

Advisory Opinion 276

Parties: Colts Neck Investments, Lindon City

Issued: September 27, 2023

TOPIC CATEGORIES:

Compliance with Mandatory Land Use Ordinances Interpretation of Ordinances

The plain language of City Code requires that a visual buffer be installed along the northern, public street-facing side of a commercial property intended for use as a storage lot for an adjacent business. However, application of City Code results in two possible visual buffers through applicable fencing/landscaping standards under which the proposed commercial use could apply.

First, the City Code lawfully requires that a landscaped buffer, which is 20'-wide and begins at the back of the sidewalk, be installed and maintained in connection with use of the storage lot. In addition to the landscape buffer, the Code includes outdoor storage and merchandise screening fencing standards which requires that a 6'-tall opaque fence be installed behind the buffer area.

Alternatively, the Code includes provisions for residential/nonresidential screening fence standards which requires the Property Owner to install a 7'-tall masonry or concrete fence on top of the property boundary to screen the commercial use from the adjoining residential zone. However, if the 7'-tall masonry or concrete fence is installed on top of the property boundary, no landscaped buffer may be required.

The Property Owner may choose to submit (or amend) a land use application depicting either (1) a 20'-wide landscaped buffer area with a storage screening 6'-tall opaque fence at the rear of the buffer area, or (2) a residential/nonresidential screening 7'-tall concrete/masonry wall along the property boundary at the back of the sidewalk, with no landscaped area. The owner's proposed use would conform to the requirements of the applicable land use regulations under either approach.

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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ADVISORY OPINION

Advisory Opinion Requested By: Colts Neck Investments

Local Government Entity: Lindon City

Applicant for land Use Approval: Colts Neck Investment

Type of Property: Commercial

Date of this Advisory Opinion: September 27, 2023

Opinion Authored By: Marcie M. Jones, Attorney
Office of the Property Rights Ombudsman

ISSUES

1. May the City lawfully require a property owner to install and maintain a 20'-wide landscape buffer along an entire street frontage effectively diminishing the usable lot area by 20%?
2. Do enhanced fence standards intended to screen commercial uses from residential uses apply where the property abuts a public road with residences across the street and where the fence will be set back 20' from the property line?

SUMMARY OF ADVISORY OPINION

The plain language of City Code requires that a visual buffer be installed along the northern, public street-facing side of a commercial property intended for use as a storage lot for an adjacent business. However, application of City Code results in two possible visual buffers through applicable fencing/landscaping standards under which the proposed commercial use could apply.

First, the City Code lawfully requires that a landscaped buffer, which is 20'-wide and begins at the back of the sidewalk, be installed and maintained in connection with use of the storage lot. In addition to the landscape buffer, the Code includes outdoor storage and merchandise screening fencing standards which requires that a 6'-tall opaque fence be installed behind the buffer area.

Alternatively, the Code includes provisions for residential/nonresidential screening fence standards which requires the Property Owner to install a 7'-tall masonry or concrete fence on top of the property boundary to screen the commercial use from the adjoining residential zone.

However, if the 7'-tall masonry or concrete fence is installed on top of the property boundary, no landscaped buffer may be required.

The Property Owner may choose to submit (or amend) a land use application depicting either (1) a 20'-wide landscaped buffer area with a storage screening 6'-tall opaque fence at the rear of the buffer area, or (2) a residential/nonresidential screening 7'-tall concrete/masonry wall along the property boundary at the back of the sidewalk, with no landscaped area. The owner's proposed use would conform to the requirements of the applicable land use regulations under either approach.

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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 this 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 Timothy Clyde on behalf of Colts Neck Investments on April 7, 2023. A copy of that request was sent via certified mail to Adam Cowie, City Administrator, Lindon City, 100 North State Street, Lindon, UT 84042.

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 Timothy Clyde on behalf of Colts Neck Investments on April 7, 2023.
2. Letter from Brian K. Haws, City Attorney, on behalf of Lindon City, on May 4, 2023.

BACKGROUND

This Advisory Opinion asks whether the City can require the Property Owner to install and maintain (1) a 20'-wide landscape buffer along the entire street frontage of a lot in use as outdoor storage for an existing business on an adjacent lot as well as (2) a 7'-tall masonry or concrete wall.

Colts Neck Investment (the "Property Owner") owns and operates a vinyl fencing business in Lindon City (the "City"). This business has been in operation for twenty years. The Property Owner has expanded the outdoor storage yard onto a vacant adjacent parcel that the Property Owner also owns (the "Storage Lot").

In 2019 and in accordance with local ordinances, the City required the Property Owner to rezone the Storage Lot from residential to commercial to accommodate the storage of materials. As a condition of the rezoning, the Property Owner was required to install curb, gutter, and sidewalk

and related public infrastructure improvements along the lot frontage of 400 North. The rezoning also specifically required the Storage Lot to meet all City landscaping requirements.

Three years later, the Property Owner submitted a site plan application which included the required roadway improvements as well as the proposed landscaping and fencing, with all improvements to be installed in phases, with final phases of the work complete by December, 2025.

The Property Owner and the City disagree on the material required for the fence facing the street. The Property Owner maintains that Lindon City Code (“City Code” or “Code”) Section 17.18.050 applies. This section applies to fences surrounding storage of materials and requires only a 6’-tall “site obscuring” fence for storage yards. This storage screening section of Code would allow the Property Owner to install chain link fencing with privacy slats.

City staff maintains that the code section regulating commercial developments abutting residential zones applies instead. This section governing residential/nonresidential screening requires the installation of a 7’-tall masonry or concrete fence along the disputed boundary, as articulated in City Code Section 17.48.040.

The Property Owner reads this section of Code as requiring residential/nonresidential screening including masonry or concrete fencing only where the Storage Lot directly abuts a residential zone, and only where the fence is built directly on the property line. The boundary in question directly abuts a public street, 400 North, with residences on the far side of the street.

The Code allows the Planning Commission to approve fencing other than masonry/concrete if it finds that certain requisite conditions are met. Accordingly, the matter was submitted to the Planning Commission to determine what screening material would be required. On March 28, 2023, the Planning Commission determined that it would not approve an alternate to the masonry or concrete fence, and that the Property Owner is required to construct fencing as required by Section 17.48.040. The record articulates a history of complaints by the residential property owners living across the street from the lot. The neighbors allege that that the property has not been maintained and is unsightly. The Planning Commission was aware of this history.

The Property Owner also questions whether the City may lawfully require that the entire street frontage along 400 North be landscaped. The Code requires that a 20’ landscaped buffer be installed and maintained along the street frontage. This will diminish the usable area of the lot by approximately 20%.

Accordingly, the Property Owner is requesting this Advisory Opinion to determine whether the required fencing material is masonry/concrete or may be chain link with privacy slats and whether the City may lawfully require that 20% of the lot be landscaped.

ANALYSIS

As a threshold matter, the City maintains that the Office of the Property Rights Ombudsman does not have authority to issue an Advisory Opinion on this topic because the issue was not appealed to district court, so is now moot. Accordingly, that issue will be addressed first.

I. Request for Advisory Opinion appropriately made before final decision was rendered.

The City believes the objections raised by the Property Owner are untimely because the decision made by the Planning Commission on March 28, 2023 regarding the required fencing material was not appealed to district court. As such, the legal issue can no longer be appealed and is therefore moot.

The City makes legally sound arguments; however, the authority of this Office differs slightly from that established for courts. The authority for Advisory Opinions is outlined in Utah Code Section 13-43-205(1)(b) which stipulates that “a request for an Advisory Opinion may be filed at any time before a final decision on a land use application” has been made. In this case, the Advisory Opinion was requested on March 31, 2023, just three days after the Planning Commission made their determination on March 28, 2023, well before the 14-day appeal window closed.

The Advisory Opinion Request was filed within the appeal window which followed the Planning Commission’s determination. The requirement that our Office issue an Advisory Opinion in response to a timely request does not change, even when the issue would become moot because judicial relief cannot affect the rights of the litigants.

As such, the issue falls within our authority and accordingly provide the following Advisory Opinion.¹

II. Area abutting public street must include a 20’-wide landscaped buffer and storage screening fence must be set behind this buffer.

City Code requires that a visual barrier be installed along the Property boundary fronting the public street as part of site plan approval. *See generally* CITY CODE §17.48. City Code requires that this visual barrier include a landscaping strip 20’-wide along all street frontages. CITY CODE § 14.18.030. A second section of Code requires that a 7’-tall concrete or masonry fence be built along the property line separating residential and nonresidential uses as part of the visual barrier. CITY CODE §14.48.040. And finally, an apparently conflicting third section of Code requires a 6’-tall chain link fence be installed as a visual barrier surrounding outdoor storage. CITY CODE §14.18.050. Both parties agree that the Code requires a visual barrier be installed along the property boundary fronting the public street. The dispute is over the material and height of that required fence, its location, and whether 20’ of landscaped buffer may be required.

We first tackle whether the 20’-wide landscaped buffer may lawfully be required. The City Code requires a 20’-wide strip starting at the back of the sidewalk be landscaped and be maintained as a landscaped buffer. The Property Owner argues that this diminishes the usable lot area by approximately 20% which is quite onerous and severely impacts the reasonable enjoyment of the property.

¹ The Property Owner initially requested an Advisory Opinion regarding the requirement that curb, gutter, and other roadway improvements be installed as a condition of the rezoning. This legislative decision was made in 2019 and any ability to appeal those conditions has long since passed. As such, that issue is not timely for an Advisory Opinion and has not been included in this Opinion.

According to City Code Section 17.48.030, “A minimum of twenty percent (20%) of each lot shall be maintained in permanent landscaped open space” and “Unless otherwise approved by the planning commission, a landscaped berm at least three feet (3’) high and twenty feet (20’) wide shall be landscaped to meet the design requirements of Chapter 17.19 and maintained in a living, growing condition along all public street frontages.” CITY CODE § 17.48.030(3) – (4).

We first look to the plain language of the text. The Code is unambiguous on this issue. The Code requires each lot to maintain a permanent landscaped area at least 20’-wide unless otherwise approved by the Planning Commission. Based on information in the record, the Planning Commission has not waived these landscaping requirements. Therefore, the Code unambiguously requires a 20’-wide landscaped buffer.

We next look to whether the ordinance itself is lawful. The Utah Code grants broad legislative authority to municipalities to regulate land use, including requiring landscaping. Utah Code Section 10-9a-102(2) specifically grants municipalities the authority to govern “open spaces” and “uses”. This general regulatory authority over land use and development has been upheld by the U.S. and Utah Supreme Courts. “It is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a state’s police power.” *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980) quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The police power has been interpreted by Utah courts to include the right to regulate aesthetics. For instance, in *Buhler v. Stone*, the Utah Supreme Court found that “reasonable measures to minimize discordant, unsightly and offensive surroundings . . . and to preserve the beauty as well as the usefulness of the environment are within the police power.” 533 P.2d 292 (Utah 1975).

In conclusion, the City may lawfully require the Storage Lot landscaping to conform to City Code including the requirements that a 20’-wide strip along the back of the sidewalk be landscaped and maintained as a landscaped buffer.

III. A residential/nonresidential screening 7’-tall masonry or concrete fence may only be required on top of the property line, not 20’ back from the property line.

We next address whether the City can require that a 7’-tall residential/nonresidential screening concrete or masonry wall be installed as an additional visual barrier at the back of the 20’-wide landscaped strip discussed above. The Property Owner does not dispute that a buffer fence is required, but maintains that the Code allows for a less costly storage screening 6’-tall chain link fence with privacy slats to be installed instead.

The Property Owner points out that City Code Section 17.48.050 governs storage and merchandise screening. The Storage Lot is for storing merchandise and equipment and this section, on its face, would apply. This section requires that “The storage of merchandise outside an approved building shall be in an area approved as part of the site plan and shall be within an area enclosed with a sight obscuring fence of at least six feet (6’) in height.” The Property Owner therefore maintains that a 6’-tall storage screening chain link fence with privacy slats meets the Code requirements.

Conversely, the City asserts that an alternate section of Code applies. City Code Section 17.48.040 governs fencing and screening between a nonresidential development and a residential use or a residential zone. This section requires that “A masonry or concrete fence seven feet (7’) high shall

be constructed and maintained along any property line between a nonresidential development and a residential use or residential zone.”

We are asked to determine which fence material and height applies to the Storage Lot on the street-facing side.

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 the 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). Furthermore, “municipal ordinances are subject to ordinary rules of statutory interpretation.” See *Colosimo v. Gateway Cmty. Church*, 2018 UT 26, ¶ 46, 424 P.3d 866. We therefore begin with the text, “presume that the [legislative body] used each word advisedly, and deem all omissions to be purposeful.” *Id.* (cleaned up). Further, “[b]ecause zoning ordinances are in derogation of a property owner’s common-law right to unrestricted use of his or her property, . . . provisions permitting property uses should be liberally construed in favor of the property owner.” *Ogden City Plaza Investors v. Ogden City Board of Zoning*, 2022 UT App 74 (cleaned up).

In this case, the requirement for masonry or concrete fencing applies “along any property line between a nonresidential development and a residential use or residential zone.” CITY CODE §17.48.040(1).



The aerial photo clipped from Google Maps above is provided for reference. The Storage Lot is highlighted in yellow.

The parties agree that the properties to the west (CG, General Commercial, CAP office) and the south (CG-A, General Commercial, Fencing business) are not a “residential use or residential zone,” therefore, those property boundaries do not need to be improved with a “seven foot (7’) masonry or concrete fence.” They can instead be buffered with a storage screening six-foot tall chain link fence with privacy slats. The parties further agree that the property to the east (R1-20, Residential Very Low Density) is a residential zone and therefore, the enhanced screening

requirements between residential and nonresidential uses, including a “seven foot (7’) masonry or concrete fence” apply.

It is the north boundary fence which abuts the public road which is disputed. The land immediately to the north of Property Owner’s parcel is public right-of-way not constituting part of any subdivision or parcel. On the far side of the street are two residences which are zoned residential (R1-20, Residential Very Low Density). The City Zoning Map indicates that the street itself is zoned residential (R1-20, Residential Very Low Density).

The Property Owner maintains that a residential/nonresidential screening masonry or concrete fence is only required when built directly on the boundary line of property which abuts a residential zone. The City Code in question reads “A masonry or concrete fence seven feet (7’) high shall be constructed and maintained *along any property line* between a nonresidential development and a residential use or residential zone.” CITY CODE § 17.48.040 (emphasis added). The City is requiring that the fence be placed 20’ from the back of sidewalk, behind the required landscaped buffer area, therefore the fence will not be placed directly on top of the boundary line, and the Property Owner argues, need not be 7’-tall nor masonry or concrete.

In contrast, the City recites the history of conflict between the Property Owner and the residential neighbors to the north and maintains that the express language of City Code Section 17.48.040 “does not require the fence be built ‘on’ a property line, only ‘along’ the property line, and that there are other places in the City where concrete fences between residential and commercial uses were built well back from the actual property lines.”

The City Code does not define *along*. When otherwise not defined, “ordinance terms should be interpreted and applied according to their commonly accepted meaning. . . .” *M&S Cox Invs., LLC v. Provo City Corp.*, 2007 UT App 315, ¶ 31, 169 P.3d 789. We therefore look to standard dictionaries to define the term. Black’s Law Dictionary provides that *along* means “by, on, or over” “according to the subject-matter and context.” *Black’s Law Dictionary* (2nd Ed.). Meriam Webster defines *along* as “in a line marching the length or direction of (example: walking *along* the road), also, at a point or points on (example: a house *along* the river). *Miriam Webster Dictionary*, online edition, accessed August 29, 2023. These definitions favors the interpretation put forth by the Property Owner, i.e. that *along* means on top of or running immediately adjacent to the boundary line.

Where any ambiguity remains in the plain language definition of *along*, we are reminded that the courts have given us direction in cases where there is more than one plausible interpretation of an ordinance. “Because zoning ordinances are in derogation of a property owner’s common-law right to unrestricted use of his or her property, . . . provisions permitting property uses should be liberally construed in favor of the property owner.” *Ogden City Plaza Investors*, 2022 UT App 74 at ¶ 7 (cleaned up). Any ambiguity is interpreted in favor of the Property Owner. Therefore, for our purposes, *along* is interpreted as meaning on top of or running immediately adjacent to the property line.

We next apply this interpretation to the City Code. The Code reads “A masonry or concrete fence seven feet (7’) high shall be constructed and maintained along any property line between a nonresidential development and a residential use or residential zone.” CITY CODE § 17.48.040. In

plain language, the City may require the Property Owner to install a 7'-tall masonry or concrete fence *on top of or immediately adjacent to* the property boundary. Therefore, this residential/nonresidential screening wall may not be required 20' back from the property line, as is currently proposed.

The City may still require that the 6'-tall storage screening opaque fence be installed, even behind the 20'-wide landscaped buffer. This section of City Code applies to all outdoor storage of merchandise and equipment, and is not restricted to locations along the boundary of the property. See CITY CODE § 17.48.050.

We therefore conclude that City Code requires only that a 6'-tall storage screening opaque fence be installed behind the landscape buffer, as required to screen outdoor storage of merchandise. Alternatively, the City Code requires the Property Owner to install a 7'-tall masonry or concrete residential/nonresidential screening fence on top of the property boundary. If the fence is installed on top of the property boundary, no landscaped buffer may be required.²

The Property Owner may choose which of the two visual buffer standards to meet. Utah Code Section 10-9a-306(2) reads "If a land use regulation does not plainly restrict a land use application, the land use authority shall interpret and apply the land use regulation to favor the land use application." In this case, the City Code does not stipulate which buffer must apply, therefore, the Property Owner may choose to submit (or amend) an application that adheres to either standard and be entitled to approval.

CONCLUSION

The plain language of City Code requires that a visual buffer be installed along the northern, public street-facing side of a commercial property intended for use as a storage lot for an adjacent business. However, application of City Code results in two possible visual buffers through applicable fencing/landscaping standards under which the proposed commercial use could apply.

First, the City Code lawfully requires that a landscaped buffer, which is 20'-wide and begins at the back of the sidewalk, be installed and maintained in connection with use of the storage lot. In addition to the landscape buffer, the Code includes outdoor storage and merchandise screening fencing standards which requires that a 6'-tall opaque fence be installed behind the buffer area.

Alternatively, the Code includes provisions for residential/nonresidential screening fence standards which requires the Property Owner to install a 7'-tall masonry or concrete fence on top of the property boundary to screen the commercial use from the adjoining residential zone. However, if the 7'-tall masonry or concrete fence is installed on top of the property boundary, no landscaped buffer may be required.

² Of note, when this section of City Code is read in its entirety, the section of City Code requiring a 7'-tall barrier between commercial and residential uses/zones arguably contemplates scenarios involving only interior lot lines where the two uses actually abut one another and not where property boundaries abut a public street. Otherwise, the requirement that the lot frontage be improved with a 20'-wide landscaped buffer is moot. Installing a landscaped barrier *behind* an opaque 7'-tall wall would not be of any benefit.

The Property Owner may choose to submit (or amend) a land use application depicting either (1) a 20'-wide landscaped buffer area with a storage screening 6'-tall opaque fence at the rear of the buffer area, or (2) a residential/nonresidential screening 7'-tall concrete/masonry wall along the property boundary at the back of the sidewalk, with no landscaped area. A land use application proposing either of these approaches would conform to the requirements of the applicable land use regulations, and would therefore be entitled to approval.

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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. 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 § 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.