 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 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

⁴ The City has not explained the four-bedroom limit. However, it stands to reason that the limit restricts the number of persons using the short-term rental, which helps harmonize the use with a residential neighborhood.

⁵ This Opinion assumes that there are no other detrimental effects that cannot be mitigated.

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.

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:

Liann Stillman
City Manager
1265 E Fort Union Blvd #250
Cottonwood Heights, Utah 84047

On this _____ Day of November, 2007, 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