

Advisory Opinion 284

Parties: Preston Winkelman and Escalante City

Issued: January 25, 2024

TOPIC CATEGORIES:

Complete Land Use Application

Compliance with Land Use Regulations

Interpretation of Ordinances

A City was procedurally correct in accepting an application as complete, but acted unlawfully in approving the application because it did not substantively comply with applicable regulations.

The application for “Municipal Project Approval” was complete as it only amounts to a site plan review and approval under the City’s ordinances, while other aspects of the proposed development would be reviewed in other subsequent applications. However, the City approval of the proposed commercial site plan on the “split-zoned” parcel that straddles the boundaries of both commercial and residential districts was nevertheless unlawful because it proposed a prohibited commercial use within the boundaries of a residential district.

The City’s practice of allowing, through administrative process, the applicants of split-zoned properties to choose which zoning district regulations to comply with is not supported by local ordinance or state law. The contiguous parcel may either be rezoned entirely commercial to accommodate the site plan as proposed, or else the project must be redesigned and relocated on the parcel so that the proposed commercial use is entirely confined to the commercial district as depicted in the zoning map.

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ADVISORY OPINION

Advisory Opinion Requested By:	Preston Winkelman
Local Government Entity:	Escalante
Applicant for Land Use Approval:	Red Root, LLC
Type of Property:	Commercial, Residential
Date of this Advisory Opinion:	January 25, 2024
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUES

1. Did Escalante City properly determine a land use application for development of a general retail store was complete for substantive review?
2. Did the City comply with mandatory provisions of its ordinances in the review and approval of the commercial development?

SUMMARY OF ADVISORY OPINION

Several citizens are opposed to the proposed development of an intended Family Tree Dollar Store in Escalante, and appealed the City's "Municipal Project Approval," which according to city ordinances, is limited to only a site plan review of a proposed general retail use for compliance with zoning standards of height, setbacks, and parking. Other development considerations such as drainage or design review are separately considered in a later building permit application. The municipal project form and site plan were therefore complete as submitted and the City did not err by not requiring development details which will be evaluated via separate application processes.

However, the City's project approval of the commercial site plan was nevertheless unlawful because it proposed a prohibited commercial use within the boundaries of a residential district. Proposed land uses must conform to zoning district boundaries as depicted in the City's zoning map. The subject property is a "split-zoned" parcel that straddles the boundaries of both

commercial and residential districts, and the proposed site plan utilized the residential-zoned portion of the parcel for a commercial use.

The City's practice of allowing, through administrative process, the applicants of split-zoned properties to choose which zoning district regulations to comply with is not supported by local ordinance or state law, as only the legislative body may, by legislative process, alter the area or boundaries of a zoning district, or otherwise rezone property to another zoning district designation. The contiguous parcel may either be rezoned entirely commercial to accommodate the site plan as proposed, or else the project must be redesigned and relocated on the parcel so that the proposed commercial use is entirely confined to the commercial district as depicted in the zoning map.

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 Preston Winkelman, received on April 23, 2023.
2. Letter from Mayor Melani Torgensen, on behalf of Escalante City, on May 18, 2023.

BACKGROUND

Escalante City (City), located in central Garfield County, is in fact classified as a town as having a population of less than a thousand people.¹ Despite having only 850 residents, the City's website notes that it is "still the largest town for 70 miles in all directions."² The City is bisected by State Road 12, or "Highway 12," which also serves as the City's "Main Street."³

Among the City's available zoning districts are a single "Commercial" district,⁴ as well as several other strictly residential districts of varying densities. The City's zoning map reflects that the Commercial district is mostly confined to the immediate area surrounding Highway 12, and that beyond the Commercial district's borders are the residential districts. According to City officials, when the zoning map was created, "they went back so many feet off of Main Street and made that a Commercial Zone," and that by doing this, the result is several individual parcels that are "split into two different zones."⁵

Red Root LLC owns one of these "split-zoned" parcels, situated on the corner of Highway 12 and at its intersection with 300 East. The majority of the parcel is zoned Commercial, while a small section of the parcel fronting on 300 East is part of the City's Residential RR-1-20 zone (See following excerpts of the City's Zoning Map and map legend, submitted by the City in response to the advisory opinion, depicting the subject property's boundaries annotated in blue).

¹ See, UTAH CODE § 10-2-301 (a municipality with a population under 1,000 is a town).

² *Welcome to Escalante City*, <https://www.escalantecity-utah.com/>.

³ See, Escalante City Zoning Map.

⁴ Referred to, interchangeably, as either "Commercial Residential" or "Residential/Commercial" in the City's zoning ordinances and zoning map.

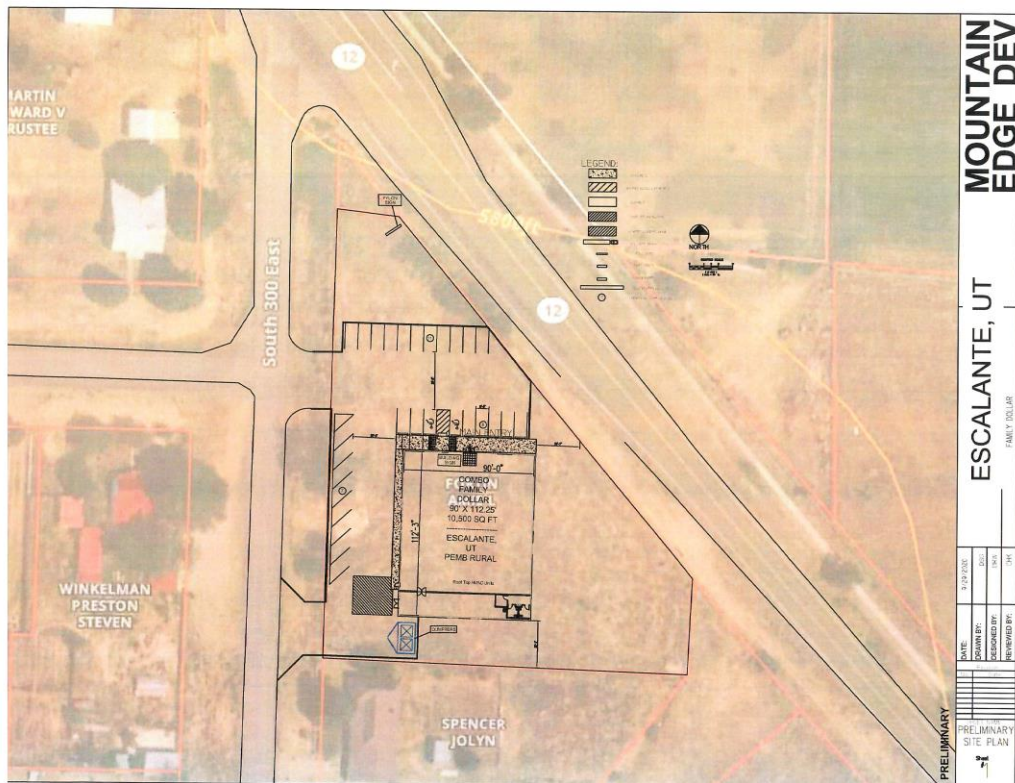
⁵ Minutes of the Escalante City Board of Adjustment, April 24, 2023, page 8.



	A-5 - Agricultural
	C-R - Commercial Residential
	Manufacturing & Districs
	Mobile Home
	R-M-7 - Multiple Residential - Min. 1/4 Acre
	RR-1 - Rural Residential - Min. 1/2 Acre
	RR-1-10 - Residential - Min. 1/4 Acre
	RR-1-20 - Residential - Min. 1/2 Acre



Red Root submitted a Municipal Project Approval Form to the City for approval of a proposed Family Dollar Tree Store. The site plan for the proposed commercial development appears to utilize the entirety of the parcel, including the portion zoned as residential. The preliminary site plan depicts one of two planned accesses at the very southwest corner of the parcel, in the residential-zoned area, which is the planned entrance point for delivery trucks, and also will feature a lighted loading dock, and dumpsters for the property. Preston Winkelman owns a home on the west side of 300 East in the Residential RR-1-20 zone, directly across the street from Red Root's property and the planned south entrance to the site.



Red Root’s proposed site plan came before the City’s Planning Commission on March 14, 2023. The Commission discussed and found that the project met applicable setbacks, height requirements, and off-street parking standards, noting the parking requirement to be 21 parking spaces, while 28 were proposed. The Commission then “recommended” the project “to the City Council for approval,” citing to Sections 10.50.020 (commercial permitted uses), 10.50.040 (commercial height regulations), 10.50.050 (commercial use lot regulations), and 10.12.040 (parking space requirements) of the City’s Planning and Zoning Ordinances. Meeting minutes reflect that Mr. Winkelman was in attendance, but the meeting was not opened up for public comment, the chairman explaining that “this meeting is to see if items on the agenda fit the ordinances,” and that “there is no public comment during the meeting,” and encouraged the audience to attend the next City Council meeting if they had any concerns.

The application came before the City Council the following week, on March 21, 2023. The meeting minutes reflect that during public comment, Mr. Winkelman spoke regarding development of the property across the street from his residence, and that his concerns pertained to “drainage, signage, lighting, speakers, traffic, fences and walls.” Comments from others in attendance asked about parcels that were partially zoned in two different zones, and whether commercial development on such a parcel would require a petition to rezone the property entirely in the Commercial zone. One commenter alleged that the City had design requirements in its code dealing with traffic and architecture that were not addressed at the planning and zoning meeting. Other comments expressed general opposition to the proposed store—concerned with the loss of small-town feel and the store’s chain-nature—but which did not speak to the application’s compliance with the requirements that were being evaluated.

The City Council considered the application, found that it was a permitted use as “General Retail, Department Store” under the City’s ordinances, and found that the project met applicable setbacks, height requirements, and off-street parking standards. The Council discussed that the applicant would have to work with UDOT on a drainage plan at a later stage in the development process. During the Council’s discussion of the application with the applicant, the applicant addressed some of the stated concerns such as lighting, and that that the project will capture drainage in a retention pond that is engineered for a one-hundred-year storm to be located close to Highway 12.

The Council concluded that the project met all requirements of the zone and the City’s ordinances then under review and approved the application. Following approval, Mr. Winkelman, as well as several others, each filed separate appeals of the decision to the City’s Board of Adjustment. Mr. Winkelman has also requested this advisory opinion to determine whether the City had complied with the mandatory provisions of its ordinances in approving the project.

ANALYSIS

Mr. Winkelman stated two questions in his request for an advisory opinion, as follows:

1. “Did the City of Escalante Planning and Zoning Commission and the Escalante City Council properly determine that Red Root, LLC’s application for approval of a commercial development project was complete and therefore entitled to review?”

2. “Did the City of Escalante Planning and Zoning Commission and the Escalante City Council comply with all the applicable mandatory provisions of its ordinances in the review and approval of the application submitted by Red Root, LLC?”

The first question, generally, asks whether the City’s approval was procedurally proper. The second, in turn, asks whether the City’s approval of the application was proper in substance, as being compliant with applicable land use ordinances.

State law requires the City to adhere to its ordinances in both substance and procedure. The Municipal Land Use, Development, and Management Act (MLUDMA) is the Utah statute that serves as the enabling act for local zoning. *See*, UTAH CODE § 10-9a-101 *et seq.* MLUDMA establishes the parameters within which local governments have discretion in enacting their own land use regulations, as well as the process for receiving and reviewing land use applications.

For reasons discussed below, we conclude that the City’s review of the Municipal Project Approval Form was procedurally proper according to the code requirements applicable to the application, but that the City’s approval was otherwise unlawful and must be reconsidered because it did not comply in substance with the terms and standards of applicable land use regulations.

I. Red Root’s Application Was Limited to a Site Plan Review of the Proposed Use and Zoning Standards, and the City’s Review Was Procedurally Proper Where Other Applications Pertaining to the Proposed Development Would Follow.

MLUDMA allows each community to establish the particular procedure that will be followed in reviewing land uses and issuing approvals or land use permits, *see*, UTAH CODE 10-9a-302(1)(e), and a city is “bound by the terms and standards of applicable land use regulations and shall comply with the mandatory provisions of those regulations.” UTAH CODE § 10-9a-509(2).

Much of the concerns raised by Mr. Winkelman—as well as others that appealed the City’s decision—pertained to whether the City had failed to require the property owner to provide details on certain aspects of the proposed development for review and consideration that are required by the City’s Zoning Code. There is some confusion, then, surrounding the scope of the application and the City’s review in light of certain code requirements.

On receiving a land use application, a city is first obligated to determine whether the application is procedurally complete for purposes of subsequent review of the application’s substance by the land use authority. *Id.* § 10-9a-509.5(1). An application is complete when it has been presented in a form that complies with all ordinance-based application requirements, including any forms and supporting documentation required by ordinance. *See, id.* §§ 10-9a-509(1)(c), 509.5(1)(b)(ii). Notably, however, substantive review of a particular application is limited to only a review of the land use regulations “applicable to the application *or to the information shown on the application.*” *Id.* § 10-9a-509(1)(i)(B) (emphasis added).

It is commonly the case that a particular development, on the whole, might be subjected to several distinct application processes related to different aspects of the development. Such is the case here.

As a smaller municipality, Escalante City has delegated the issuance of building permits to Garfield County; as such, certain construction-related aspects of development are not reviewed by the City, but it nevertheless maintains responsibility over reviewing and approving development proposals from the perspective of land use and other zoning considerations.

The application Red Root submitted to Escalante City was a “Municipal Project Approval Form.” The City’s Zoning Code provides that anyone seeking a building permit must first obtain Municipal Project Approval from the City’s planning and zoning commission and city council. UNIFORM ZONING ORDINANCE OF ESCALANTE CITY, UTAH (ZONING CODE) § 10.020.060. This Municipal Project Approval is therefore a prerequisite before applying for a building permit.

Municipal Project Approval includes the filing of a required site plan, which requires only the following to be shown:

- A. Scale of plan, and direction of north point.
- B. Lot lines, adjacent streets, roads, rights-of-way.
- C. Location of existing structures on subject property and adjoining properties, with utility lines, poles, etc., fully dimensioned.
- D. Location of proposed construction and improvements, with location and dimension of all signs.
- E. Any parking lot to be built new or remodeled must be built to plan, have proper drainage, and must have a building permit. Building permit fee shall be as set forth in the UBC.
- F. Motor vehicle access, circulation patterns, with individual parking stalls, and curb, gutter, and sidewalk location.
- G. Necessary explanatory notes.
- H. Name, address, telephone number of builder and/or owner.
- I. All other information required as determined by the Escalante City Planning Commission or the Escalante City Zoning Administrator or Assistant when authorized.

Id. § 10.020.080.

Mr. Winkelman contends that there were several things missing from Red Root’s application to determine the impact of the project on the surrounding neighborhood. His primary concern appears to be the sufficiency of the submitted site plan in regards to traffic flow and business traffic accessing the property from 300 east, a residential street. Other contentions relate to the applicant’s alleged failure to explain its plans for drainage, and the alleged noncompliance with sign regulations. Mr. Winkelman also argued that the buildings plans were generic and were not very detailed.

However, as stated, Red Root’s application was for Municipal Project Approval, which is limited to a site plan review, while building permits are separately applied for and processed by the county. Other than this, the Zoning Code also contains a design review process by the planning commission, but this review is also in conjunction with a building permit application. *See id.* § 10.24.020; *see also, id.* § 10.020.180.

In response to Mr. Winkelman’s concerns with traffic, the City notes in its response to the advisory opinion that off-street parking is the ordinance’s only substantive traffic requirement, which the applicant had complied with by proposing 28 parking spaces to the 21 required by ordinance.⁶

Regarding signage, during the City Council meeting, Red Root explained that Family Dollar would be providing the signs, and the City noted that Family Dollar would have to have its own approved Municipal Project Approval Form and a Building Permit for the sign(s).

While information on the location and dimension of signs is required as part of a submitted site plan, because the store signs will be pursued by Family Dollar, and not Red Root, signage therefore does not appear to be a substantive part of Red Root’s application, and was not required to be reviewed by the City in approving the application for Municipal Project Approval. *See*, UTAH CODE § 10-9a-509(1)(a)(i)(B) (an applicant is entitled to substantive review under land use regulations “applicable to the application or to the *information shown on the application*”)(emphasis added). There is nothing in the City’s standards that suggest that a commercial use cannot be approved *unless* it includes signs. Red Root, as the assumed eventual owner of the subject property, appears to have the intention of acting as the landlord to a commercial tenant, the scope of Red Root’s application is simply to approve the development of a building that may be used as a general retail store. If the tenant undertaking the general retail store use wishes to propose signage as part of its intended business, it may, as the City noted, provide its own application for land use approval of the business signs.

Regarding drainage, the City’s site plan standards require a plan showing that any parking lot to be built will “have proper drainage, and must have a building permit.” ZONING CODE §10.24.020. Other than this, there are no substantive provisions regarding drainage that apply to Red Root’s application as a zoning matter. While certain other processes have drainage requirements, including PUD’s or subdivisions, neither apply to this project. The City noted in meetings that whereas building permits for Escalante are provided by the County, drainage will be addressed in that process. Again, the scope of Red Root’s Municipal Project Approval application was to approve the *use* of the property for a general retail store, according to enacted zoning standards.

The site plan, while itself a requirement, serves the purpose of providing useful information to help the land use authority determine an application’s compliance with other substantive land use regulations. In this case, based on the information submitted with the site plan, the City Council determined that the proposed use complied with the City’s zoning requirements, namely: (1) that the proposed use was a permitted commercial use, citing to Sections 10.50.020 (commercial permitted uses), (2) that the project met applicable height requirements, citing to Section 10.50.040 (commercial height regulations), (3) the project met applicable setbacks, citing to Section 10.50.050 (commercial use lot regulations), and that the project met off-street parking standards, citing to Section 10.12.040 (parking space requirements).

Because Red Root’s application, in this case, was limited to a site plan review of the development of a commercial building to be used as a general retail store, the application was complete where

⁶ Traffic considerations also appear to be part of the City’s required Design Review in conjunction with a building permit, *see* ZONING CODE § 10.024.050, but those design review standards are not part of the Municipal Project Approval, and are reviewed when a building permit is submitted. We therefore offer no opinion on those standards.

a site plan was provided, and the City appropriately reviewed the application with the information submitted, where other development aspects were to be reviewed in later building permit or other applications.

However, despite the procedural adequacy of the City's review, we conclude that the City's approval was unlawful as not complying in substance with the Zoning Code, as discussed below.

II. The City's Approval of the Project Was Unlawful Because it Approves a Commercial Use within the Rural Residential District According to the Adopted Zoning Map.

MLUDMA allows a city to enact a land use ordinance that creates distinct zoning districts wherein certain land uses are allowed or otherwise prohibited, including the adoption of a zoning map. *See* UTAH CODE § 10-9a-505. An adopted zoning map is a form of land use regulation that governs the use or development of land accordingly. *See*, UTAH CODE § 10-9a-103(33). Utah courts have noted that the “existence of a map is the essence of the enabling statute.” *See, Hatch v. Boulder Town Council*, 2001 UT App 55 (holding that, under a prior version of LUDMA, a zoning ordinance enacted without a map was invalid).

MLUDMA also provides that “only a legislative body may amend,” by legislative process, the “shape, boundaries, area or general uses of any zoning district.” UTAH CODE § 10-9a-503. This is because the process of changing the zoning classification of a particular property “involves the establishment of new law out of whole cloth” as it relates to that property, and is deemed a legislative act. *Krejci v. City of Saratoga Springs*, 2013 UT 74, ¶¶ 37-38.

Escalante City has formally adopted a Zoning Map together with its land use ordinance, *see* Zoning Code § 10.34.020, and City officials have explained that in establishing the City's zoning districts by map, “they went back so many feet off of Main Street and made that a Commercial Zone,” which is acknowledged to have resulted in several parcels that are “split into two different zones.”⁷

The Zoning Code provides that where uncertainly exists as to the boundaries of a district shown on the Zoning Map, if a boundary is “indicated as approximately following the right-of-way lines of street, highways or alleys,” or is “parallel to . . . [such] features,” it “shall be so construed. Distances not specifically indicated on the official map shall be determined by the scale of the map.” *Id.* § 10.34.030(B), (E).

Reference to the City's Zoning Map makes clear that the subject property of Red Root's application is split between the City's Commercial zone, and one of its residential zones.⁸ And while “[d]istances [are] not specifically indicated on the official map,” for our purposes, Red Root's site plan clearly utilizes the entirety of the property up to its eastern and southern borders, and unquestionably involves the portion of the property that is zoned residential.

⁷ Note 5, *supra*.

⁸ Neither the legislature, through MLUDMA, nor Utah courts have directly addressed the practice of “split-zoning” properties. We assume that the practice, in general, is not prohibited *per se*, although, as applied, the practice may be illegal pertaining to its effect on a particular property.

The Zoning Code provides that “[a]ny use not expressly identified as a use allowed within Escalante City, as either a Permitted, Conditional, or Temporary Use, is hereby determined to be a prohibited use.” See, ZONING CODE §§ 10.24.050 (RR-1-20 district), 10.50.035 (Commercial district). The Zoning Code provides a list of Permitted and Conditional Uses in each zoning district. The City Council determined that Red Root’s application proposed a “General Retail, Department Store” use under the City’s ordinances. While such use is listed as a permitted use in the Commercial zone, see *id.* § 10.50.020(G), the use is not listed as either a permitted or conditional use in the RR-1-20 district, see *id.* §§ 10.50.020, 10.50.030, and is therefore a prohibited use in that residential district. The Zoning Code does not otherwise contain any provision that addresses split-zoned properties or the ability of any particular property to maintain a land use outside of the explicit boundaries of the zoning district as depicted on the Zoning Map.

In responding to Mr. Winkelman’s request for an advisory opinion, the City alleges that it has treated every applicant the same when one parcel has two different zones—in that the City’s Planning and Zoning has allowed the applicant to make their entire parcel the same zone, or to “choose” their zone. The City notes that others have been allowed to choose their zone without going through a public hearing or zone change application, and the City argues that it would be doing something different than other applicants if it required Red Root to go back for a zone change.

In considering any particular land use application, the City’s prior practice in deciding other applications has no influence, legally, on deciding the application currently before the land use authority; rather, the only consideration is whether the application “conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect” at the time of application. UTAH CODE § 10-9a-509(1)(a)(ii).

The City’s practice of allowing, through an administrative process, owners of split-zoned parcels to choose the district regulations that will apply to the property as a whole does not comply with either local ordinance or state law.⁹ As stated, the Zoning Code makes clear that only those uses listed as permitted or conditional for any particular zoning district are allowed within that district, and the City may not use the administrative process as a *de facto* rezone of the property for the desired use where no ordinance has been enacted to govern such situations, as MLUDMA provides that zoning districts may only be altered or amended by the legislative body, through a legislative process.¹⁰

⁹ We note here that this is not an instance in which the map or ordinance is vague about which zoning designation applies to the property in question. In other words, this is not a matter of interpretation, but rather a question of which individual or entity has authority to determine the zoning designation of a particular property, and in what manner.

¹⁰ We note that, just prior to Red Root’s application, Escalante City had passed an ordinance to provide for a formal process of rezoning property, which was not stated in code previously. The City’s Zoning Code defines “rezone” as a “[c]hange of an existing zone or a portion thereof by application to amend the Escalante City Zoning Map,” and provides that rezone applications are to be considered by the Planning Commission. ZONING CODE § 10.34.040 (emphasis added). Enacting an ordinance authorizing the planning commission to rezone property directly conflicts with state law, see UTAH CODE § 10-9a-503. Even if it were proper for the legislative body to delegate authority to the planning commission to make rezone decisions, the process outlined in the City’s rezoning ordinance was not followed in approving Red Root’s proposed commercial use of the residential-zoned portion of the subject property, as the ordinance requires a formal application process to “Amend the Escalante City Zoning Map,” which did not happen here.

Proposed land uses that are allowable under a particular zoning district must therefore be confined within the boundaries of that district, or else the property must first be rezoned by the legislative body, through a legislative process, to change the zoning designation of the property to allow for the proposed use.

The subject property is part of two zoning districts, and Red Root's site plan proposed a prohibited commercial use within the boundaries of a residential zoning district. The City's approval of Red Root's application was therefore unlawful as not compliant with the Zoning Code.

CONCLUSION

The City's review of Red Root's application was limited to a site plan review of the proposed use for compliance with certain zoning standards including height, setbacks, and parking, and did not include drainage or design review issues that are considered with a subsequent building permit, or sign regulations that will be applied for separately by the intended Dollar Store tenant. However, the City's approval of the proposed development was unlawful in that it approved a commercial use within a residential district. A commercial use on the split-zoned parcel must be limited to only the portion of property within the commercial district, or else the contiguous parcel must first be rezoned entirely commercial to allow the site plan as proposed.

Jordan S. Cullimore, Lead Attorney
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.