

Advisory Opinion #83

Parties: Kristen Nilssen and City of Draper

Issued: February 1, 2010

TOPIC CATEGORIES:

J: Requirements Imposed upon Development

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

The City has a legitimate public interest in preventing harm due to geologic hazards such as subsidence or landslide. The benefits of a geologic review ordinance outweigh the burdens imposed upon property owners. An expert report should be accepted if it is complete, uses reliable data, and follows accepted methodology. Rejection is justified if there is a factual basis disputing the report's conclusions to the point that the report should not be approved.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Kristen Nilssen

Local Government Entity: Draper City

Applicant for the Land Use Approval: Kristen Nilssen

Project: Single Family Home

Date of this Advisory Opinion: February 1, 2010

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

Issues

Did the City follow its Geologic Hazards Ordinance when reviewing a geotechnical report submitted by an applicant for development approval?

Summary of Advisory Opinion

The City has a legitimate public interest in preventing harm due to geologic hazards such as subsidence or landslide. The benefits of a geologic review ordinance outweigh the burdens imposed upon property owners. The City's ordinance requires that an applicant submit a geotechnical report, which is then reviewed for completeness, and whether the proposed use may be conducted without unreasonable risk. The report should be accepted if it is complete, uses reliable data, and follows accepted methodology. Rejection is justified if there is a factual basis disputing the report's conclusions to the point that the report should not be approved.

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 Kristen Nilssen on August 4, 2009. A copy of that request was sent via certified mail to Tracy B. Norr, Draper City Recorder. The return certificate, indicating that the City received the copy of the Request, was received by the Office of the Property Rights Ombudsman on August 10, 2009. The City submitted a response via e-mail on August 20, 2009. However, the OPRO has no record of receiving that email. The City resubmitted its response on October 26, 2009. It was received by the OPRO on November 2, 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, filed August 4, 2009 with the Office of the Property Rights Ombudsman by Kristen Nilssen.
2. Response from Draper City, originally submitted via email on August 20, 2009, resubmitted on October 26, 2009, by Douglas Ahlstrom, Attorney for Draper City.
3. Email reply from Kristen Nilssen, dated September 9, 2009.

Background

Kristen Nilssen owns a lot in the SunCrest development in Draper City. The development is located on the Traverse Mountain Ridge, which separates the Salt Lake and Utah Valleys. The City contends that Traverse Mountain has potentially dangerous geologic hazards, including faults, landslides, and other instability. Because of these conditions, the City enacted a geologic hazards ordinance. The ordinance identifies areas with potential geologic hazards, and requires expert analysis of any application for development within those areas.¹

¹ DRAPER CITY CODE, §§ 9-19-010 to -150. The Traverse Mountain area has been subject to land slides and other instability, which prompted the ordinance.

Ms. Nilssen's lot is situated on a relatively flat area, and is at the end of a cul-de-sac. The Lot slopes downward slightly towards the rear. There are two homes located on either side of the Lot, but the Lot has not been developed or disturbed, other than installation of the cul-de-sac. A few hundred feet behind the Lot is a road with more proposed building lots, which have not yet been developed. That road is at a slightly lower elevation than the Lot.² It is not clear how far the boundaries of the Lot extend towards the rear.

In 2006, a geotechnical report was prepared for the Lot by Professional Service Industries, Inc. (PSI). That report explains the analysis performed on the Lot, including two test pits dug in the center. The PSI report concluded that a home could be safely built, and suggested designs for the foundations and drainage.

In March of 2008, Taylor Geo-Engineering (TGE) reviewed the PSI report, and disputed the earlier report's claim that there was no evidence of landslides near the Lot. The TGE report stated that the "head scarp" of the Little Valley Landslide was located to the rear of the Lot. Because of that head scarp, the TGE report recommended that any building be set back (from the rear of the Lot), although the TGE report did not recommend a set back distance.³

In April and May of 2008, the two reports were studied by Simon Bymaster, Inc (SBI). Experts from SBI also visited the Lot, and dug a trench on the Lot, in the same area as the test pits from the earlier report.⁴ The trench was 10 feet deep, and about 70 feet long. The purpose of the trench was to determine whether or not the head scarp identified in the TGE report required any special modifications to the planned residence on the Lot. In a series of three reports, SBI agreed with the TGE report that the Lot was subject to the Little Valley Landslide head scarp, and that a set back was recommended.⁵

In June of 2008, Ms. Nilssen obtained a new report from Geo-Strata Engineering (Geo-Strata). That report reviewed the earlier information, and also observed the trench. The Geo-Strata report concluded that a home could be safely built, if it were located about 40 feet from the trench, or if the home were designed to accommodate 6 inches of settlement. In August, TGE reviewed the Geo-Strata report, and noted that some information was missing, including the basis for the two recommended alternatives.

In response to the TGE review, Geo-Strata, along with another company which had provided some of the analysis, submitted the information requested by TGE.⁶ Geo-Strata also revised its recommendations, based upon further analysis. In its report of April 22, 2009, Geo-Strata recommended a 20 foot setback. In the alternative, it felt that a special design to accommodate settling was no longer necessary.⁷

² Topographic maps indicate that the difference in elevation is about 200 feet.

³ The TGE report left that determination to PSI.

⁴ The trench and test pits were located near the center of the Lot, where a home would most likely be built.

⁵ There were a few other concerns related to definition of terms and whether the PSI report was properly signed.

⁶ Geo-Strata contracted with Intermountain GeoEnvironmental Services, Inc. (IGES), which provided some of the analysis for the reports. IGES submitted a supplementary report in October of 2008.

⁷ Geo-Strata and IGES relied upon soil strength tests conducted on nearby lots. According to their reports, the soil conditions on those lots is similar, and so the analysis should be valid for the conditions on Nilssen Lot.

In May of 2009, SBI submitted a review of Geo-Strata's April report. In that letter, SBI disputed Geo-Strata's conclusion that "no landslide features were observed in the trench." SBI pointed to three specific features which it felt demonstrated the existence of a potentially unstable landslide.⁸

In reports dated May 29 and June 3 of 2009, TGE disputed the conclusions reached by Geo-Strata, including the applicability of soil tests from nearby lots, and the necessity of either setbacks or special building design. Representatives from the companies met during the summer of 2009, in an effort to resolve the differences. As of the date this Advisory Opinion, there has been no resolution.

It appears that the major point of the dispute centers on whether the trench reveals evidence of a potentially unstable landslide, or if the soil is sufficiently stable to construct a home on the Lot. There are some other disagreements between TGE and Geo-Strata, based on the reports submitted in the Summer of 2009, but even those disagreements appear to relate to the analysis of the evidence found in the trench.

Analysis

I. An Applicant is Entitled to Approval if the Land Use Application Complies with Applicable Ordinances.

Utah Law provides that an applicant is entitled to approval of a land use application that complies with a local government's land use maps, zoning map, and applicable land use ordinances. *See* UTAH CODE ANN. § 10-9a-509(1)(a).⁹ If a proposed use is allowed, and the application meets the requirements of applicable ordinances, then the application must be approved. In this case, Ms. Nilssen's application must satisfy the City's Geologic Hazards Ordinance, because it was in force when the development application was submitted.

Protecting against landslides and other geologic instability is a highly important public interest. Homeowners in Draper, along with other cities throughout the state, have suffered great losses due to soil instability. The City adopted its geologic hazards ordinance, in an effort to address the very real threat of injury and property damage, particularly on hillsides. Regulating the design and use of buildings, through building and fire codes and other safety statutes, serves the overall public interest, even though such regulation often imposes additional costs and burdens

⁸ The SBI report states that its experts visited the trench and enlarged the digging at one end. The new excavation revealed additional features which, to SBI, further strengthen the conclusion that the soil on the Lot is unstable.

⁹ *See also* UTAH CODE ANN. § 17-27a-508(1) (applicable to counties). An otherwise compliant application may be denied if there is a compelling, countervailing public interest that would be jeopardized if the application were approved, or if the local government has initiated proceedings to change its ordinances in a way that prohibits or affects the application. *See id.* § 10-9a-509(1)(a)(i)-(ii).

upon individual property owners. The public benefit of compliance with a geologic hazard ordinance outweighs the additional burden imposed on property owners.¹⁰

II. The City’s Geologic Hazards Ordinance Requires Evaluation to Determine if a Proposed Land Use Presents an Unreasonable Risk due to Geologic Hazards.

The City’s Geologic Hazards Ordinance requires evaluation of an application, to determine if there is a geologic hazard, and if the proposed use poses an unreasonable risk due to the hazard. This determination is to be made by the City, not by an outside party. “The City shall review any proposed land use which requires preparation of a geologic hazards report under this chapter [*i.e.*, Chapter 9-19] to determine the possible risks to the safety of persons, property, and City infrastructure from geologic hazards.” DRAPER CITY CODE, § 9-19-110(a). To carry out that evaluation,

The City shall determine whether the report complies will all of the following standards:

- (1) a suitable geologic hazard report has been prepared . . .
- (2) the proposed land use does not present an unreasonable risk to the health, safety, and welfare of persons or property . . . because of the presence of geologic hazards or because of modifications to the site due to the proposed land use.
- (3) the proposed land use demonstrates that, consistent with the state of the practice, the identified geologic hazards can be mitigated to a level where the risk to human life and damage to property are reduced to an acceptable and reasonable level . . .

Id., § 9-19-110(f).¹¹

The City’s ordinance anticipates that the applicant will submit a geotechnical report that includes required information, such as logs of observations and data used as the basis for conclusions and recommendations. *Id.*, § 9-19-100.¹² If a report prepared by an applicant’s geotechnical expert complies with the City’s requirements, has all required information, and follows accepted methods of data collection and analysis, the City should accept it and its recommendations. If it

¹⁰ Ms. Nilssen raises the question that the delay associated with obtaining geotechnical reports, and their associated costs, could constitute an impermissible taking of her property rights. It is true that a regulation “that goes too far” may constitute a taking (*See Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)), but on its face, the City’s geologic hazard ordinance does not appear to “go too far,” because of the important public benefit of preventing harm due to geologic failure. However, an unjustified delay, even in pursuit of a legitimate public objective, may give rise to a possible takings claim. *See Del Monte Dunes at Monterrey v. City of Monterrey*, 526 U.S. 687 (1999).

¹¹ The phrase “acceptable and reasonable risk” is defined as meaning “no loss or significant injury to occupants, no release of hazardous or toxic substances, and minimal structural damage.” DRAPER CITY CODE, § 9-19-020.

¹² *See also id.*, § 9-19-090: “Any applicant requesting development approval . . . within a Geologic Hazard Study Area . . . shall submit to the City five paper copies and one electronic copy of a site-specific geologic hazard study report.”

does not, the City may reject it. The City's review should be completed in a reasonable time.¹³ If the report does not include required information, the City may withhold a decision until the information is submitted. If a report does not follow accepted methodology or uses unreliable data, the City may reject the conclusions, or it may request that the report be supplemented with correct data or with a justification for using an "unorthodox" analysis.¹⁴ The City's Geologic Hazards Ordinance, however, does not call for the City to commission its own competing report, and subject an applicant to a never-ending loop of comment and response between two sets of experts.¹⁵

To assist in carrying out its responsibility, the City contracted with its own experts to review the reports prepared by Ms. Nilssen's experts.¹⁶ The City may, of course, seek expert advice to review these reports, which deal with highly technical and specialized knowledge. The ordinance, however, requires a decision by the City on a complete report submitted by an applicant.

Ultimately, the focus of the analysis is whether carrying out the proposed use will pose an unreasonable risk because of documented geologic hazards. The use may be approved if the risk can be reduced to an acceptable and reasonable level by mitigating the hazards associated with the use. The analysis should therefore not be blind to the conditions associated with the site, and should include study of the actual geologic features as well as consideration of well-reasoned scientific studies. The City should make its final decision on a complete report within 45 days.¹⁷ If there is still a dispute concerning the City's decision, it may be necessary to file an appeal, as provided in § 10-9a-703(2) of the Utah Code.¹⁸

The Office of the Property Rights Ombudsman is not equipped or qualified to determine which of the competing experts is the most correct. That is the role of the geotechnical experts, who should follow the procedure envisioned by the City's ordinance. The property owner's experts should prepare a report containing all required information, and any additional data to support their conclusions. The City's experts should review that report, and should recommend approval if the property owner's report uses reliable data and follows accepted methodology. As long as the applicant's report sufficiently identifies the raw data upon which the expert's conclusions are based, the City's experts should not need to collect their own data, nor should they conduct their

¹³ The City's ordinance provides that the City will issue a final decision within 45 days. DRAPER CITY CODE, § 9-19-110(c); *see also* UTAH CODE ANN. § 10-9a-509.5(2) (requiring a final decision on a land use application within a reasonable time, or within 45 days if requested by an applicant).

¹⁴ Simply reaching a different conclusion by adopting a different type of analysis should not be a legitimate reason to reject a report. If a geotechnical report is complete and follows accepted methodology, it should not be rejected.

¹⁵ In addition, an applicant is responsible for "[a]ll direct costs associated with the review of geologic hazard studies," along with the costs of preparing the initial report.

¹⁶ The City's geotechnical experts are TGE and (possibly) SBI. Taylor Geo-Engineering seems to have taken the lead in the City's review.

¹⁷ One issue in this ongoing dispute is whether Ms. Nilssen's experts have submitted complete report. The TGE reviews identified specific information that was absent. The City's experts may require inclusion of required information or other supporting information in order to conduct an informed review of the report.

¹⁸ That section provides for an appeal of a decision applying or interpreting a geologic hazard ordinance. The statute requires review by a three-member panel of experts.

own analysis.¹⁹ The role of the City's experts is to evaluate the report that is submitted, and recommend approval or denial to the City. That recommendation must be based upon the information found in the report, and must be a reasoned analysis of the report's data and conclusions.²⁰ The ultimate decision on the report must be made within a reasonable time by the City.

Conclusion

The City's Geologic Hazards Ordinance serves a legitimate public objective, and land use applicants must comply with the ordinance. Even though there are additional burdens imposed on property owners and developers, the public benefits of the ordinance justify the obligation.

The ordinance requires that an applicant for development approval submit a geologic hazard study report. That report is then reviewed for completeness, and whether the proposed use may be conducted without unreasonable risk. The City should issue a final decision on approval or rejection within a reasonable time. As long as a report complies with City requirements, uses reliable data, and follows accepted methodology, it should be approved. Rejection is justified when there is a factual basis that outweighs the evidence presented in the report. Simply disagreeing with a complete and properly-reasoned report is not sufficiently fact-based to warrant rejection.

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

¹⁹ Unfortunately, that has already happened. Perhaps Ms. Nilssen's experts could prepare a final report, using the data uncovered by the City's experts. That report could then be reviewed and submitted to the City for a decision.

²⁰ As was stated earlier, the property owner's report may be rejected if the data is unreliable, or if the methodology is not acceptable. The City may not reject a report unless there is a factual basis justifying the rejection. "[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).

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:

Tracy B. Norr, City Recorder
Draper City
1020 Pioneer Road
Draper, Utah 84020

On this _____ Day of February, 2010, 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