Advisory Opinion 288

Parties: David Wright and Millcreek City

Issued: June 27, 2024

TOPIC CATEGORIES:

Compliance With Land Use Regulations

Entitlement to Application Approval (Vested Rights)

Subdivision Plat Approval

Where a substandard property was created by deed without subdivision approval, the city's recording of a notice of noncompliance on the property was an appropriate action as a means of code enforcement to prevent illegal use of the property. The city may exercise prosecutorial discretion in allowing a limited gardening use to occur on the property without a permit, but the property owner would not be entitled to approval for any permit on the illegal lot to conduct development activity, including grading, clearing, and excavation, as prohibited by applicable land use regulations.

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ADVISORY OPINION

Advisory Opinion Requested By:	David Wright
Local Government Entity:	Millcreek City
Applicant for Land Use Approval:	Wright Mind, LLC
Type of Property:	Vacant/Forestry and Recreation Zone
Date of this Advisory Opinion:	June 27, 2024
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUES

1. Did the City properly record a Notice of Noncompliance stating the property was created without regard to lot requirements in applicable ordinances?
2. May the property be put to agricultural use and is the property entitled to grading permit approvals in furtherance of such a use?

SUMMARY OF ADVISORY OPINION

The subject property is a substandard lot illegally subdivided by deed that did not comply with the applicable County subdivision ordinances at the time of its creation, including minimum lot area and frontage requirements in the applicable zone.

State law allows cities to take appropriate actions to prevent or enjoin the violation of its subdivision ordinance. The City's recording of a notice of noncompliance on the property was an appropriate action as it imparted record notice of the violation as a means of code enforcement to prevent the illegal use of the property. While cities have prosecutorial discretion in enforcing land use violations, state law would not allow a city to approve any submitted application for a land use permit on an illegal lot where the proposal fails to conform to the requirements of applicable land use regulations in any regard, including a zone's minimum lot size requirements for permitted uses.

The City has concluded that it does not object to a limited gardening use on the Subject Property and that it will not require a land use approval for this activity. This is appropriate. If the property owner seeks a permit to conduct development activity, defined to include grading, clearing, and excavation, state law would require the City to follow the mandatory provisions of the City's land use regulations. In this case, the current regulations governing the parcel would prohibit development activity on the parcel, and the permit would not be entitled to approval.

EVIDENCE

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

1. Request for an Advisory Opinion, submitted by David Wright, on behalf of Wright Mind LLC, received May 1, 2023.
2. Submission from John Brems, City Attorney for Millcreek, received May 1, 2023.
3. Email from David Wright, received May 3, 2023.
4. Call with John Brems and Francis Lilly on February 15, 2024.
5. Call with David Wright on March 7, 2024.
6. Meeting with John Brems and Francis Lilly on April 17, 2024.
7. Call with David Wright on May 24, 2024.

BACKGROUND

Wright Mind, LLC (Wright), owns a 0.27-acre parcel of property ("Subject Property") at 4661 S Ledgemont Drive, in Millcreek, and is part of the Forest Residential (FR-5) zone and Foothills and Canyons Overlay Zone (FCOZ). The Subject Property fronts on a residential street, but is undeveloped, intensely sloped, and—on its side of the street—neighbored by a larger unsubdivided parcel and other subdivided residential lots.

The Subject Property was once part of a larger subdivision remnant of approximately a little over 8 acres ("Parent Parcel"). However, on December 7, 2004, the owner of this Parent Parcel deeded nearly all of the property, 8.07 acres, to a lot owner in one of the adjoining subdivisions as additional acreage to that lot, but in doing so, withheld the approximately 10,000[1] square foot Subject Property with the intention of future development. A June 1, 2010 letter from the former owner of the Parent Parcel states that "[w]hen we sold the property between Jupiter and Ledgemont . . . we held out of the sale a piece that had frontage on Ledgemont. Our reasoning for holding this property was because we felt there was a buildable area along the frontage of Ledgemont."

At the time of the conveyance that resulted in the creation of the Subject Property, the property was in the County's FR-5 zone, with the Foothills and Canyons Overlay Zone. This zone had a 5-acre minimum lot size requirement for any subdivision of land, and all permitted uses in the zone were required to comply with all applicable requirements "including those relating to site and lot dimensions." SALT LAKE COUNTY ORDINANCES § 19.12.020 (2001).

[1] Recognized by the parties to be the 0.27-acre Wright parcel, though the acres to sq. ft conversion isn't exact.

In 2011, the Salt Lake County Zoning Administrator issued a letter pertaining to history of the Parent Parcel, including the conveyance that created the Subject Property. The purpose of this letter was to address the allowed use of the 8.07 acres of the Parent Parcel that had been deeded as additional lot acreage. The Zoning administrator noted that as it had remained separate from the lot to which it was deeded as additional acreage, it concluded that "[u]n-subdivided land that is not combined with a subdivided lot may be used for agricultural purposes, but is subject to the subdivision platting requirements if it is converted to any other kind of use (such as residential development)."

Millcreek City later incorporated in 2017, and adopted all existing Salt Lake County zoning ordinances, including the FR-5 zoning district and the FCOZ that applied to the Subject Property.

The City states that, in approximately 2020, in response to the Subject Property being listed for sale and several inquiries to the City about the potential for development, the City recorded a Notice of Noncompliance against the Subject Property to notify potential buyers that the property was not eligible for development.

The Notice of Noncompliance, dated September 29, 2020 and recorded the next day, states as follows:

> *Notice is hereby given that the property located at 4661 South Ledgemont Drive is not in compliance with Millcreek Ordinances. Specifically, the parcel was created in 2004 without regard to the subdivision design standards established in §18.08.010, the minimum lot area and frontage requirements in the FR-5 zone, as established in §19.12.040 of the Salt Lake County Code of Ordinances, and the Foothills and Canyons Overlay Zone requirements found in §18.20.025 and Chapter 19.72 of the Salt Lake County Ordinances. These ordinances were in force at the time of the creation of the lot, were subsequently adopted by Millcreek upon its incorporation in 2017, and remain in force as of the recording of this notice.*

Wright purchased the Subject Property in August of 2021 subject to the recorded Notice of Noncompliance. The following month, Wright applied for and was granted by the City an Excavation Permit dated September 14, 2021, with the project description as "We will be flattening the dirt back from the gutter edge on our side of the property 5'."

At some point after issuing the permit, the City appeared to have reversed course and informed Wright that no site grading or disturbance of the property could be pursued, including that some initial work of planting trees and plants that had already been performed should be undone.

Wright claims that he has not petitioned to build on the property, rather, his plans for the property include some grading and terracing the property to be used as a private garden. The City has responded that it does not object to Wright gardening on the property without the need for land use approval, as the same is routinely enjoyed by other property owners in FCOZ without seeking approval. However, the City clarifies that whereas it assumes Wright intends for some type of development activity that requires a permit, the City would intend to review the proposal for compliance with the requirements of the FCOZ ordinance.

Wright has requested this Advisory Opinion to determine whether such use of the property is permitted, whether it is entitled to grading permits in furtherance of such a use, whether the City properly recorded the Notice of Noncompliance, and what effect the recorded notice has on its property.

ANALYSIS

State law requires all subdivisions of land to be approved by the applicable land use authority in the relevant jurisdiction. *See*, UTAH CODE § 17-27a-603(2).[2] However, this does not apply if the division is "exempt under Section 17-27a-605 or excluded from the definition of subdivision under Section 17-27a-103." *Id.* These same requirements and exceptions, generally, were found in Salt Lake County's Subdivision Ordinance at the time of the Subject Property's 2004 deed. *See*, SALT LAKE COUNTY ORDINANCES §18.040.260 (1998).

We have been asked to opine on whether the City acted lawfully in recording a notice of noncompliance on the Subject Property alleging that the property was created as an illegal division of land, or whether the property may be legally put to agricultural use and may otherwise be entitled to certain grading permits in furtherance of that use.

I. The Subject Property Was Created by an Illegal Subdivision of Land, and the City's Recorded Notice of Noncompliance was a Lawful Way to Enjoin Further Violations of its Land Use Regulations

Section 17-27a-103 excludes from the definition of "subdivision" certain divisions of land by deed in unincorporated county jurisdictions, including the "bona fide division or partition of agricultural land for agricultural purposes." *See*, UTAH CODE § 17-27a-103(73)(c)(i).

The County's 2011 letter had concluded that the 8.07 deeded acres that resulted in creating the Subject Property could be used for agricultural purposes but would need to meet subdivision standards if converted to any other use. The County based its conclusion by citing Section 17-27a-605(2) of the Utah Code. However, under that section, to be considered a bona fide division of agricultural land, the parcel must (1) be land in agricultural use as defined in Section 59-2-502,[3] (2) meet the minimum size requirement of applicable land use ordinances, and (3) not used for any nonagricultural purposes now or in the future. *Id.* § 17-27a-605(2). Under those circumstances, land divided by deed may continue as agricultural use, but any subsequent proposed change in use requires that the property and proposal satisfy the current applicable zoning requirements of the applicable zoning district.

We have been asked to opine on whether the County's 2011 letter applies to the Subject Property and means that the property may be approved for a proposed agricultural use. We conclude that

[2] While current citations are used, the general requirement that all subdivisions of land are subject to approval by the applicable land use authority has been found in law since well before the time of the land divisions at issue here.
[3] "Land in agricultural use" means "land devoted to the raising of useful plants and animals with a reasonable expectation of profit . . . [or] "land devoted to and meeting the requirements and qualifications for payments or other compensation under a crop-land retirement program with an agency of the state or federal government."

the letter does not apply to the Subject Property, or that if it did, does not correctly conclude that the Subject Property, or even the 8.07 acres that had been the subject of the deed, may be legally put to agricultural use.

First, the 2004 deed of the Parent Parcel does not meet the subdivision definition's exclusion for bona fide divisions for agricultural purposes. The evidence in the record reflects that the purpose of the 2004 deed was to convey 8.07 acres to a nearby lot owner as additional acreage to a residential lot, and also to withhold the remaining 0.27-acre Subject Property for purposes of future development. Neither of these qualifies as an agricultural purpose, and therefore the conveyance is considered a subdivision as it was a division of land "for the purpose, whether immediate or future, for offer, sale, lease, or development." *Id.* § 17-27a-103(73)(a).

Second, the 2004 deed was also not exempted from platting requirements for agricultural divisions under Section 605(2) as the Parent Parcel was unsubdivided vacant acreage at the time of deed, not being put to any active use, and therefore was not "land in agricultural use" at the time of the conveyance. Moreover, while the 8.07 acres that was conveyed away in the deed might have, itself, met the 5-acre "minimum size requirement" of the applicable FR-5 zone, the deed also resulted in the creation of the 0.27 acre Subject Property, which does not meet the zone's minimum size requirement.

As the 2004 deed was not excluded from the definition of a subdivision and was not exempted from platting requirements, the resulting division of land was an illegal subdivision that violated state law. *See*, *id.* § 17-27a-611(1)(a)-(b). Moreover, by creating the Subject Property that did not conform with minimum lot size for the purpose of future development, the 2004 deed also violated Salt Lake County ordinances at the time, which provided that "[n]o parcel of land which has less than the minimum width and area requirements for the zone in which it is located may be cut off from a large parcel of land for the purpose, immediate or future, of building or development as a lot, except by permit of the board of adjustment." SALT LAKE COUNTY ORDINANCES § 19.76.090 (2001).

Utah law gives certain remedies to cities and counties to take action to require the property to conform to state or local subdivision requirements, which includes "an injunction or any other appropriate action or proceeding to prevent or enjoin the violation." *See*, UTAH CODE §§ 17-27a-611(2)(a)-(c) (for counties), 10-9a-611(2)(a)-(b) (for municipalities).

We have been asked to opine on whether the City's Notice of Noncompliance was properly recorded against the property. One purpose in recording documents is to impart notice to all persons of their contents. *See*, *id.* § 57-3-102. While not explicitly stated in state code at the time, state law was recently amended to clarify that a city "may submit to a county recorder's office for recording . . . a document related to . . . code enforcement. *Id.* §10-9a-532(2)(e).[4] As discussed, the 2004 deed that created the new acreage parcel and the Subject Property remainder was in violation of state law and local ordinance. The City's recording the Notice of Noncompliance stating that the Subject Property parcel had been created without regard to the minimum lot area and frontage requirements in the FR-5 zone and FCOZ overlay did not, by its terms, create or impose any kind of restriction on use or development that did not already exist, but merely

[4] Amended by Chapter 415, 2024 General Session.

imparted record notice of the violation. The recorded notice therefore is an action consistent with Section 10-9a-611(2) as an acceptable way to prevent or enjoin further violation of the law in the property's use.

II. The City May Choose Not to Enforce a Code Violation for a Gardening Use Undertaken Without Development Approval, But May Not Approve Applications for Permits that Do Not Comply with Land Use Ordinances.

Just as a city has available remedies to enjoin violations, a city also generally enjoys discretion in how and when to enforce violations of its ordinances. *See*, *Heckler v. Chaney*, 470 U.S. 821, 831, 84 L. Ed. 2d 714, 105 S. Ct. 1649 (1985) ("decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion"). Nevertheless, in considering any land use application submitted by a property owner seeking approval of a land use permit,[5] a municipality "is bound by the terms and standards of applicable land use regulations and shall comply with mandatory provisions of those regulations," UTAH CODE §10-9a-509(2), and state law requires the municipality's land use authority to "apply the plain language of [its] land use regulations." *Id.* §10-9a-306(1).

In this matter, despite the recorded notice of noncompliance, the City has conceded that it does not object to Wright gardening on the property without the need for land use approval, as the same is routinely enjoyed by other property owners in FCOZ without seeking approval. However, the City clarifies that whereas it assumes Wright intends for some type of development activity that requires a permit, the City would intend to review the proposal for compliance with the requirements of the FCOZ ordinance.

Under the FCOZ ordinance, all development activity is subject to an application process for review and approval, and development is defined to include "all land disturbance activities such as grading, clearing, and excavation." MILLCREEK ZONING CODE (MKZ) §§ 19.72.020(B), 19.72.030. The FCOZ further provides that all development must comply with the standards of the underlying zone. *Id.* § 19.72.040. The FR-5 zone provides that all permitted uses in the zone must also comply with all applicable requirements "including those relating to site and lot dimensions." *Id.* § 19.12.010.

While the City has discretion in choosing whether to pursue enforcement of a violation by any active gardening use on the property, because the Subject Property is an illegal lot that does not conform with the FR-5 zone's 5-acre minimum lot area requirement and other applicable land use regulations, the City may not affirmatively approve a submitted application for a land use permit necessary for development activity in furtherance of such a use.[6]

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[5] See definitions of "land use applicant," "land use application," and "land use permit." UTAH CODE § 10-9a-103.

[6] Since the filing of this advisory opinion request, the City has since rezoned repealed all of its FR zones, and rezoned all properties in the FR districts to a new "Forest Recreation Estates" (FRE) zone. *See*, Ord. 24-01, enacted February 12, 2024. While this opinion references the now-appealed FR-5 zoning standards, the analysis and outcome of the opinion are unchanged in reference to the property's current zoning – that is, the City has prosecutorial discretion as to whether to take any enforcement action on the current use of the property as a violation of the City's ordinances, but whereas the Subject Property is an illegal lot that cannot conform to applicable regulations, a land use application submitted for a land use permit on the property is not entitled to approval.

CONCLUSION

Because the Subject Property was the result of an illegal subdivision that did not conform to applicable subdivision standards including minimum lot size, the City acted lawfully in recording the notice of noncompliance detailing the violation. While the City has prosecutorial discretion whether to enforce a code violation regarding any current use of the property, and may appropriately allow incidental gardening on the land, the City, under the current land use regulations governing the property, may not affirmatively approve a land use application seeking a land use permit as any proposed development of the property would not comply with the minimum lot requirements for allowed uses in the applicable zone.

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 the author's understanding of the relevant law, the author 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 or her interest.

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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.