

Advisory Opinion #75

Parties: Jeff Widener and Morgan County

Issued: September 30, 2009

TOPIC CATEGORIES:

R(v): Other Topics (Interpretation of Ordinances)

Review of a geotechnical report is a land use decision which should be completed within a reasonable time. An applicant may be required to pay the reasonable cost to review a report. An expert report should be challenged by objective, fact-based reasons, and the applicant should be given an opportunity to respond.

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ADVISORY OPINION

Advisory Opinion Requested by: Jeff Widener

Local Government Entity: Morgan County

Applicant for the Land Use Approval: Jeff Widener

Project: Single Family Dwelling

Date of this Advisory Opinion: September 30, 2009

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

Issue

Did a local government unreasonably delay an application for a building permit, were the application fees excessive, and was the eventual denial of the applicant's expert report justified?

Summary of Advisory Opinion

Review of geotechnical reports is a land use decision that must be completed within a reasonable time. The time between the date of application and the final decision by the Geologic Peer Review Board (GPRB) was reasonable under the circumstances.

Requiring an applicant to pay for the review a geotechnical report is justified where the cost of the review is reasonable. However, requiring that an applicant pay for a geotechnical review by three experts is unreasonable where review by one expert could suffice, unless it can be shown that the circumstances necessitate a review by three experts.

Finally, a report by a qualified expert using accepted research methods should not be lightly disregarded. However, the decision of the GPRB rejecting the applicant's report is justified, because the GPRB identified fact-based, objective reasons to reject the applicant's report. The applicant should be given the opportunity to amend the report to address the questions and concerns raised by the GPRB.

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.

A request for an Advisory Opinion was received from Jeff Widener on July 23, 2009. A copy of that request was sent via certified mail to Jann L. Farris, Morgan County Attorney. The return certificate, indicating that the County received the copy of the request, was received by the Office of the Property Rights Ombudsman on August 3, 2009. The County submitted a response to the OPRO, which was received on September 3, 2009.

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, including attachments, filed July 23, 2009 with the Office of the Property Rights Ombudsman by Jeff Widener, including attachments.
2. Response from Morgan County, including attachments, submitted by Jann L. Farris, Morgan County Attorney, received September 3, 2009.

Background

Jeff Widener owns a parcel of land in the Highlands West Subdivision, in the Mountain Green area of Morgan County. In September of 2008, Mr. Widener applied for a building permit to construct a single-family home on the lot. Because the property is located in a mountainous area that has experienced soil stability problems, the County enacted Ordinance 06-22, which requires that applicants obtain a geotechnical report. Building may not commence until the County has reviewed the report and given approval.

The County's ordinance also established a Geologic Peer Review Board (GPRB), to review required geotechnical reports and recommend approval, disapproval, or conditions on an application. The GPRB consists of three experts in geology or other related fields.¹ The County's Engineer, Planner, and Building Official shall review all proposed structures designed for human occupancy, to determine the risks from geologic hazards.² An applicant is required to

¹ Morgan County Ordinances No. CO-06-22(3)(C).

² *Id.* CO-06-22(3)(A).

submit a geotechnical study, which is then reviewed by the GPRB. In addition to the costs of the geotechnical report, the applicant is also expected to pay the costs and fees of each of the experts on the GPRB.³

As part of his application, Mr. Widener obtained geotechnical a report, prepared by Western GeoLogic and Earthtec, which he submitted to the County for review. The report evidently cited to earlier studies of the same area, along with some site observations made by the report's author. Mr. Widener also submitted studies performed on the same lot in 2007. On October 13, 2008, the GPRB met and reviewed the reports. Thereafter they issued several questions, and requested clarification on many statements made in the reports. The GPRB also reported that they had visited the site on October 9. After the October 13 meeting, Mr. Widener requested that the GPRB delay its final written analysis "until further notice," apparently to allow Mr. Widener's experts to respond to the GPRB's concerns.

Mr. Widener's expert, Western GeoLogic, submitted a response to the GPRB dated January 30, 2009. The County requested that another company, SBI, review the 2007 report, which had also been prepared by Western GeoLogic. On March 24, 2009, Western GeoLogic submitted a response to SBI's analysis. In May of 2009, SBI prepared a "Project Summary," of the application's history. Finally, the GPRB issued its report on July 24, 2009. The board felt that Mr. Widener's experts had not demonstrated that construction could proceed safely without additional data and study.⁴

Analysis

I. The Application Was Processed Within a Reasonable Time.

Nearly ten months passed between submission of the application and issuance of the final analysis and decision by the Geologic Peer Review Board. Under the circumstances, and given the complexity of the geotechnical reports, ten months was a reasonable time for a decision on the application.

Local governments must process applications for land use approval within a reasonable time. "Each land use authority shall substantively review a complete application . . . and shall approve or deny each application with reasonable diligence." UTAH CODE ANN. § 17-27a-508.5(2)(a).⁵ There is little guidance to help determine what the term "reasonable diligence" means. Each application is unique, and what should be considered a reasonable time for processing can only be determined on a case-by-case basis. Whether a "reasonable" time has passed could depend on several factors, including the complexity of the application, the resources available to the local

³ *Id.* CO-06-22(3)(C). The ordinance specifically applies to the Highland West Subdivision.

⁴ Except as explained herein, this Opinion does not attempt a detailed analysis of the expert reports submitted by Mr. Widener or the analysis prepared by the GPRB.

⁵ After a reasonable time has passed, an applicant may request that the local government act within 45 days. *Id.*, § 17-27a-508.5(2)(b). Mr. Widener did not invoke the 45-day provision.

government (including staff members), the speed and diligence of the applicant, and the number of pending applications to be processed.⁶

In this matter, the application was submitted in September of 2008, including the geotechnical report prepared by Mr. Widener's expert, Western GeoLogic. The GPRB conducted a public hearing on October 13, where several questions were raised about the report. Mr. Widener requested that the GPRB delay further action, apparently so his experts could prepare a response, which was submitted in January of 2009. The County obtained its own review from SBI in March of 2009, which was followed up by a response from Western GeoLogic. Finally, the GPRB issued its final report in July. The board's final analysis identified concerns, and did not recommend approval of the building permit.

Given these facts, it cannot be said that the time taken to review the geotechnical reports and prepare a final decision was unreasonable. The GPRB and the County allowed Western GeoLogic to supplement its original study, and the County obtained its own study. The GPRB diligently reviewed all geotechnical studies as they became available. No part of this process appears to have taken an inordinate amount of time. The geotechnical reports are very complex, and involve highly technical data analysis. With all of the information submitted over an extended period of time, ten months was not an unreasonable amount of time for the GPRB to issue its final report.

II. The Total Fees Charged for the Geotechnical Review are Unnecessarily High.

Morgan County's ordinance mandates that Mr. Widener pay for the services of the three experts on the GPRB. Because nothing has been submitted to show that three experts are necessary to review the plans, and that one expert would not suffice, the fees charged for three experts are unreasonably high.

Fees charged to review and approve development plans must be reasonable. *See Lafferty v. Payson City*, 642 P.2d 376, 377 (Utah 1982).⁷ Moreover, a number of past cases have imposed a "reasonableness" requirement on other types of local fees.⁸ The same restriction applies to fees charged to process land use applications. Morgan County ordinance establishes a three-member panel to review geotechnical reports, and specifically provides that the applicant bear the costs of

⁶ The amount of time spent to process similar applications under similar circumstances could be a useful guide to determine what constitutes a "reasonable time." No such information was submitted for this Opinion.

⁷ *Lafferty* concerned increases to building permit fees, which were justified as a means to fund infrastructure necessitated by new development. 642 P.2d at 377. Subparagraph (1) of § 17-27a-509 states that counties may only charge applicants the actual cost of reviewing plans for commercial or residential buildings, or 65% of the building permit fee, whichever is less. By its plain language, that statute applies to reviews of building plans (*i.e.*, blueprints), not development plans. *See also* Utah Code Ann. § 17-27a-509(2) (limiting fees for reviewing identical building plans). The first two subsections of § 17-27a-509 were adopted in 2005. The 2009 Legislature added new language limiting the amount of application fees "to the reasonable cost of processing the application." That amendment did not take effect until May of 2009, after Mr. Widener submitted his application.

⁸ *See e.g.*, *Lafferty*, (permit, connection, and impact fees); *Walker v. Brigham City*, 856 P.2d 347 (Utah 1993) (charges for utility service); *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981) (impact fees); *Weber Basin Home Builders Ass'n v. Roy*, 26 Utah 2d 215; 487 P.2d 866 (1971) (building permit fees).

that review, including the costs charged by the experts chosen for that panel.⁹ The experts are not employed by the County, but are independent contractors who charge for their services and time. It is understood and acknowledged that employing a full-time geologist would not be practical or cost-effective for the County, given the limited number of applications subject to geotechnical review. Thus, it is reasonable and appropriate for the County to contract with qualified experts to conduct the review. Because that review is necessitated by the land use application, it is reasonable and appropriate that the applicant pay the costs of the review.

However, the County's ordinance imposes too great a burden on applicants, by forcing them to pay for the services of three experts, when one may be sufficient. The County has offered nothing that justifies appointing a three-member panel to review the applicant's geotechnical reports. One person may just as easily review an application and provide expert analysis as three.¹⁰ Unless there is significant justification to warrant empanelling three geologic experts, the amount charged to the applicant is unnecessarily high.¹¹

The County has legitimate concerns about soil stability in the Mountain Green area. The requirement that an applicant submit a geotechnical study for review is an appropriate means to address those concerns. The County's requirements must be tempered by reasonableness, and no applicant should be required to bear more than is fair or necessary. The County has not shown that a review by three geologic experts is necessary to accomplish its purposes of ensuring the safety of buildings in areas susceptible to soil instability. Review by one expert may be justifiable, but absent some significant justification, review by a committee of three is not. Therefore, requiring the applicant to pay the full cost for three experts is unreasonable and excessive.

III. The GPRB's Decision was not Arbitrary Because it Identified Legitimate Factual Concerns with the Applicant's Report

The final report prepared by the GPRB was not arbitrary, because its analysis identified several factual concerns with the reports prepared by Mr. Widener's experts. There is only limited guidance on how local governments should use and follow expert reports. The County's Ordinance states that the GPRB "shall determine if the proposed structure presents an unreasonable risk to the safety of persons or property . . . or to the natural functions of the landscape . . . because of the presence of geologic hazards or because of modifications to the site due to the proposed structure." Morgan County Ordinances No. CO-06-22(3)(D). The applicant has the responsibility to show that a proposed structure could be built without unreasonable risk. *Id.* CO-06-22(3)(F).

⁹ Morgan County Ordinances No. CO-06-22(3)(C).

¹⁰ The problem is not the number of experts serving on the GPRB, but the cost to applicants. The County may choose to create a panel, board, or committee with any number of members, and the County may require that applicants bear a fair share of the costs to process an application. However, the costs borne by the applicant must still be reasonable. Should the County be able to show that three experts is necessary for a review of the reports, by showing for example that the application is highly complex, or specialized expertise is necessary, then charging for three experts may be justified. However, where one expert would do, unnecessarily tripling the cost of the review is unreasonable.

¹¹ It must also be remembered that an applicant must obtain a geotechnical study to be reviewed. In essence, an applicant must pay for four experts. Mr. Widener's experts actually submitted three separate reports.

Approval of a geotechnical report is a type of land use decision issued by a local government. All land use decisions must follow local ordinances, and a denial cannot be arbitrary, capricious, or illegal. *See* UTAH CODE ANN. § 17-27a-801 “[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). Denials cannot be based on vague reservations without a factual basis. *Id.*¹²

The GPRB report identifies several fact-based concerns, including:

The GPRB noted a discrepancy involving the depth of groundwater at the site. The report stated that groundwater was anticipated at greater than 30 feet, but another document submitted by the applicant noted that groundwater was present at 10 feet.

The GPRB noted that more recent studies may have superseded the studies cited in the applicant’s report.

There was a discrepancy between the test pit data cited in the Western GeoLogic report and what was cited in the Earthtec report.

The board members also noted that some information required by the County’s ordinance was not included, such as a site geology map and geologic cross sections.

Several of the GPRB’s comments seek additional information or clarification of statements made in the applicant’s reports. The GPRB did not indicate that the information was incorrect or that it would reject the conclusions made. It merely requested additional information or clarification in order to make a reasoned analysis.

A geotechnical report which follows accepted methodology and includes recommendations based on careful analysis of the situation should not be lightly dismissed, or held to an impossibly high standard. If a qualified expert using acceptable methodology concludes that a structure does not pose an unreasonable risk to safety, the County should accept that conclusion. However, an expert study can be rejected if a qualified expert identifies specific concerns with the research methods used, inconsistencies in data, or reliance on outdated or inapplicable studies. An applicant should be given the opportunity to respond to any concerns and submit supplemental information. It does not appear that the GPRB’s analysis is unreasonable or lacking a factual basis.

¹² The Utah Court of Appeals cited a Minnesota case which reviewed a denial of a land use application. The denial was based on unfounded concerns about traffic, density, and reduced property values. The Minnesota Supreme Court overturned the denial, because there was no factual basis supporting the concerns identified by the citizens, “even though they would have been legally sufficient had the record demonstrated a factual basis for them.” *Davis County*, 756 P.2d at 711, (quoting *C.R. Investments, Inc. v. Village of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981)).

Conclusion

The final decision or analysis by the Geologic Peer Review Board was not unreasonably delayed. During the ten months following the original application, there were supplemental reports prepared and a delay was requested by the applicant. Given these facts, it cannot be said that the GPRB took an unreasonably long time to issue its final report.

The fees charged by the County for the geologic review are unreasonably high. A local government may require expert reports to address legitimate public concerns, and may require that applicants bear a fair share of the costs to review the expert reports. However, the costs must be reasonable. The County mandated a three-member panel to review geologic reports, but review by one expert may have been sufficient. Requiring an applicant to pay the costs for analysis by three experts is unnecessary, unless there is significant justification for the additional persons and expense.

The analysis prepared by the GPRB does not appear to be arbitrary, because it identifies legitimate factual concerns with the reports submitted by the applicant. Rejection of an expert report is arbitrary if there is no factual basis for the denial. The GPRB report identified several discrepancies in facts or assumptions, which are fact-based. The applicant should be given the opportunity to supplement the reports to clarify information. The applicant's studies should not be rejected if they show that a home could be built without unreasonable risk.

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.

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:

Jann L. Farris
Morgan County Attorney
48 Young Street
Morgan, Utah 84050

On this _____ Day of September, 2009, 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