

Advisory Opinion #37

Parties: David Mansell and City of Santa Clara

Issued: April 8, 2008

TOPIC CATEGORIES:

H: Compelling, Countervailing Public Interests

J: Requirements Imposed Upon Development

The Developer met the requirements of the City's code, by obtaining a geotechnical analysis by a qualified expert. The City's concerns about soil stability were legitimate, but the expert report addressed those concerns and showed how the stability problems could be minimized. The City had no factual information that outweighed the expert analysis, and so the Developer is entitled to approval, unless there is factual evidence contradicting the expert's report.

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

Hazardous Conditions as Grounds for Denial of Land Use Application

Advisory Opinion Requested by: David Mansell

Local Government Entity: City of Santa Clara

Applicant for the Land Use Approval: David Mansell

Project: Residential Subdivision

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

Date of this Advisory Opinion: April 8, 2008

Issue

Was the City's decision to deny an application for subdivision approval justified because of compelling concerns over soil stability?

Summary of Advisory Opinion

Section 10-9a-509 of the Utah Code requires approval of a complete application that conforms to land use statutes and ordinances, unless there is a compelling, countervailing public interest that would be jeopardized by the proposed development. While concerns about soil stability on the developer's property were a compelling public interest, the concerns were addressed and mitigated by recommendations from a geotechnical report prepared by qualified experts. There was no evidence presented that contradicted or disputed the report or its recommendations. The City's decision to deny the application was arbitrary and in violation of § 10-9a-509, because the decision did not have sufficient factual support.

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 U.C.A. §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 Mansell on January 8, 2008. As provided in statute, a letter with the request attached was sent via certified mail, return receipt requested, to Barbara Salmon, City Recorder, at 2721 Santa Clara Dr., Santa Clara, Utah 84765. The return receipt was signed and was received by the Office of the Property Rights Ombudsman on January 14, 2008, indicating that it had been received by the City.

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 filed January 8, 2008 with the Office of the Property Rights Ombudsman by David Mansell.
2. Additional information from David Mansell, emailed to the Office of the Property Rights Ombudsman, February, 2008
3. Response Letter, with attachments, from Russell J. Gallian, attorney for the City of Santa Clara, received March 7, 2008.

Assumed Facts

1. It is assumed that the proposed subdivision would meet all other development requirements of the City which are not discussed herein.

Background

In 2005, David Mansell acquired 10.5 acres located near 2700 North Canyon View Drive in Santa Clara. At the time Mr. Mansell purchased the property, and at the time he applied for approval, the property was within an “R-1-10” zone. As many as thirty residential building lots could be developed on the property, but the topography limited the actual area that could be used. The property includes a higher area that slopes downward about 40 feet to level area, including a wash and streambed that intermittently carries storm runoff water. The stream and wash are part of the Tuacahn Wash drainage.

The bulk of the soil, particularly in the lower area, is made up of mudstone, also known as Petrified Forest Member or “blue clay.” Both Mr. Mansell and the City acknowledged that this soil type is problematic from a geological-hazard perspective. The blue clay soil is soft and is highly expansive when wet. This expansion leads to stability problems, including landslides and

damage to foundations. Blue clay soil led to landslides and other stability in the St. George/Santa Clara area in the past. In fact, two properties near the proposed subdivision have recently experienced foundation problems attributable to the blue clay soil.¹

The lower area of the property also has a fairly high water table, particularly near the wash. Not only does the presence of water contribute to instability, it may also cause flooding and damage to underground utilities. In addition, concrete foundations and structures could be subject to damage, because of chemicals in the soil that may leach out into the water.

In early 2005, property owners in Santa Clara experienced serious flooding and landslides. Because of these past problems, the City adopted ordinances governing development on hillsides and floodplains.² Mr. Mansell was aware that these ordinance changes were being considered, and in fact he stated that he deliberately waited until the new ordinance was in place before proceeding with further discussions on the proposed subdivision.

After discussing development proposals with the City for nearly two years, Mr. Mansell submitted a preliminary plat on July 23, 2007, proposing 17 lots, with roughly 25% of the total property remaining as undeveloped open space. The proposed open space included the wash and a steep slope leading down to the wash. Five of the lots were proposed for an area above the wash, which is on the same elevation as Canyon View Drive. Several homes have already been built along that road, including an existing home located on Lot 3 of the proposed subdivision. The remaining 12 lots were proposed for the lower portion of the property. The discussions were drawn out because of concerns about the topography and soil stability, and because the new hillside ordinance was being drafted.

Mr. Mansell commissioned a geotechnical investigation from Applied Geotechnical Engineering Consultants, Inc. (AGEC), an engineering firm in St. George. Two reports were prepared by AGEC, the first in October of 2006, and another in July of 2007. The firm undertook field testing and sampling, and recommended steps that would enable development of the property. Among the recommendations were reinforcement of hillsides, compaction of the soil, adequate drainage, and installing concrete piers to strengthen the ground underneath the buildings. Both AGEC reports concluded that homes could be safely located on the property, provided the recommendations were followed.

The City asked the Utah Geological Survey (UGS), which is part of the Utah Department of Natural Resources, to review the AGEC reports. The UGS did not undertake independent sampling or analysis of the soil or groundwater from the property. The UGS review generally agreed with the AGEC report's conclusions and recommendations. The UGS also agreed that AGEC's recommendations would make construction on the property feasible and adequately

¹ See Letter from Utah Geological Survey to Matthew J. Brower, "Review of the 'Mansell Property,' a proposed 17-lot subdivision in Santa Clara, Washington County, Utah" dated September 6, 2007, at 5.

² Chapter 17-80 of the Santa Clara Municipal Code, adopted in 2006, governs "Hillside Development Standards," and Chapter 15-36, adopted in 2005, governs development in floodplains.

safe.³ Mr. Mansell asked AGECE to respond to the UGS review. AGECE submitted a letter addressing four concerns from the UGS review. That letter was dated October 4, 2007. Finally, the City requested additional review from Walter Jones and Todd Edwards, who are civil engineers in the St. George area. Their brief reviews generally agreed with the AGECE reports that the proposed subdivision could be developed on the property.

The City's planning commission met in November of 2007, and tabled consideration of Mr. Mansell's application, so that more information relevant to the adequacy of the proposed construction methods could be obtained. Mr. Mansell states that he provided the information that was requested, and that his engineering firm was prepared to address questions from the planning commission. At the December, 2007 meeting, the planning commission recommended that the City deny Mr. Mansell's application for preliminary plat approval, because they felt there were risks not explained by the engineers, and that the risk to the City was too great.

On January 9, 2008, the Santa Clara City Council considered Mr. Mansell's application. At that meeting, City Planner John Willie explained the history of the application, and noted that the project had been extensively studied. Todd Edwards noted several concerns raised by the City's staff, including the geotechnical issues, and made recommendations based on those concerns.⁴ Mr. Edwards noted that the AGECE report concluded that the proposed subdivision was safe. Walter Jones, who evaluated the application at the request of the City, stated that AGECE's recommendations "are the steps [the City] has asked them to take. They are meeting the requirements we have asked them to meet."⁵ Russ Gallian, Santa Clara's City Attorney, raised the issue that the soil would have greater instability should more water be introduced through leakage from a water or sewer line. He also noted that road maintenance would potentially cost more because of the soil issues.

Wayne Rogers, of AGECE, explained his firm's findings and conclusions, and stated that the geotechnical problems with the property could be mitigated through structural improvements and construction techniques. He identified three principal issues related to the subdivision: Slope Stability, Soil Expansion, and Drainage.⁶ The slope stability problem could be addressed through such things as reinforcements on the hillsides, using concrete piers, and by introducing compacted outside soil. Mr. Rogers explained that these improvements would actually strengthen the hillside, particularly the hill beneath the homes which exist above the subdivision property.

Soil expansion and drainage are interrelated, because the expansion problem is tied to the amount of water present in the soil. Mr. Rogers first noted that most of the water present in the soil—at least at shallow depths—is not natural, but is the result of culinary irrigation running off

³ The UGS review noted that further study may be necessary to address concerns about seismic stability and liquefaction.

⁴ Mr. Edwards also indicated concerns with the placement of roads, and the impact on traffic. He also suggested that the internal roads of Mr. Mansell's subdivision could be privately owned and maintained, and that the ownership and use of the open space area needed to be clarified. These issues are not evaluated in this Opinion.

⁵ See Minutes of the Santa Clara City Council, January 9, 2008, pp. 7-8 (*hereafter* "Minutes").

⁶ *Id.*, p. 13.

from other properties. He proposed piping runoff water into an existing storm drain system that fed into the Tuacahn Wash, using flexible pipes to reduce the possibility of leaks or breaks. He stated that other practices, such as connecting roof drains directly into the drain system, regular maintenance and cleaning of the storm drain system, and xeriscaping techniques would greatly reduce the amount of water introduced into the soil. Compacting and grading were also proposed to help stabilize the soil, and manage water runoff. Mr. Rogers's opinion was that the proposed practices and structures adequately addressed the soil stability, expansion, and drainage issues, and that the subdivision could be successfully and safely built.

The City Council also heard from several homeowners in the area, who expressed concerns about soil stability and the possibility of landslides. A few homeowners pointed out that they had already experienced problems due to soil expansion and movement. Most citizens were opposed to the Mansell subdivision, because they felt it would lead to landslides or other soil stability problems, and because they felt that the City would be assuming liability if such problems occurred.

In its discussion, the members of the City Council expressed "discomfort" with the risks associated with the development. The City Council was specifically concerned that the subdivision could introduce additional water into the underlying soil, which would lead to expansion and instability. Ultimately the council members felt that the hazards or risks could not be overcome, although there was no expert opinion directly refuting the AGEC report and recommendations. The City Council voted to deny Mr. Mansell's application.

Analysis

I. The Subdivision Should be Approved, Because it Conforms to the City's Land Use Ordinances, and Because There is not a Compelling, Countervailing Public Interest to Deny it.

There appears to be no reason why the subdivision application should not be approved. The application conforms to the City's land use ordinances, and there is not a compelling, countervailing reason to withhold approval. Section 10-9a-509 of the Utah Code governs when a land use application must be approved:

An applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect when a complete application is submitted and all fees have been paid, unless:

(i) the land use authority, on the record, finds that a compelling, countervailing public interest would be jeopardized by approving the application

UTAH CODE ANN. § 10-9a-509(1)(a).⁷ This section requires approval of applications that conform to a local government's ordinances, but also allows for denial in order to protect important public interests.

A. The Application Conforms to the City's Land Use Maps and Ordinances

In the matter at issue in this Opinion, there has been no dispute that Mr. Mansell's subdivision application conforms to the City's land use maps and ordinances. The parcel is zoned for single-family residential development, and the lots meet the City's minimum size requirements. The information made available for this Opinion show no objections to the subdivision, other than those which concern soil stability.⁸

The City's Hillside Development Standards Ordinance requires analysis by qualified experts to recommend plans for grading and drainage, and a geotechnical report of soil and groundwater conditions. The ordinance requires that the geotechnical report make recommendations for construction, including "the means proposed to minimize any hazards to life or property, or adverse impact on the natural environment." Santa Clara City Code, § 17.80.070(G)(6). The AGEC reports complied with that requirement, and made specific recommendations intended to minimize the hazards identified on the Mansell parcel. While the experts which evaluated the reports for the City raised some general concerns about the risks involved, there was no expert testimony or report that disputed or contradicted AGEC's conclusions and recommendations.

The application conforms to the City's ordinances governing development on hillsides and drainages.⁹ The City's ordinances require investigation and recommendations from engineering experts. The developer obtained two engineering reports, as required by the City.¹⁰ The reports evaluated the soil and drainage concerns, and the engineers recommended grading and construction designs that they felt would successfully address those concerns. As Walt Jones, one of the City's experts stated, the developer took "the steps [the City has] asked them to take. They are meeting the requirements we have asked them to meet."¹¹ Todd Edwards stated that "AGEC has indicated in their reports and studies that the subdivision is safe and *within the guidelines of [the City's] ordinances in their engineering judgment.*"¹² The Utah Geological Survey reviewed the AGEC report, and while suggesting additional investigations in some areas, agreed that development could proceed with certain precautions.

⁷ A parallel section, applicable to counties is found at § 17-27a-509.

⁸ It is assumed for the purposes of this Opinion that there are no other objections to the subdivision's design.

⁹ See Santa Clara City Code, Chapters 15-36 (floodplains); 17-48 (geotechnical issues); and 17-80 (hillside development).

¹⁰ § 17.48.020 of the Santa Clara City Code requires a report prepared by a licensed engineer when potential hazards due to erosion or soil stability have been identified. Furthermore, § 17.80.070 requires a drainage and geotechnical analysis for development on hillsides. The two reports were prepared by AGEC in July and August of 2007.

¹¹ See note 5, *supra*, with the associated text.

¹² Minutes, January 9, 2008, p. 7 (emphasis added). Mr. Edwards identified 6 areas of concern, and later indicated that those areas had all been addressed. See *id.*, p. 34

Mr. Mansell presented recommendations from his experts that addressed the concerns raised regarding soil stability, soil expansion, and drainage for the parcel. Nothing was presented which contradicted the AGECE report, or called its methodology into question. Since Mr. Mansell's application conforms to the City's land use ordinances, including the ordinances which govern development on hillsides, the application is complete, and is entitled to approval, unless the City can identify a compelling, countervailing public interest that may be jeopardized by the subdivision.

B. The City has not Identified a Compelling, Countervailing Public Interest that Would be Jeopardized if the Application were Approved.

The City may not withhold approval of the subdivision because its objections and concerns have been adequately addressed. Because there have been past problems with landslides and soil movement, the City wisely adopted ordinances governing development on hillsides, floodplains, and other problem areas. There is no question that the City's concern over soil stability and drainage is a legitimate and compelling public interest. *See e.g., Gardner v. Wasatch County*, 2008 UT 6, ¶ 22, 596 Utah Adv. Rep. 38 (a county ordinance addressing development in geologically sensitive areas was a legitimate governmental concern). However, the mere existence of a compelling public interest does not automatically mean that a local government may deny a land use application. Denial is justified only when a compelling public interest associated with a specific development cannot be resolved or sufficiently mitigated.

This concept is illustrated in the Utah Supreme Court's decision in *Western Land Equities*, which injected the term "compelling, countervailing public interest" into land use parlance. In that case, the City of Logan denied an application for a residential subdivision, in part because it felt that the road access to the parcel was insufficient for fire and other emergency equipment. The court noted that while Logan's concern about emergency access was reasonable, it was not sufficient to justify denying the application, because "it does not appear [that] the problem would be any less serious if the unarguably-permitted manufacturing facilities were erected instead of single-family houses." *Western Land Equities*, 617 P.2d 388, 396 (Utah 1980). In other words, although there is a compelling public interest—access for emergency equipment—the public concern was resolved, because the access problem would have been the same regardless of what was built.¹³

The City has justifiable concerns over the proposed subdivision, because of the soil conditions and the topography of the parcel. However, those concerns have been addressed through the process established by City ordinances—analysis and recommendations by experts. As has been discussed, the application complied with the City's ordinances, and addressed the concerns of soil stability, soil expansion, and drainage. Because the application conforms to the City's ordinance, § 10-9a-509 of the Utah Code compels approval, and the City cannot ignore its own

¹³ The court also noted that Logan could modify its specifications to meet the needs of a residential subdivision. *Western Land Equities*, 617 P.2d at 396.

requirements.¹⁴ The geotechnical expert retained by the applicant proposed measures to mitigate the problems, and there does not appear to be any expert testimony disputing those proposals. The applicants have thus resolved the issues raised by the City's compelling public interest, and, without strong evidence contradicting the expert's conclusions, denial of the subdivision application is not justified.

C. The City Council's Decision was Arbitrary, Because There was not a Sufficient Factual Basis to Deny the Application.

Finally, the decision of the City Council is arbitrary, because it does not have a sufficient factual basis. The minutes of the City Council meeting on January 9 show that the City's concerns were based on fears that some serious problem may occur despite the recommendations from the geotechnical report. "[D]enial of a [land use application] is arbitrary when the reasons are without sufficient factual basis." *Davis County v. Clearfield City*, 756 P.2d 704, 711 (Utah Ct. App. 1988). According to the minutes of the January 9 meeting, the City Council did not rely on factual conclusions or the expert's opinions, but instead denied the application because its members were not "comfortable" with the risks that were involved.¹⁵ The decision "did not have factual support in the 'vague reservations expressed . . . by the [council] members.'" *Id.*, 756 P.2d at 711, (quoting *C.R. Invs., Inc. v. Village of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981)). Since there was not a factual basis for the Council's denial, the decision was arbitrary.¹⁶

Conclusion

The application submitted by David Mansell was complete, and conformed to the City's ordinances, including those specifically addressing development on hillsides. The City's concerns over soil stability, soil expansion, and drainage were addressed in the geotechnical reports submitted by the developer's experts from AGECE. There was no evidence or expert testimony that contradicted the conclusions and recommendations proposed by AGECE. Because the application was complete and in conformity, § 10-9a-509 mandates approval of the application, unless a compelling, countervailing public interest dictates otherwise.

Concern over soil stability is a compelling public interest. However, the existence of a compelling interest does not by itself justify denial. A land use application may be denied only

¹⁴ See e.g., *Springville Citizens for a Better Community v. Springville*, 1999 UT 25, ¶ 30, 979 P.2d 332, 337-38 ("Municipal zoning authorities are bound by the terms and standards of applicable zoning ordinances and are not at liberty to make land use decisions in derogation thereof.")

¹⁵ See e.g. Minutes, January 9, 2008, p. 28.

¹⁶ There were also discussions centered on what would happen if the drainage system were to fail, or if an unusual amount of water were somehow introduced (for example, because of a water main break or leak), causing soil expansion or movement. These concerns were speculative, and not sufficiently factual to justify denial. In addition, soil expansion problems exist whether the subdivision is built or not. These concerns are legitimate, but they are not uniquely associated with the development. Like the access issue in *Western Land Equities* discussed above (see note 13, *supra*, and associated text) these speculative concerns about the impact of water being artificially introduced cannot be considered a "compelling, countervailing public interest" within the terms of § 10-9a-509.

when a compelling interest cannot be resolved or otherwise mitigated. There is no question that the soil conditions and the topography raise compelling public concerns. However, those concerns were addressed through the geotechnical report prepared by AGECE. Nothing was presented that was sufficient to contradict the conclusions and recommendations made by AGECE. Since the expert's recommendations mitigate the compelling public interest, the City did not have a basis to deny the application.

Finally, the City's decision is arbitrary, because there was not a sufficient factual basis to deny the application. In spite of the expert report (required by the City's ordinance), the City Council based its decision on "vague reservations" that the development was risky. A denial must have a factual basis. The geotechnical report provided expert analysis, and recommendations on how the soil stability problems could be addressed.

This Opinion recognizes that there are significant concerns about soil stability on this particular parcel that present unique challenges to development. The conditions on the property warrant greater scrutiny in the approval and the construction process. The City is right to carefully scrutinize the proposed subdivision. Careful investigation and inspection may yet reveal additional stability problems that cannot be mitigated in a practical or cost-effective manner. The conclusion of this Opinion is that the Utah Code, relevant caselaw, and the City's own ordinance require that any decision to approve or deny the application, or to suspend construction, must be based on expert recommendations and other established facts, not on speculation or unsupported "discomfort" about the risks associated with the development.

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 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

U.C.A. §13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. §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:

Barbara Salmon
City Recorder
City of Santa Clara
2721 Santa Clara Drive
Santa Clara, UT 84765

On this _____ Day of April, 2008, 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