Advisory Opinion #143

Parties: Lawrence Meadows and Park City

Issued: August 14, 2014

TOPIC CATEGORIES:

Appealing Land Use Decisions
Review for Application Completeness
Review Within a Reasonable Time

Review and approval of a development application is a process that may involve input from the applicant, planning staff, other entities, and the public. As new information is obtained, the application may be modified. It is not necessary that each and every condition and requirement be satisfied before the review and approval process may begin, as long as the government is satisfied that there is sufficient information to begin the process. Some requirements and conditions may be deferred until final approval.

An appeal of development approvals may be submitted to different appellate bodies, as provided in a local ordinance.

The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI
Executive Director

BRENT N. BATEMAN
Lead Attorney, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested by:	Lawrence Meadows
Local Government Entity:	Park City
Property Owner:	Woodside Development, LLC
Type of Property:	Residential
Date of this Advisory Opinion:	August 14, 2014
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

Was it proper to begin the review and approval process for a development application?

Summary of Advisory Opinion

Review and approval of development applications is a process that may involve input from the applicant, the local government, the public, and other entities. As the process unfolds, new or clarifying information may be solicited, and the application may be modified. It is not necessary that each and every condition and requirement be satisfied before an application may be reviewed and submitted for approval, as long as the local government is satisfied that the review process may begin. Information and requirements necessary for review and approval should be provided when needed, and conditions required by ordinance or statute should be satisfied when required. Satisfying conditions of approval, or requirements dependent on the final approval granted, may be deferred until that point.

Review

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is

hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Lawrence Meadows on March 5, 2014. A copy of that request was sent via certified mail to Marci Heil, City Recorder for Park City, at 445 Marsac Ave., Park City, Utah. According to the return receipt, the City received the Request on March 10, 2014.

Evidence

The following documents and information with relevance to the issue involved in this Advisory Opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, with attachments, submitted by Lawrence Meadows, received by the Office of the Property Rights Ombudsman on March 5, 2014.
2. Response submitted on behalf of Park City, by Polly Samuels McLean, Assistant City Attorney, received on May 2, 2014.
3. Additional response submitted by Park City, received on May 15, 2014.
4. Reply submitted by Mr. Meadows, received May 14, 2014.
5. Response submitted by Woodside Development, LLC, with attachments, received on June 13, 2014.
6. "Petition for Judicial Review and Request for Injunctive Relief," Lawrence Meadows v. Park City, Woodside Development, LLC, et al., Third District Court, Case No. 140500199, filed by Mr. Meadows on April 4, 2014 (copy submitted by Mr. Meadows).

Background

This Opinion visits yet again a proposal to remodel a home located at 505 Woodside Avenue in Park City. In July of 2010, the Office of the Property Rights Ombudsman issued an Advisory Opinion requested by Lawrence Meadows, concerning the same property and a proposal to remodel the home. Mr. Meadows has requested this Opinion to evaluate aspects of a new remodeling proposal.

The property is owned by 505 Woodside Development, LLC. The home has been designated by the City as being "historically significant," because the original portion was built around 1904, and is representative of the City's development during its mining heyday.[1] An addition was constructed on one side of the home 1930s, with a new rear area added in the 1960s. The front

[1] The home was designated as "historically significant" after a city-wide survey in 2008. The home is considered historic because it dates from the "mature mining era" (*i.e.*, 1894-1930), but it has no other historic or cultural significance.

portion retains the original design. The home sits a few feet above the street level, with a retaining wall along the front.

The City's historic preservation ordinance governs replacement or renovation of structures deemed to be historically significant. Any change to a historic structure requires specific evaluation and approval under the City's Historic District Design Review code ("HDDR"). Decisions concerning historic structures made by the City may be appealed to the Historic Preservation Board.

In March of 2009, Woodside applied for a permit to remodel the 505 Woodside structure. The proposed remodeling included replacing much of the rear portion with new construction, and removing about 5 feet from one end of the front portion. Because the proposed remodeling included alteration of a historic structure, an application was subject to the City's HDDR code. Lawrence Meadows, who owns a neighboring property, objected to that proposal.

As the application was being processed, it was discovered that the owners mistakenly believed that the 5-foot portion was a later addition to the home, and so could be removed without compromising the historic nature of the structure. Mr. Meadows requested an Advisory Opinion to evaluate, among other things, whether the application was complete and eligible to be considered for approval. That Opinion concluded that due to the mistake concerning the 5-foot portion of the home, the application was not complete, and was not entitled to vested rights as submitted.[2] The property owners withdrew the application.

In September of 2012, the owners submitted a new application, which entailed excavating a space beneath the structure for a garage, with the home above the garage.[3] This would require construction activity on at least a portion of the historic structure, as well as changes to the front yard and the retaining wall, including removal of some vegetation from the front yard.[4] The new application was also subject to the HDDR. The City's staff approved most of the application, with some conditions, on February 4, 2013.[5] Mr. Meadows pursued administrative appeals of the approvals that were granted.[6] The administrative bodies upheld the City's actions, and at that

[2] The Opinion reasoned that the mistake made the application incomplete, because it concerned a significant aspect of the application. The application could have been revised and resubmitted, but the owner could not claim vested rights until the revised materials were submitted and the application became complete. *See* Advisory Opinion #88, Lawrence Meadows and Park City, July 14, 2010.

[3] The owners initially proposed disassembling the structure, and then reassembling it after the garage was complete. (The process is referred to as "panelization.") The proposal also involved removal and replacement of the "non-historic" additions on the rear of the home. A new addition would be constructed with a "green roof"—vegetation on a roof portion—connecting the older part of the structure to the new additions. This new addition would not require modification to the historic portion of the structure.

[4] Removal of vegetation, particularly mature trees, requires approval from the City.

[5] Because of winter conditions, the City deferred action on the owner's panelization proposal pending further analysis. In December of 2013, the owners proposed instead to raise the home intact, construct the garage below it, and then lower the structure back down to rest on the garage. The City approved this preservation proposal in January of 2014.

[6] Appeals of the portions of the application which concerned historic preservation were heard by the Historic Preservation Board, as provided in the City Code. *See* PARK CITY LAND MANAGEMENT CODE, § 15-1-18(A). The remainder of the decision was appealed to the City's Planning Commission. *Id.*

time, Mr. Meadows did not seek review of those actions by the district court. Mr. Meadows requested a second Advisory Opinion, which was issued on October 18, 2013.[7]

Ultimately, the City gave final approval to Woodside's amended plan in January of 2014. Mr. Meadows again voiced objections to the proposal, requested this Advisory Opinion, and filed an administrative appeal to the Historic Preservation Board.[8] Mr. Meadows argues that the Woodside application was not complete and not eligible for vested rights, and so should not have been reviewed and approved by the City. Specifically, he states that Woodside had not submitted a required financial guarantee, and that the application was not properly signed by Woodside's owner.[9] Mr. Meadows also complained that the City did not consider the impact of Woodside's project on the original root cellar located beneath the home. Finally, Mr. Meadows objected to the City's appeal procedure, which divided different aspects of the appeal to different administrative bodies.[10]

The City and Woodside dispute Mr. Meadows's claims, and contend that the Woodside application was properly reviewed, and that all requirements have been met. They also argue that Mr. Meadows may not contest the approvals granted in 2013, since they have been upheld in administrative appeals. The City and Woodside contend that Mr. Meadows's claim of duplicative appeals is moot, because it is based on the 2013 administrative appeals, not his 2014 appeal. In addition, Woodside argues that Mr. Meadows does not have standing to request an Advisory Opinion.

Analysis

I. Mr. Meadows is a Potentially Aggrieved Person, and may Request an Advisory Opinion on the City's Decisions Regarding 505 Woodside.

As a neighboring landowner, Mr. Meadows may request an Advisory Opinion reviewing land use decisions impacting 505 Woodside. Any "potentially aggrieved person" may request an Advisory Opinion from the Office of the Property Rights Ombudsman. UTAH CODE ANN. § 13-43-205(1). A neighboring landowner would be "potentially aggrieved" by a decision approving substantial construction on a nearby parcel, and so Mr. Meadows may request an Advisory Opinion.

[7] *See* Advisory Opinion # 131, Lawrence Meadows and Park City, October 18, 2013.

[8] In March of 2014, the Historic Preservation Board upheld the City's approval of Woodside's proposal. Mr. Meadows filed a "Petition for Judicial Review," which includes a request to review the 2013 actions as well as the 2014 decision.

[9] The December 2013 application was signed on behalf of Woodside by David White, who is the architect for Woodside's project. In March of 2014, Woodside signed the application form.

[10] Mr. Meadows raised the same issue in his second Advisory Opinion request, arguing that the City's ordinance directing some appeals to the City's Planning Commission, with others going to the Historic Preservation Board, violated the prohibition against "duplicative or successive appeals" found in the Utah Code. *See* UTAH CODE ANN. § 10-9a-701(4)(d). Mr. Meadows states that the 2014 appeal is an extension of the 2013 appeal, and so the two matters should be treated as one. The City maintains that the 2013 matter is closed, and that the 2014 appeal is on the building preservation decision only.

Section 13-43-205 uses the term "potentially aggrieved person" to indicate the level of association in a matter necessary for a person to request an Opinion. The language used is similar to that used to describe a party's "standing" to bring a suit. In essence, standing means that a party has a "stake" in the outcome of a dispute:

> Standing is a jurisdictional requirement that must be satisfied before a court may entertain a controversy between two parties. . . . The issue of standing requires the court to focus on whether the parties have both a sufficient interest in the subject matter of the dispute and a sufficient adverseness so that the issues can be properly explored.

Specht v. Big Water Town, 2007 UT App 335, ¶ 8, 172 P.3d 306, 308 (citations and alterations omitted)(*overruled on other grounds by Cedar Mountain Environmental, Inc. v. Tooele County*, 2009 UT 48, 214 P.3d 95).

In order to bring a suit to court, a party must "assert that it has been or will be adversely affected by the challenged actions." *Cedar Mountain*, 2009 UT 48, ¶ 8, 214 P.3d at 98.[11] However, courts "rarely impose[] a requirement that a party prove its alleged harm, or even causation, to establish standing." *Id.*, 2009 UT 48, ¶ 12, 214 P.3d at 99. An allegation of harm is usually sufficient. *Id.* If standing to bring a suit is conferred with an allegation of harm, then standing to request an Advisory Opinion may be conferred if a party is "potentially aggrieved."[12] To request an Advisory Opinion, it is not necessary for Mr. Meadows to show that he has actually suffered some injury due to the City's decisions. It is sufficient that he allege a potential impact on his property.[13]

II. The Application had the Necessary Information for the City's Review.

A. Application Review is a Process.

The application had the information needed by the City to conduct a substantive review. In essence, Mr. Meadows argues that the City should not have reviewed and approved the application, because every single requirement had not yet been fulfilled. However, this ignores

[11] In *Cedar Mountain*, the Utah Supreme Court explained the "traditional" standing test, which requires that a party (1) be adversely affected by the challenged action, (2) allege a causal relationship between the action, the party's injury, and the requested relief, and (3) request relief to redress injury claimed. *See Cedar Mountain*, 200(UT 48, ¶ 8, 214 P.3d at 98. The Court also explained that § 801 of LUDMA incorporates the traditional standing test, by granting that any "adversely affected" person may appeal a land use decision. *Id.*

[12] The language used underscores the conclusion that it is not necessary that a party prove an injury in order to request an Opinion. If a simple allegation is sufficient to show that a party is "adversely affected" enough to file a lawsuit, then it is more than enough to show that the party is a "*potentially* aggrieved person" who may request an Opinion. This policy furthers the purpose of Advisory Opinions to resolve disputes and avoid litigation. Furthermore, the Office of the Property Rights Ombudsman may only draft Opinions on a limited number of topics listed in § 13-43-205. The Office may decline a request for an Advisory Opinion if it feels that the request does not concern one of the topics listed in the statute.

[13] This Opinion concludes only that Mr. Meadows has demonstrated a sufficient interest to be a "potentially aggrieved person" and that he may request an Advisory Opinion. Whether or not he has standing to bring a lawsuit arising from this situation is a different question, and this Opinion takes no position on that issue.

the simple fact that review of development applications is most often a process involving input from the applicant, planning staff, and other entities. Over the course of that process, an application may be modified as new concerns are raised or as new information becomes available. An application is "complete" when it is "provided in a form that complies with the requirements of applicable ordinances and all applicable fees have been paid." UTAH CODE ANN. § 10-9a-509(f). If the City is satisfied that enough information has been submitted, the application review and approval process may begin.

In the first Advisory Opinion requested by Mr. Meadows, issued in July of 2010, the Office of the Property Rights Ombudsman concluded that the 505 Woodside application was not complete, because of the material mistake regarding the structure.[14] The Opinion concluded that the owner could not claim a vested right for approval of the application until it was complete, as provided in the Utah Code.[15] This does not mean, however, that an application cannot be *reviewed* until it is "complete," only that the applicant cannot claim vested rights until the application is complete.[16] Otherwise, development application could never be reviewed, because there would be no way to determine if it was complete without a review. The Vested Rights Rule means that land use ordinances may not be changed after a complete application is submitted.[17] The Rule does not mean that applications cannot be reviewed and approved until all necessary requirements are met.

The 2014 Utah Legislature adopted new language intended to clarify an applicant's entitlement to review under existing ordinances. "An applicant who has filed a complete land use application, including the payment of all application fees, is entitled to substantive land use review of the land use application under the land use laws in effect on the date that the application is complete . . .." *Id.*, § 10-9a-509(1)(a)(i). This new provision means that an

[14] *See* Advisory Opinion #88, Lawrence Meadows and Park City (July 14, 2010). That Opinion considered questions about a proposed development at 505 Woodside. In the original application, the owner mistakenly believed that a small area had been added to the original home, and thus was not part of the "historic" structure. Because of this error, the application could not be considered "complete," and eligible for vested rights protection. Correcting the error required revision of the entire application. The issue was important, because there had been subsequent changes to the City's zoning ordinance which affected the proposal, but did not prohibit it altogether.

[15] *See* UTAH CODE ANN. § 10-9a-509(1)(a)(ii) (Applicant entitled to approval when the application conforms to the zoning ordinances in place on the date of the application.) The 2010 Opinion pointed out that minor errors or omissions, that are not material to an application, could be corrected without affecting an applicant's rights, and that review could proceed. In this matter, Mr. Meadows argues that the owner of 505 Woodside did not sign the application. However, that appears to be a minor omission that does not significantly affect the application. Furthermore, a lack of signatures is easily remedied. The City states that the owners have provided the necessary signatures, so the omission has been corrected.

[16] Review of an application is different than a vested right to approval. When an application conforms to the applicable zoning ordinances, including any approvals that may need to be granted, the applicant is entitled to approval. Review of the application, on the other hand, is the process to determine if the application receives approval. Reviewing an application may lead to it receiving vested rights, but the review process itself does not grant any specific approval right.

[17] "A property owner should be able to plan for developing his property in a manner permitted by existing zoning regulations with some degree of assurance that the basic ground rules will not be changed in midstream." *Western Land Equities v. City of Logan*, 617 P.2d 388, 398 (Utah 1980).

applicant may rely on the ordinances in place on the date the application is complete, and that an application may not be jeopardized by ordinance changes enacted after that date.[18]

B. Required Conditions do not Necessarily Need to be in Place Prior to Approval.

Because the review process can lead to alterations in a development plan, conditions which are imposed on an approved application would not need to be in place prior to approval, unless those conditions are necessary for evaluation of the application, or are specifically required.[19] In this matter, Mr. Meadows states that 505 Woodside did not submit a financial guarantee for the project, and so the City should not have reviewed the application. However, the financial guarantee is a requirement of *approved* applications.[20] It is not necessary that the applicant obtain the guarantee until the application is approved. In addition, the amount of the financial guarantee would not be known until the application has been fully reviewed and approved, so it would be nearly impossible to comply with the requirement prior to final approval.[21] It appears, therefore, that there was sufficient information for the City to begin the review and approval process.[22]

III. In the Matter Being Evaluated for this Opinion, Mr. Meadows was not Subjected to Duplicative or Successive Appeals.

The single appeal filed by Mr. Meadows addressed in this Opinion cannot be "successive or duplicative" because it is only one administrative action. In the second Opinion requested by Mr. Meadows, dated October 18, 2013, the Office of the Property Rights Ombudsman concluded that the appeals process required by the City did not violate the Utah Code's prohibition on

[18] The Utah Code's Vested Rights Rule provides that if proceedings to amend an ordinance have been initiated when an application is submitted, the applicant may not claim vested rights in the former ordinance if the changes are adopted. *Id.*, § 10-9a-509(1)(a)(ii)(B).

[19] As an example, a subdivision plat requires approval from a culinary water provider before it can be approved by the local land use authority. *See* UTAH CODE ANN. § 10-9a-603(2)(a). Although culinary water would not be needed until the development is finished, adequate water service is an important component of the development review process. Thus, it is appropriate that approval for water service is required prior to approval of the subdivision plat.

[20] *See* PARK CITY MUNICIPAL CODE, § 15-11-9(B) (Financial guarantee required "to ensure compliance with the conditions and terms of the Historic Preservation Plan.") The amount of the guarantee is determined by the City, based on the Historic Preservation Plan. *Id.*, § 15-11-9(C).

[21] It should also be noted that the purpose of the financial guarantee is to provide funding to either complete the project, or preserve historic structures. That need will not arise during the application review process, so the guarantee is unnecessary during review.

[22] This Opinion will not evaluate the specifics of the preservation plan, or whether the City's Historic Preservation Board was correct when it upheld the plan. Such evaluation is beyond the limits of this Office's statutory mandate.

"duplicate or successive appeals."[23] Since this current Opinion concerns only one appeal to the Historic Preservation Board, there is not a question about duplicative or successive appeals.[24]

Conclusion

As a neighboring property owner, Mr. Meadows is a "potentially aggrieved person" who may request an Advisory Opinion concerning the approvals issued for 505 Woodside's development and historic preservation activities. It is not necessary for a person to show a direct injury to be a "potentially aggrieved person," only an allegation of potential harm or injury. A property owner may be potentially impacted by development on a neighboring parcel, which is sufficient to at least request an Advisory Opinion.

A local government may review a land use application when it determines that there is enough information to begin the review and approval process. Over the course of the review, new or clarifying information may be requested, and the application may be modified. It is not necessary that each and every requirement be satisfied before the review process may begin. Conditions that would be imposed on approval do not need to be satisfied until approval, and requirements that are dependent upon information in the final approval also do not need to be satisfied. Other conditions and information needed for review may need to be required, and a condition required by statute should be met as provided in the applicable statute.

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

[23] UTAH CODE ANN. § 10-9a-701(4)(b). When Mr. Meadows appealed the earlier approvals of the 505 Woodside Preservation Plan, the City bifurcated the appeals, with some portions considered by the City's Planning Commission, and others heard by the Historic Preservation Board. This process was required by the City's ordinances. The October, 2013 Opinion concluded that a bifurcated process is authorized by § 701, as well as the City's ordinances, and that the appeals were not duplicate, because they concerned different questions. In the present matter, there was only one appeal to the Historic Preservation Board.

[24] The Office of the Property Rights Ombudsman was notified that, as of the date of this Opinion, Mr. Meadows was seeking judicial review of the 505 Woodside Preservation Plan. Part of his petition for review challenges the administrative appeal actions (including those conducted in 2013) as being "duplicate or successive."

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

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

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 provisions, found in Utah Code § 13-43-206, 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.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Marci Heil
City Recorder
Park City
445 Marsac Ave.
Park City, Utah 84060

On this _____ Day of August, 2014, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

_____
Office of the Property Rights Ombudsman