Advisory Opinion 267

Parties: Derek and Dana Andreason / Salina City Issued:

April 20, 2023

TOPIC CATEGORIES:

Interpretation of Ordinances

Proceeding with Reasonable Diligence

Requirements Imposed on Development

The holder of an issued building permit constructed a residential fourplex building at the end of an existing dead-end street according to approved plans, but also built certain accessory structures in deviation of the issued permit, including road improvements, without further approval.

While the fourplex building is entitled to remain as approved in the permit, the added improvements must comply with the plain language of applicable land use regulations. The applicant must remove an attached awning that encroaches in a setback area and also remove landscaping improvements that unreasonably interfere with a deeded turnaround easement needed for emergency services, but may then be entitled to a certificate of occupancy for the fourplex. The city may not unreasonably withhold occupancy because of other noncompliance issues with detached accessory structures that have no material effect on the health and safety of the fourplex occupants, but may address these continued violations through typical zoning enforcement measures until remedied.

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ADVISORY OPINION

Advisory Opinion Requested By:	Derek & Dana Andreason
Local Government Entity:	Salina City
Applicant for Land Use Approval:	Derek & Dana Andreason
Type of Property:	Residential
Date of this Advisory Opinion:	April 20, 2023
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUES

Did Salina City properly deny a Certificate of Occupancy for the owner's project where construction deviated from approved plans? Is the as-built project entitled to occupancy?

SUMMARY OF ADVISORY OPINION

A permit-holder constructed a residential fourplex building at the end of an existing dead-end street according to approved plans, but also added certain accessory structures and improvements, including road improvements, without approval. Deviating from approved plans in a way that raises issues of compliance with applicable land use regulations requires additional land use approval according to the plain language of applicable regulations.

While the fourplex building is entitled to remain as approved in the permit, the added improvements must comply with the plain language of applicable land use regulations. The applicant must remove an awning attached to the fourplex building in a setback area and also remove landscaping improvements that unreasonably interfere with a deeded turnaround easement needed for emergency services, and may then be entitled to a certificate of occupancy. The city may not unreasonably withhold occupancy for the fourplex building because of noncompliance issues with detached accessory structures on the same property that have no material effect on occupancy of the fourplex, but may address these continued violations through typical zoning enforcement measures until remedied.

EVIDENCE

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

1. Request for Advisory Opinion submitted by Derek & Dana Andreason, and supporting documents, received on August 2, 2022.
2. Letter from Jayme Blakesley, attorney for Salina City, and supporting documents, dated November 4, 2022.
3. Letter from Bruce W. Parker, AICP, on behalf of the Andreasons, and supporting documents, dated November 21, 2022.
4. Salina Shields Subdivision Plat, Sevier County Recorder, Book 3, Page 41.

BACKGROUND

The Andreasons own "Lot 21" in the Shields Subdivision in Salina City, which is the last lot on west side of Maple Drive, currently a dead-end street. The property is zoned Multiple-Family Residential Zone (R-3), and the Andreasons received a building permit in 2016 to build a residential four-plex. However, over the course of construction, several stop-work orders were issued because of construction of certain additional structures that were not included in the permit as issued, as well as some concerns that these added improvements encroached on neighboring properties. The Andreasons executed boundary agreements to resolve boundary issues with neighboring property owners and had further discussions with the City on certain compliance issues. The Andreasons finished construction in November of 2020, but the City identified a number of compliance items that would need to be addressed before issuing any certificate of occupancy.

Believing they had adequately addressed the compliance concerns identified by the City, the Andreasons formally requested a Certificate of Occupancy in December of 2021. Following some further discussion, the City's attorney issued a letter dated June 15, 2022, which formally denied the requested occupancy because the City determined that four compliance items previously identified were still unresolved according to the City's development standards, which were stated as follows:

> *In summary, no occupancy permit will be issued until the following is removed or modified:*
>
> 1. *The carports must be removed.*
> 2. *The accessory building slab in the southeast corner must be removed and replaced with greenery.*
> 3. *The awnings on the north side of the building must be removed.*
> 4. *The cul-de-sac will need to be enlarged [with a radius from the center to the closest edge of the sidewalk of not less than 37.5 feet] under the supervision of the City.*

The Andreasons appealed that denial to the City's Board of Adjustment, and separately requested an Advisory Opinion to determine whether the denial was proper, or if they are entitled to occupancy under city ordinance and state law.

The background to this dispute involves a lengthy written record, derived from several public meetings before the City's Planning and Zoning Committee spanning the space of years that the project was under construction, and subsequent discussions of occupancy after construction was

complete. Because of this, instead of listing all relevant facts on which our analysis will rely together as a separate Background section, we will instead provide some detailed portions of the relevant facts in the following Analysis section, as needed, according to each issue discussed.

ANALYSIS

The Property Rights Ombudsman Act provides that an advisory opinion may be requested "to determine compliance with" applicable land use law. *See,* UTAH CODE § 13-43-205(1). In other words, the role of our opinion is limited to either (1) determining whether a particular action taken by the local government in approving or denying an application was proper, or (2) more broadly, whether a particular land use proposal is entitled to approval according to the plain language of applicable land use ordinances, and in accordance with state law.

Here, the Andreasons have requested an Advisory Opinion as to whether the City properly denied their requested Certificate of Occupancy as stated in the June 15, 2022 letter. That letter identified four remaining items the City determined to be unresolved before the City would grant occupancy. As the parties have each centered on these four items in their submissions, we will address each item in turn in this opinion. However, rather than make the opinion's focus on whether the particular June 15, 2022 decision was made properly with the information available to the City at the time,[1] because the greater interest of the parties is to have some finality on the outcome of the Andreasons' project, our opinion will look at these compliance issues in light of all current information to determine what the Andreasons need in order to be granted occupancy hereafter.

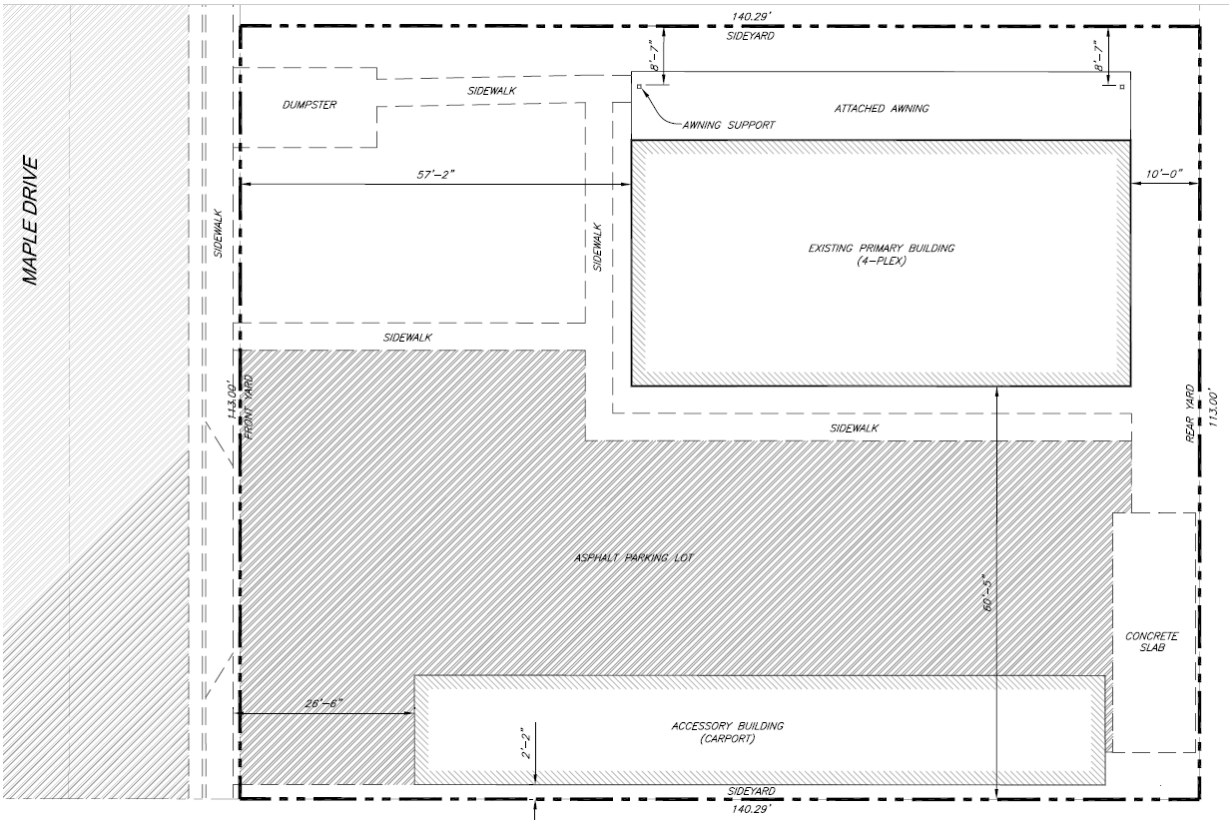
I. The As-Built Development Does Not Currently Meet All Applicable Regulations

Once a land use application is approved, and a permit is issued, the continuing validity of that approval is conditioned upon the applicant proceeding after approval to implement the approval with reasonable diligence. UTAH CODE § 10-9a-509(1)(e). Departing from the proposed land uses or structures that were approved in an issued land use permit is not "implement[ing] the approval" obtained by the land use authority, and may result in invalid or illegal uses or structures unless subsequent approval is obtained.

Here, the Andreasons deviated from the issued permit by, first, adding a shed (later removed and reduced to a concrete pad), second, relocating the carport structure from the location for parking indicated in the permit, and finally, the addition of an awning on the rear of the building. At a minimum, this requires the applicant to submit new plans for review and approval of a revised

[1] We conclude that the City's June 15, 2022 letter denying occupancy was arbitrary and capricious as it makes a number of conclusive statements without adequate explanation or support. *See*, *McElhaney v. City of Moab*, 2017 UT 65, ¶ 36 (land use decisions require written findings which must be "sufficiently detailed [to] disclose the steps by which an administrative agency reaches its ultimate factual conclusions."). However, remanding the decision to the City to be remade upon proper findings will likewise not resolve the dispute, as the June 15th letter also noted a number of areas where the record was lacking information to determine compliance, stating that a new survey would be needed to verify property lines. We note that following the June 15, 2022 letter, the Andreasons have since provided a new revised site plan dated November 22, 2022, which reflects all of the structures as-built at the time construction was completed. This revised site plan would not be part of the existing record for the purpose of any remand of the Andreasons' appeal of the June 15, 2022 letter. *See, N. Monticello All. LLC v. San Juan Cty.*, 2023 UT App 18, ¶ 21 (on remand, the land use authority is limited to only the evidence in the existing record that was before the agency at the time of the decision). It would, however, be considered on any renewed request for occupancy, and for this reason we choose to focus our opinion on whether, in light of all currently available information, the Andreasons are entitled to occupancy moving forward.

building permit. The Andreasons have provided a new revised site plan dated November 22, 2022, which reflects all of the structures as-built at the time construction was completed. (see, excerpt of revised site plan, below). This revised site plan should be the basis for considering any renewed request for occupancy, in which case, the plain language of the City's ordinances must be applied. UTAH CODE § 10-9a-306(3).



A. <u>The as-built carport complies with setback requirements, and may remain</u>

In their respective submissions responding to the request for an advisory opinion, both parties appear to agree that the carport is an "Accessory building," as defined by City Code, *see* CITY CODE § 17.04.120, and that R-3 zone requires the following setbacks for accessory structures, as found in Section 17.36.040.C:

1. Front: "twenty-five (25) feet . . ."
2. Side: "one foot if located at least six feet from the rear of main building . . ."
3. Rear: "one foot . . ."

But while the parties agree on the applicable setback standards, it appears that the parties simply disagree that the carport, factually, satisfies these setback distances. While the City may not have had adequate information at the time of the June 15, 2022 letter, the existing available evidence, however, does reflect that the Andreasons' have had a survey prepared, which establishes the existing fence line as the property line, and have now provided a professionally prepared revised site plan dated November 17, 2022 (see, above), which clearly depicts the distances of the carport from surrounding boundaries and improvements.

We note that the new site plan appropriately depicts "Front Yard" as the west side of the property facing the street, with "Rear Yard" to the east, and north/south "Sideyard[s]."[2] With this orientation, the plans depict the carport as having a Front Yard setback of 26'-6", a side yard setback from the south property line of 2'-2", and no label for a rear yard setback from the east property line, though the concrete slab stands between the carport and property line (and the respective distance between the carport and concrete slab is, at least visually, greater than the structure's setback distance from the south property line).

Based on the settled property lines to the south and east, and according to the surveys and revised site plans provided by the Andreasons, it appears that the existing carport, as an accessory structure, meets the applicable setback requirements of 25' feet in the front yard, one foot in the side yard, and one foot in the rear yard.

B. The Concrete Slab must be removed as violating Open Green Space requirements

There is some disagreement between the parties as to whether the concrete pad—which was what remained after the Andreasons' removed the unpermitted shed—is considered a "structure" and "building" under City Code,[3] and therefore subject to yard setback requirements for accessory buildings. However, providing an opinion on that question does not appear to be necessary as we conclude that the concrete pad otherwise causes the property to violate Open Green Space Requirements, and must therefore be removed.

The R-3 zoning regulations provide that "[a]t least forty (40) percent of the lot area shall be left in open green space." CITY CODE § 17.36.040.F. "Open green space" is defined as "an open space suitable for relaxation or landscaping. It shall be unoccupied and unobstructed by buildings and/or hard surfaces such as asphalt, cement and packed gravel, except that such open green space may be traversed by necessary sidewalks." *Id.* § 17.04.120.

Past meeting minutes reflect that by even the Andreasons' own admissions, the presence of the concrete pad results in the property being only approximately 32% open green space. At one point, the Planning and Zoning Committee appeared poised to accept the 32% open green space for the property on the theory that the concrete pad provided a recreation area for the residents, likely as a basketball court, which the Andreasons' argued met the "spirit of the ordinance".

However, a municipality is required to "apply the plain language of land use regulations," UTAH CODE § 10-9a-306(1), and is "not at liberty to make land use decisions in derogation thereof."

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[2] We note some discrepancy in how the parties have applied the City's setback requirements according to how the lot and fourplex building are oriented. Salina City's ordinances provide for Front, Side, and Rear Yard setbacks, and these setbacks are very clearly written with the assumption that a building will be oriented toward the public street on which it has frontage. For example, "Frontage" means "all the property fronting on one side of the street," and the "Front yard" means the open space "between the front line of the building . . . and the front lot line," or, the "Rear yard" means the space "between the rear line of the building . . . and the rear lot line," and so on. *See* REVISED ORDINANCES OF SALINA, Utah, 1999 § 17.04.120 ("CITY CODE"). The Andreason lot fronts on Maple Drive to the west. Therefore, according to the CITY CODE, the property has frontage to the west, and its "Front yard" is oriented from the west property line, the "Rear Yard" is oriented from the east property line, and the "Side Yards" are oriented from the north and south property lines, respectively.

[3] City Code defines "Building" as "any structure other than a boundary wall or fence," and in turn defines "structure" as "anything constructed or erected, the use of which requires location on the ground, or attachment to something having location on the ground." CITY CODE § 17.04.120.

Springville Citizens for a Better Community v. City of Springville, 1999 UT 25, ¶ 20. The concrete slab therefore cannot be included in calculating open green space requirements, because it is prohibited as a "building and/or hard surface." CITY CODE § 17.04.120.

Where the applicable open green space requirement is at least 40%, the City has no discretion to approve projects at percentages less than that, unless the ordinance is first amended in a way that either reduces the applicable threshold or would allow for the concrete slab to be included in that calculation as space intended for recreation, as had been discussed at previous meetings and tentatively acceptable to the City. Unless that occurs, the concrete slab must be removed to comply with existing coverage regulations.[4]

C. The attached "Awning" violates yard setbacks as approved, and must be removed

The City Code defines "Yard" as "an open space on a lot, other than a court, unoccupied and unobstructed from the ground upward by buildings, except as otherwise provided herein." CITY CODE § 17.04.120. Accordingly, the Code further defines Side and Rear yards each as "open, unoccupied space" between the respective line of "the building" and lot line. *Id.*

City Code provides that "[e]very part of a required yard shall be open to the sky unobstructed *except for . . . the ordinary projections of skylights, sills, belt courses, cornices and other ornamental features*." *Id.* § 17.72.040 (emphasis added). The Andreasons argue that the awning is considered an "architectural projection" that City Code does not consider an obstruction for purposes of yard requirements. The Code defines "Architectural projection" as "any projection which is not intended for occupancy and which extends beyond the face of an exterior wall of a building." *Id.* § 17.04.120.

When interpreting a statute, the primary goal is to ascertain the legislature's intent, the best evidence of which is the plain language of the statute itself. *Ragsdale v. Fishler*, 2020 UT 56, ¶ 29. The plain language of a statute is to be read as a whole and its provisions interpreted in harmony with other statutes in the same chapter. *Selman v. Box Elder County*, 2011 UT 18, ¶ 29 (citations omitted). The City Code has provided definitions in Chapter 17 of its Zoning Title and states that the words defined therein "shall have the meanings indicated." CITY CODE § 17.04.120. Otherwise, as for any other terms that are not provided a definition and no specialized meaning would otherwise apply, statutory language is to be interpreted "according to the 'plain' and 'ordinary' meaning of its text." *O'Hearon v. Hansen*, 2017 UT App 214, ¶ 24.

According to the Code's definitions, an "architectural projection" is specifically something "not intended for occupancy." CITY CODE § 17.04.120. The term "architectural projection" does not appear in any substantive provision of City Code, and is only found in the definitions section. However, we believe that this term is synonymous with the "ordinary projections" of "ornamental features" listed as excepted obstructions in the code's yard requirements. *Id.* § 17.72.040. In other words, "not intended for occupancy" means a projection that is purely ornamental.

Here, the attached awning or patio cover is not "ornamental" in nature, but is instead *functional*, as it houses the AC support for the building dwelling units, and is otherwise intended for the occupancy of the owners/tenants as a covered patio space. We therefore conclude that the

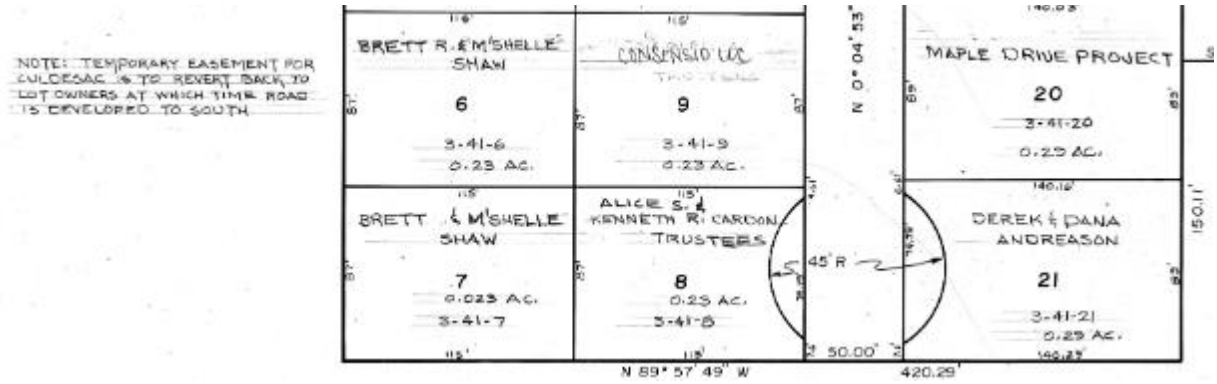
[4] Even if the Open Green Space requirement is amended to allow the concrete pad to remain, the issue of whether it is subject to required setbacks remains; and to that issue, none of the revised site plans provided include any measurement of the distances between the concrete pad and adjacent property lines, so such a determination of required setbacks, if applicable, is not possible at this time without more information.

additional projection of the awning is to be included as part of the fourplex building for purposes of determining setback distances.

The Andreasons were approved for a setback variance that established an 18' yard setback between the rear of the building and the north property line.[5] The updated site plan provided by the Andreasons' depicts that the face of the exterior wall of the fourplex building sits exactly 18' from the north property line, but that the attached awning then extends out from the building into that required yard. We conclude that the awning therefore violates the yard requirements that apply to the property, and must therefore be removed prior to a certificate of occupancy of the building.

D. <u>The City may accept installed road & sidewalk improvements according to through-street standards, so long as the Andreasons maintain the recorded temporary cul-de-sac easement area to reasonably allow for vehicle turnaround for as long as a dead-end exists</u>

Maple Drive currently dead ends with the Andreason property at its terminus, and is improved with asphalt and sidewalks featuring a "rolled curb" transition into gutters. At the time the Andreasons' permit was issued, these road improvements stopped short at the Andreason property line. The subdivision plat reflects a temporary easement for a radial cul-de-sac that encumbers a portion of the Andreason property (as well as the property to the west of the street) to allow for a turnaround. (see excerpt of Salina Shields Subdivision Plat, below).[6]



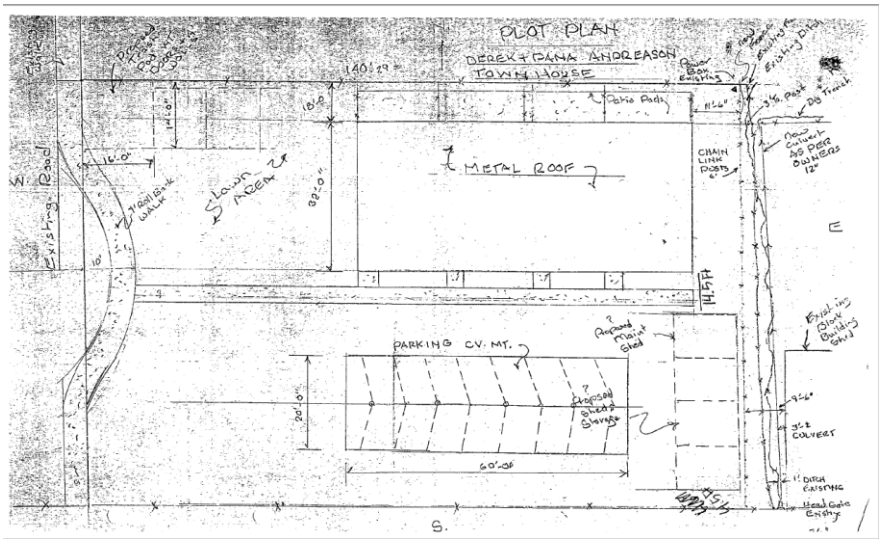
[5] The Andreasons alternatively argue that, even accounting for the inclusion of the awning in the building's footprint, the yard setback requirement is met. However, this relies on considering the space between the rear of the building and the north property line as the "side yard," specifically. But, while a plain application of the City's Code would, in fact, determine that this space is a "side yard" due to the lot's orientation toward Maple Drive to the west, *see*, note 4, supra, because the Andreasons were granted a rear setback variance for the fourplex building according to a south-oriented building plan, the City's approval of that variance has established this space as the rear yard. To argue otherwise, as the Andreasons do, would ignore the fact that the true rear yard—the space between the building and the east property line—is not met by the existing fourplex building, as the updated site plan reflects a distance of 10' from the east property line, which not only fails to meet the code's stated rear yard setback of 30', but would likewise fail to meet even the reduced 18' variance anticipated in the approved setback variance. It is our opinion that the legal effect of the City's approved setback variance should be to generally accept as compliant the actual setbacks of the fourplex building, as depicted and approved in the issued permit.

[6] Salina Shields Subdivision Plat Lots 1-21, SEVIER COUNTY RECORDER, Book 3, Page 41, accessed via https://www.sevierutah.net/departments/county_officials/recorder/index.php > Ownership Plats Google Drive > Subdivisions > Subdivisions-BK3 (last accessed March 15, 2023).

The “Plot Plan” on the original building permit application only depicted sidewalk improvements along the west property line, and did not otherwise account for any turnaround or the recorded easement. However, at the July 13, 2016 Planning and Zoning meeting, prior to the permit issuance, the cul-de-sac was discussed, as follows:

> *According to Salina City plat map there is a recorded 20’ roundabout that encroaches the property on the west. Andreason will have to account for the 20’ roundabout and the additional required side setback. The committee reviewed the sidewalks, curb and gutter with Andreason. Andreason understood and agreed to complete the sidewalk, curb and gutter along the property line to the west.*

Following this discussion, the Andreasons submitted revised plans that depicted a bowed-out sidewalk meandering into the Andreason property along Maple drive, and noted as “Rollback walk.” (see, revised “Plot Plan,” below).



However, at some point prior to completion of construction in November 2020, the Andreasons instead installed a continuation of the existing sidewalk/rolling-curb/gutter as a straight shot along the west property line, but with an added radial portion of concrete to the east of the sidewalk going into the Andreason property. (see aerial photo survey of completed construction, below). These improvements were constructed without authorization or direction from the City. *See* CITY CODE § 12.04.030 (“[a]ll sidewalks shall be constructed under the inspection of the supervisor of streets or his or her duly authorized representative.”)

The City's road standards apply to all development activity, and contrary to the Andreasons' argument, just because these standards are found in the City's subdivision chapter does not mean that the Andreasons are not subject to them because they are not further subdividing their lot. *See*, *id.* § 16.04.120 (no permit may be issued "unless the plans for the proposed erection, construction, reconstruction, alternation or use fully conform to all provisions of this [subdivision standards] chapter.").

The City Code provides that all streets are required to meet the City's construction standards. *Id.* § 16.04.070. Through streets in a subdivision "must conform to the major street plan of Salina, Utah," *id.* § 16.04.060.A, and all dead-end streets must "provide at their terminus a turnaround with a radius of at least fifty (50) feet, and shall provide adequate storm sewers or other means of drainage." *Id.* § 16.04.060.E. All streets within city limits are required to be dedicated for public use. *Id.* § 16.04.060.L.

The City's position is that as Maple Drive is a dead-end street, a cul-de-sac is required as a turnaround, and the Andreasons are responsible for providing the portion of the turnaround adjacent to and commensurate with the property they are developing, that is, half of the turnaround along their frontage. While the Andreasons completed a section of the road without prior City approval, the City was not going to require the entire street be torn up and redone, as long as the turnaround is rebuilt to the City's standard for a cul-de-sac.

The Andreasons argue that because the City's Transportation Master Plan provides that Maple Drive is planned to continue southward as a through street, and the subdivision plat contains a note that reads "Temporary Easement for Culdesac is to revert back to lot owners at which time road is developed to south," they should not be required to install an improved cul-de-sac so long as the property otherwise continues to allow for vehicle turnaround. The Andreasons note that the property to the west of the right-of-way has already been developed with residential dwellings, and no similar street improvements have been required on that neighbor's respective portion of the cul-de-sac easement.

We agree that, under these circumstances, considering the City's transportation plans for a continuation of Maple Drive and the fact that the existing cul-de-sac easement was platted as temporary with the intent to revert to the owners upon future road expansion, the City should treat Maple Drive as a through street, and not a dead-end street, for purposes of meeting the City's required road improvement standards.[7]

As for the City's need to currently provide a code-compliant turnaround for Maple Drive while it remains a dead end, this may be adequately accomplished by continuing to utilize the existing recorded cul-de-sac easement, which prior to the Andreasons' development appears to have been considered adequate to serve as a turnaround for the other existing residential uses on Maple Drive to this point (the City also appears to have been willing to accept only the Andreasons' respective half of an improved cul-de-sac while allowing the other half to remain unimproved along the property to the west—with no likely future opportunity to impose the other half of road improvements on that property, since it has already been developed).

However, in order to continue utilizing the existing easement area as a required turnaround with the property being developed, it does appear that the Andreasons may need to remove several improvements that are obstructing the radial easement area as recorded, or would otherwise unreasonably interfere with or restrict the easement's intended use as a vehicle turnaround. *See N. Union Canal Co. v. Newell*, 550 P.2d 178, 180 (Utah 1976) (an estate burdened by an easement may be used in any manner so long as not to unreasonably restrict or interfere with the proper use of the dominant estate's easement).

Specifically, there appears to be a small, curbed landscaped area noted as "sign area" on the updated Plot Plan, as well as some parking stall curbs, that will likely need to be removed to allow for adequate turnaround clearance.[8] Additionally, the recorded easement area also covers a larger area that appears to be currently unimproved but noted as a "lawn area" in the same Plot Plan. To meet the City's standards for safe travel, we imagine this area would need to be replaced with some form of drivable hard surface acceptable to the City engineer. *See, generally,* CITY CODE §§ 12.08.110 (temporary improvements shall be safe for travel and convenient for users, and consistent with city standards); and 12.08.010 (providing that streets "must be hard surfaced," and "work site restoration" as "the restoring of the original ground or paved hard surface area to comply with engineering regulations [including] . . . backfilling, compaction and stabilization, and other work necessary to place the site in acceptable condition").

II. If Turnaround and Awning Issues are Remedied, the Fourplex May Be Occupied Despite Other Outstanding Compliance Issues

[7] Additionally, it appears that an argument can be made that this may have been the City's original approach, and that the Andreasons—by installing the sidewalks to continue along the west property line instead of forming a perimeter of an improved cul-de-sac into the property—have followed the instructions of the Planning and Zoning Committee as expressly stated in the July 13, 2016 meeting minutes, wherein the committee stated that the Andreasons needed to "account for the 20' roundabout" when it came to "the additional required side setback," but in relation to the sidewalks, the Andreasons "understood and agreed to complete the sidewalk, curb and gutter ***along the property line*** to the west." (emphasis added).

[8] The recent survey also appears to depict that a very small portion of the noted "Trash Enclosure" encroaches on the recorded easement area as well. Again, the standard is that the use of the property may not *unreasonably* restrict or interfere. Assuming the other obstructions identified here are removed, so long as vehicle turnarounds are still reasonably accommodated in the easement area with the trash enclosure in its current location, it should not have to be relocated.

The City argues that whereas LUDMA provides that a municipality may not withhold issuance of a certificate of occupancy because of an applicant's failure to comply with a requirement that is not expressed: "in the building permit . . . , documents on which the building permit or subdivision plat is based, or the written record evidencing approval of the land use permit or subdivision plat[,] or [LUDMA] or the municipality's ordinances," UTAH CODE § 10-9a-509(1)(h), this generally means that the City *may* withhold occupancy for failure to comply with requirements that are, in fact, so stated.

However, the City overlooks that this provision (1)(h) is first prefaced by the following: "Except as provided in Subsection (1)(i), ..." This Subsection (1)(i), and the exception language added as a preface to Subsection (1)(h), were a recent addition to the statute made by the Utah Legislature in 2019,[9] and expressly acts as a qualifier to the substantive terms of Subsection (1)(h).

This qualifier, Subsection (1)(i), provides: "A municipality may not ***unreasonably*** withhold issuance of a certificate of occupancy where an applicant has met ***all requirements essential for the public health, public safety, and general welfare of the occupants***, in accordance with [LUDMA]."[10] *Id.* § 10-9a-509(1)(i) (emphases added).

In other words, not only is it the case that a city may not withhold occupancy for some invented reason not having basis at all in the approval or state or local code—read, Subsection (1)(h)—but it would also be unreasonable for the city to withhold occupancy for failure to comply with certain requirements, even if actually stated, if not essential to the immediate health, safety, and welfare of the intended occupants—per Subsection (1)(i).

We note that since this qualifying provision was added to statute four years ago, no Utah appellate court has yet weighed in to further define just which kinds of requirements are "essential" for public health, safety, and general welfare, or when withholding of occupancy under that basis would be "unreasonable." However, we think that the several compliance issues addressed in this case provide good examples of both. That is, removal of the awning from the actual fourplex structure, which may require some construction work on the building itself, as well as providing for a compliant turnaround so that emergency vehicles may respond to the building's occupants, are both essential for the fourplex's occupation. However, removal of an illegally added concrete pad elsewhere on the property site, or the rehabilitation of some of the site's anticipated landscaping areas or as-built improvements to bring the as-is condition of the property back into compliance with open green space requirements, does not appear to materially affect the ability of the fourplex to be occupied, and would essentially amount to routine site work that could otherwise be approved while the building is occupied.

We therefore conclude that insofar as the awning is removed and the cul-de-sac easement area is improved/remediated to allow for emergency vehicle access, the Andreasons should be entitled to receive a certificate of occupancy as having reasonably met the requirements essential for occupancy, even if some other compliance issues are not entirely met at that point, such as the open green space requirement or the removal of the concrete pad. As to these other non-essential

[9] 2019 Ut. HB 315, 2019 Utah Laws 384, 2019 Ut. Ch. 384, 2019 Ut. ALS 384. At that time, these Subsections were numbered (1)(g), and (1)(h), respectively, with Subsection (1)(h) being the addition.

[10] This provision lists two exceptions, being "(i) the applicant and the municipality have agreed in a written document to the withholding of a certificate of occupancy; or (ii) the applicant has not provided a financial assurance for required and uncompleted landscaping or infrastructure improvements in accordance with an applicable ordinance that the legislative body adopts under this chapter." UTAH CODE § 10-9a-509(1)(i).

compliance concerns, the City otherwise has its general zoning enforcement powers to address those situations as needed after occupancy is granted. *See,* CITY CODE § 17.04.050. It is the Andreasons' choice as to when they would like to request occupancy, knowing that they will be subject to zoning enforcement for any remaining noncompliance issues at the time it is requested. It is the City's obligation, however, not to unreasonably withhold occupancy when requested, where at least the essential requirements have been satisfied.

CONCLUSION

The Andreasons failed to implement the approval granted in the issued building permit when they installed several improvements without City authorization. The attached awning and concrete pad do not comply with the plain language of the City's regulations and must be removed. The City should accept the installed road and sidewalk improvements so long as the Andreasons otherwise improve the recorded temporary cul-de-sac easement area with a drivable surface free from any obstructions to reasonably allow for vehicle turnaround, until such time as Maple Drive is developed to the south as a through street. The Andreasons may request a certificate of occupancy for the fourplex building once the turnaround is compliant and the awning removed from the building, but will continue to be subject to zoning enforcement measures until all compliance issues are remedied, including conformance with open green space requirements.

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Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Section 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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees and civil penalty provisions, found in Section 13-43-206 of the Utah Code, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.