Advisory Opinion #171

Parties: John Davis
Issued: August 17, 2016

TOPIC CATEGORIES:
Compliance with Land Use Ordinances

Utah law requires strict compliance with notice ordinances. The failure to strictly comply with notice requirements renders the action taken void. Accordingly, since Salt Lake City held a statutorily required public hearing in violation of the City's 45 day notice ordinance, a final decision on the application will be void without a new public hearing before the Planning Commission.

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ADVISORY OPINION

Advisory Opinion Requested By:	John Davis
Local Government Entity:	Salt Lake City
Applicant for Land Use Approval:	Trolley Square Ventures, LLC
Type of Property:	Commercial Property
Date of this Advisory Opinion:	August 17, 2016
Opinion Authored By:	Brent N. Bateman Office of the Property Rights Ombudsman

ISSUE

Did Salt Lake City fail to provide adequate notice of a public hearing?

SUMMARY OF ADVISORY OPINION

Salt Lake City's land use ordinance requires a 45 day notice to a recognized community organization before it may hold a public hearing. The plain language of the ordinance does not support the interpretation that the 45 day requirement is unnecessary when another recognized community organization is within 600 feet of the project.

Utah law requires strict compliance with notice ordinances. The failure to strictly comply with notice requirements renders the action taken void. Accordingly, since the City held a statutorily required public hearing at the planning commission in violation of the City's 45 day notice ordinance, a final decision on the application will be void without a new public hearing before the Planning Commission.

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 John Davis on March 22, 2016. A copy of that request was sent via certified mail to Cindi Mansell, Salt Lake City Recorder, 451 South State Street, RM 415, Salt Lake City, Utah.

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 John Davis on March 22, 2016, with attachments.
2. Letter submitted by Paul C. Nielson, Attorney for Salt Lake City, received April 19, 2016, with attachments.
3. Letter submitted by John P. Davis, received May 2, 2016, and attachments.
4. Letter submitted by Douglas F. White, Attorney for Trolley Square Ventures, LLC. Received on May 5, 2016.
5. Letter submitted by John P Davis, received on May 6, 2016.

BACKGROUND

Within Salt Lake City, several neighborhoods have organized into *Recognized Community Organizations*. These organizations, officially recognized by Salt Lake City ordinance, receive notice and the opportunity to provide input to the City on matters of local interest. On some land use matters, the City must provide these organizations with notice in accordance with Salt Lake City Ordinance 2.60.050(C):

> The recognized community organization chair(s) have forty five (45) days to provide comments, from the date the notice was sent. A public hearing will not be held, nor will a final decision be made about the project within the forty five (45) day period. Where a project is within six hundred feet (600') of the boundaries of

> another recognized community organization's district, when more than one recognized organization has requested a presentation of the matter, when the subject property is located west of 2200 West, or when the project is a text amendment to the city code, the city will schedule the item for an open house and notify the public, including those recognized community organizations who may be affected by the project or who have specifically requested notification of the public open house.

This ordinance adds two processes that exceed the notice requirements of the state law; a 45 day notice prior to a public hearing or making a final decision, and under certain specific circumstances, an open house. On March 9, 2016, the Salt Lake City Planning Commission held a public hearing to consider the petition by Trolley Square Ventures, LLC to amend the zoning designation of certain parcels in the Trolley Square area. The parcels are all within the Central City Neighborhood Council ("CCNC") district. The parcels are also within 600 feet of the East Central Community Council district, another Recognized Community Organization. At the public hearing, several persons, including the chair of the CCNC, expressed concerns that the City had failed to provide adequate notice of the public hearing. Despite the expressed concerns, the SLC Planning Commission recommended approval of the zone change to the City Council.

Soon afterward, John Davis, a nearby affected property owner, requested this Advisory Opinion. According to Mr. Davis, the earliest that the Chair of the CCNC received notice was February 4th, 2016. This email notice was sent only 35 days prior to the Planning Commission's public hearing. Therefore, Mr. Davis asserts that the City violated the mandatory provisions of Salt Lake City ordinance 2.60.050(C) by failing to notify the applicable community organization at least forty-five days in advance of the public hearing. Mr. Davis argues that this violation of the plain language of the ordinance renders the Planning Commission's recommendation void.

Salt Lake City interprets its notice ordinance differently. The City feels that the ordinance provides two *alternate* notice procedures. The City believes that if there is another recognized community organization within 600 feet of the project, the 45 day notice requirement is replaced by the requirement to hold a project open house. That appears to have been the standing practice of the City for some time. Because it held an open house, the City believes that it has complied with the ordinance. Moreover, the City argues that the CCNC has not suffered any harm by the actions of the City.

ANALYSIS

I. Salt Lake City Has Not Complied with the Plain Language of the Notice Ordinance

The ordinary rules of statutory construction do not support the City's interpretation of Ordinance 2.60.050(C). The language does not provide alternate notice requirements. Rather, the 45 day notice requirement must be construed to apply in all situations.

When interpreting a statute or ordinance, the primary objective is "to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Foutz v. City of S. Jordan*, 100 P.3d 1171, 1174 (Utah 2004).

> To discern legislative intent, . . . look first to the statute's plain language. In doing so, . . . presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning. Additionally, . . .read the plain language of the statute as a whole and interpret its provisions in harmony with other statutes in the same chapter.

Selman v. Box Elder County, 2011 UT 18, ¶18, 251 P.3d 804, 807 (citations and alterations from original omitted). Moreover, "[O]ur interpretation of a statute requires that each part or section be construed in connection with every other part or section so as to produce a harmonious whole." *State in Interest of J.M.S.*, 280 P.3d 410, 413 (Utah 2011). In addition, "omissions in statutory language should be taken note of and given effect." *Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14, 993 P.2d 875, 879 (citation omitted).

The City argues that Ordinance 2.60.050(C) provides two alternate processes. The first prohibits the City from holding a public hearing or making a final decision within 45 days of the day notice was sent to the recognized community organization chair:

> The recognized community organization chair(s) have forty five (45) days to provide comments, from the date the notice was sent. A public hearing will not be held, nor will a final decision be made about the project within the forty five (45) day period.

The second process requires that if certain conditions exist, including the project being within 600 feet of another recognized community organization, the City must schedule an open house, and notify the public and the recognized community organizations:

> Where a project is within six hundred feet (600') of the boundaries of another recognized community organization's district, when more than one recognized organization has requested a presentation of the matter, when the subject property is located west of 2200 West, or when the project is a text amendment to the city code, the city will schedule the item for an open house and notify the public, including those recognized community organizations who may be affected by the project or who have specifically requested notification of the public open house.

The City argues that when the second "open house" provision is in effect, the first "45 day" provision is not. They indicate that since there is another community organization within 600 feet of the project, the Planning Commission's action, with 35 days' notice, was valid.

The plain language of the ordinance simply does not support the City's interpretation. The ordinance unambiguously and expressly states that "a public hearing <u>will not be held</u> . . . within the 45 day period" (emphasis added). That language is plain, without qualifiers. Nothing in any part of the ordinance removes or contradicts that requirement, or indicates that the two sections are alternate, or that holding an open house eliminates the need to comply with the 45 day notice. Furthermore, a public hearing before the Planning Commission on a legislative decision is mandatory according to State law. UTAH CODE § 10-9a-502. Thus the second portion of the

ordinance cannot eliminate the need for a public hearing. The second section does not mention any time frames and it does not give any indication at all that it supersedes or counters in any way the 45 day notice requirement. We are required to give effect to *each section* of a statute. We thus cannot disregard the uncontradicted 45 day requirement.

Making the two sections alternate would have been easy for the legislative body to do. Nothing can be found in the ordinance that does so. "[O]missions in statutory language should be taken note of and given effect." *Biddle*, 1999 UT 110, ¶14. One cannot assume that a mandatory time frame, so plainly stated, can be ignored unless the ordinance expressly so provides. In order to read each section of the statute as a harmonious whole, we cannot read one section at the exclusion of the other.

Moreover, the principles of statutory interpretation require that we assume every term in the ordinance was used advisedly. Thus we assume that the fifth word in this ordinance, *chair(s)*, is intentionally plural. Accordingly, the 45 day notice requirement could apply to multiple organization chairs. Nothing in the plain language limits the meaning of the term *chair(s)* to a case where there may be multiple chairpersons in a single organization. The far more likely plain language interpretation of this plural word is that the 45 day notice must sometimes be provided to more than one community organization chair. Therefore, the language does not support an argument that the 45 day rule does not apply where more than one recognized community organization is involved. Accordingly, we must give effect to the entire ordinance. The two portions of the ordinance are not alternate.

The City also argues that interpreting these provisions as alternate reflects the long-standing practice of the City. That would be highly relevant if the ordinance were ambiguous, resulting in a need to seek the meaning beyond the plain language. But this ordinance is not ambiguous on its face. Only the long-standing practice makes it potentially ambiguous. The plain language of the ordinance contains nothing that could render the ordinance subject to more than one interpretation. The plain language, rather than the long-standing practice, is the first consideration in ordinance interpretation. *Selman*, 2011 UT 18, ¶18. Therefore, the public hearing, held 35 days after notice was given, violates the City's notice ordinance.

II. The Action by the Planning Commission is Void

A violation of the City's notice ordinance renders the action taken void. All available Utah authority indicates that notice provisions require strict compliance. *See Hatch v. Boulder Town Council*, 2001 UT App 55. "Failure to strictly follow the statutory requirements in enacting the ordinance renders it invalid." *Call v. West Jordan*, 727 P.2d 180, 183 (Utah 1986); *Melville v. Salt Lake County*, 536 P.2d 133 (Utah 1975).

It is acknowledged that the Salt Lake City ordinance far exceeds the notice requirements in the state law. Moreover, 35 days vs. 45 days seems like a *de minimus* violation. Also, the parties will have the opportunity to provide input because the City Council will hold another public hearing before making a final decision. Thus, the question of actual harm, raised by the City, is understandable. However, no authority can be found to excuse a jurisdiction from strict compliance with notice ordinances. "This well established rule [that failure to strictly comply

with notice provisions renders a decision invalid] is followed by the great majority of jurisdictions." *Call*, 727 P.2d at 183. Accordingly, the established law leaves us no choice but to find that a final decision taken in violation of the City's notice ordinance will be void.

Note that the cases examined all hold that, after a violation of a notice ordinance, the *final decision* is invalid. In this matter, there has not been a final decision, only a decision by the Planning Commission to recommend approval of the zone change. This recommendation to the City Council is required by statute. UTAH CODE § 10-9a-302, but is only advisory. The City Council is not obligated to follow the Planning Commission's recommendation. Nonetheless, the recommendation is a mandatory part of the statutory process, as is the public hearing at the Planning Commission. UTAH CODE § 10-9a-502. Strict compliance must include compliance with all notices required by the process. It appears, therefore, that to rectify the matter, the City must hold another public hearing before the planning commission.

CONCLUSION

By holding a public hearing 35 days after sending notice to the Chair of the CCNC, Salt Lake City has violated the plain language of its land use ordinance. Utah law requires strict compliance with notice provisions, and any decision following that violation will be void. The Planning Commission should hold a public hearing in order to comply with the ordinance.

Brent N. Bateman, Lead Attorney
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.

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 § 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:

Cindi Mansell, City Recorder
Salt Lake City
451 So. State Street, RM 415
Salt Lake City, Utah 84111

On this _____ Day of August, 2016, 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