Advisory Opinion #191

Parties: Reeves' Riverton Ranch, LLC; Riverton City
Issued: September 19, 2017

TOPIC CATEGORIES:
Conditional Use Applications
Entitlement to Application Approval

By law, conditions imposed upon a conditional use permit must accord with applicable standards adopted by ordinance. The City's only valid standard vaguely references preserving the health, safety, and general welfare. Accordingly, the City may only impose reasonable conditions on the Applicant's development proposal to the extent that the conditions mitigate the use's reasonably anticipated detrimental effects on health, safety, or general welfare. To the extent that the City's conditions do not accord with this or other applicable ordinance standards, they are invalid.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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ADVISORY OPINION

Advisory Opinion Requested By:	Bruce R. Baird, Attorney for Reeves' Riverton Ranch, LLC
Local Government Entity:	Riverton City
Type of Property:	Recreational
Date of this Advisory Opinion:	September 19, 2017
Opinion Authored By:	Jordan S. Cullimore Office of the Property Rights Ombudsman

ISSUES

Are the conditions imposed by Riverton City on the applicant's proposed conditional use permit lawful?

SUMMARY OF ADVISORY OPINION

By law, conditions imposed upon a conditional use permit must accord with applicable standards adopted by ordinance. Riverton City's only valid standard vaguely references preserving the health, safety, and general welfare. Accordingly, Riverton City may only impose reasonable conditions on Reeves' development proposal to the extent that the conditions mitigate the use's reasonably anticipated detrimental effects on health, safety, or general welfare. To the extent that Riverton City's conditions do not accord with this or other applicable ordinance standards, they are invalid.

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 Bruce R. Baird on October 20, 2016. A copy of that request was sent via certified mail to Virginia Loader, City Recorder, City of Riverton, at 12830 South 1700 West, Riverton, Utah. The City received the request on October 24, 2016.

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 Bruce R. Baird, Attorney for Reeves Riverton Ranch, LLC, on October 20, 2016.
2. Supplemental Submission submitted by Bruce A. Baird, Attorney for Reeves Riverton Ranch, LLC, on February 17, 2017.
3. Reply from J. Craig Smith & Clayton H. Preece, Attorneys for the Riverton City, received March 24, 2017.
4. Response from Bruce R. Baird, Attorney for Reeves Riverton Ranch, LLC, received April 18, 2017.
5. Response from J. Craig Smith & Clayton H. Preece, Attorneys for the Riverton City, received May 9, 2017.

BACKGROUND

Reeves Riverton Ranch, LLC ("Reeves") owns approximately 7.6 acres of land (the "property") adjacent to the Jordan River Parkway along the west bank of the Jordan River in Riverton City (the "City"). The western border of the property abuts several existing single-family residences.

The property is presently zoned A-5, Agricultural. The A-5 Zone allows for agricultural uses and a number of other related and compatible uses. The minimum lot size in the zoning district is 5 acres, so, under the current zoning, the lot may not be further subdivided for residential development. On May 9, 2016, after failed attempts to petition the Riverton City Council to rezone the property to allow a residential subdivision, Reeves submitted a conditional use permit application to construct a privately-owned park consisting of two sports fields, a sand volleyball pit, and a tot-lot playground. The use category "Parks and open space, public" is a conditionally permitted use the A-5 Zone.

During the course of the City's administrative review of the application, a great deal of discussion and analysis occurred regarding whether the proposed privately-owned but publicly-accessible park fit within the Zone's "public park" use category. Ultimately, the Planning Commission determined that it did and that it was a conditionally permitted use within the A-5 Zone. The Commission formally reviewed and approved the application during its August 25, 2016 meeting, subject to several conditions. This approval was formally adopted on October 13,

2016. The conditions the City imposed were a result of staff analysis and recommendation, multiple public meetings, and extensive input from City residents and neighbors to the property.[1]

The imposed conditions require that:

1. The parking area include a minimum of 220 parking stalls, with stall dimensions and landscaped islands compliant with Riverton City standards and ordinances, with all parking areas accessible from the north access point.
2. The parking area be paved with an asphalt or concrete surface.
3. Drive aisle widths and turn radiuses comply with the requirements of the International Fire Code.
4. No gates on drive accesses are allowed.
5. Permanent plumbed restroom facilities be provided compliant with the International Building Code and Americans with Disabilities Act.
6. Irrigated landscaping compliant with all applicable Riverton City standards and ordinances be installed on all unpaved areas of the property, with a landscaped plan approved as part of the site plan.
7. Eight (8) foot solid masonry fencing be installed on the west and south property lines, with fencing to be extended adjacent to the existing sand volleyball pit.
8. Parking lot and site lighting comply with Riverton City standards and ordinances, and be designed to minimize impact to the surrounding properties.
9. Any necessary permits and/or permissions be secured prior to connection to the existing trail to the east.
10. The site plan application include information on the existing pond in the northeast corner of the site, including fencing.
11. The access to the parking area from Reeves Lane be widened to accommodate two-way flow of traffic in compliance with all applicable Riverton City standards and ordinances.
12. The trash container/dumpster be enclosed, with enclosure and solid gating approved with site plan application.
13. Access to and from the site include the public right-of-way at the north end of the property.

Reeves argues that several of these conditions are "illegal, punitive, facially insupportable, [and] factually and legally unsupportable." Reeves further asserts that the imposition of the conditions is "tantamount to a denial of the CUP." Reeves timely filed an administrative appeal with the City, and Reeves and the City subsequently agreed "that it would be in everyone's best interest to obtain an Advisory Opinion from the Office of the Property Rights Ombudsman before proceeding with the administrative appeal."

Accordingly, Reeves submitted a Request for Advisory Opinion to this office on October 20, 2016 asking us to examine the imposed conditions to determine whether they are lawful.

[1] In the submitted materials, Reeves accuses a city councilmember of secretly lobbying the planning commissioners prior to the public hearing. Whether or not actionable ethics violations occurred relative to these communications exceeds the scope of this Advisory Opinion. We limit our review to the question of whether the conditions imposed on Reeves's conditional use permit are lawful.

ANALYSIS

I. Law Governing Conditional Uses

State law gives local governments authority to designate certain uses as conditional uses within their individual zoning districts. UTAH CODE § 10-9a-507(1). State Code defines a conditional use as "a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts." UTAH CODE § 10-9a-103(5).

Consequently, in addition to ensuring that the proposed conditional use complies with all general, relevant, non-discretionary requirements in the local code that any other *permitted* use must comply with in the same zoning district[2], a municipality must review and permit conditional uses in accordance with the following:

> (1) A land use ordinance may include conditional uses and provisions for conditional uses that require compliance with standards set forth in an applicable ordinance.
> (2) (a) A conditional use shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards.
> (b) If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied.

UTAH CODE § 10-9a-507. In accordance with state law, a municipality must adopt applicable standards for conditional uses. These standards guide and limit the municipality's discretion in imposing specific conditions in addition to generally applicable code requirements.

When the municipality receives a conditional use permit application, it must first ensure the proposal complies with relevant and generally applicable code requirements. The city must then review the local code's standards applicable to conditional uses and determine whether, in light of the standards, the proposed use will produce any "detrimental impacts" on the municipality generally, or on the surrounding uses and property owners specifically. If the decision makers are unable to identify any reasonably anticipated detrimental effects, additional conditions are unnecessary, and should not be imposed.

[2] Such requirements may include density ratios, minimum lot sizes, setbacks, parking lot and landscaping requirements (percentage of landscaped area, number of trees), building and fire code requirements, etc.

However, if detrimental impacts are identified, the municipality possesses discretion to impose reasonable conditions specifically to mitigate the anticipated impacts and achieve compliance with applicable standards. The conditions must be related to the purposes and goals of the applicable standards, and must address the impacts in a reasonable manner. Finally, the conditions must be supported by substantial evidence in the record.[3] *Wadsworth v. West Jordan City*, 2000 UT App 49, ¶ 9.

A. Applicable Standards for Conditional Uses Generally

Reeves argues that the City violated the law because it imposed conditions on the proposed park use unrelated to applicable standards in the Riverton City Code. Reeves argues that in some instances an applicable standard simply does not exist to justify a particular condition.

Most local ordinances contain standards addressing conditional use permits generally. These general standards often relate to health, safety, general welfare, design, landscaping, aesthetics, etc. Effective standards go further than this and identify specific considerations (traffic, access, noise, lighting, buffering, compatibility, etc.). They also articulate purposes or goals related to such considerations to guide the decision maker in identifying detrimental impacts.

The Utah Code does not define "applicable standard," nor does it explain the degree of specificity a standard must reach to be legally sufficient in guiding the local decision maker. Clear, well-crafted standards effectively guide the local land use authority and produce relatively predictable and unsurprising results. However, the law does not presently require that every standard be flawlessly specific and objective. Although those make the best standards, the *legal* threshold a standard must satisfy to be valid is much lower.

The Utah Supreme Court addressed what constitutes an appropriate "applicable standard" in the context of a conditional use permit in *Thurston v. Cache County*, 626 P.2d 440 (Utah 1981). The standard under review in *Thurston* required the decision maker to ensure that "the proposed use will not be detrimental to the health, safety, or general welfare of persons residing in the vicinity, or injurious to the property in the vicinity." *Thurston v. Cache County*, 626 P.2d 440, 444 (Utah 1981). The applicant for a conditional use permit in *Thurston* argued that this standard provided "insufficient guidelines…for the issuance or denial of conditional use permits," *Id.* at 443, and that the standard left the city "completely without legislative limitations to issue or deny permits according to its own desires…." *Id.* In response to this argument, the Court stated that the County's standard "adequately channel[ed] the discretionary activities of the Planning Commission…." *Id.* at 444. Moreover, the court explained:

[3] Substantial evidence is "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *First Nat'l Bank of Boston v. County Bd. of Equalization,* 799 P.2d 1163, 1165 (Utah 1990). Moreover, and in this context, a court will uphold the City's determination as supported by substantial evidence as long as the decision maker has carefully reviewed and considered the submitted application and evidence such as site plan drawings, elevations, material samples, architectural renderings, technical studies, etc., and made a reasonable, evidence-based determination in accordance with applicable ordinance provisions. *See Springville Citizens v. City of Springville*, 1999 UT 25, ¶¶ 25-30, 979 P.2d 332 (the city's decision was based upon substantial evidence, and not arbitrary or capricious, because it held required meetings, carefully considered the materials submitted, and reached a decision that a reasonable person could have reached).

> While it is true that a zoning ordinance must set some ascertainable boundaries on the exercise of discretion by a zoning authority, such boundaries are not required to be unduly rigid or detailed. A generalized exposition of overall standards or policy goals suffices to direct the inquiry and deliberation of the zoning authority, and to permit appellate review of its decision.

Id. at 443-444. This reasoning applies to applicable standards intended to guide decision makers in identifying detrimental impacts and imposing reasonable conditions to mitigate the impacts.[4]

B. Applicable Standards in Riverton's City Code

Here, the only applicable standard in the Riverton City Code at the time Reeves applied for a conditional use permit states that "the planning commission shall impose such…conditions as are necessary for the protection of adjacent properties and the public welfare." RIVERTON CITY CODE § 18.195.060. This standard is subsequently restated, and slightly expounded upon, a few lines later: "[a] use [must] not, under circumstances of the particular case, be detrimental to the health, safety, or general welfare[5] of persons residing or working in the vicinity…."[6] *Id.* This standard is strikingly similar to the standard considered in *Thurston*. While we agree that this vague standard, in a practical sense, may encourage imposition of inapplicable or illegal conditions because it lacks a degree of specificity, it is nonetheless legally sufficient.

Accordingly, we turn to the individual conditions imposed by the City on Reeves' proposal to determine whether the conditions are reasonable, and designed to mitigate anticipated detrimental impacts in accordance with this standard. Because the applicable standard is relatively broad, each condition's connection to the standard must be clearly ascertainable to avoid being deemed unassociated with the applicable standard, and therefore improper. The connection cannot be a strained or ambiguous one. Moreover, as indicated previously, each condition must be supported by substantial evidence in the record and may not be based simply on individual preferences.

[4] Reeves seems to imply that a lawful standard must be as specific as, for example, "the parking lot must be paved with asphalt or concrete," or "the site must include two or more access points." This confuses the concept of a "standard" with that of a "categorical requirement" or "condition" in the context of conditional uses. A requirement, or condition, is often the result of applying a standard. A requirement instructs the applicant specifically what he or she must do to mitigate a detrimental effect. A standard, in this context, simply guides the decision maker and sets reasonable limits on what types of requirements, or conditions, he or she may impose. The examples above are examples of requirements, not standards.

[5] While detriments to health and safety are relatively easy to conceptualize, the "general welfare" and detriments to it often prove difficult to articulate coherently. The Utah Supreme Court has observed that "courts have usually shown deference to the findings of the [legislative body] of what is detrimental to the public welfare." *Skaggs Drug Center, Inc. v. Ashley*, 484 P.2d 723, 725 (Utah 1971). In the local government context, this means something is detrimental to the public welfare only if the city's local ordinance—the city code—designates it as such. To avoid overbroad applications of this standard, we adhere to this principle.

[6] The ordinance contains other standards that both parties agree are no longer applicable due to recent changes in State law regarding conditional uses. Accordingly, we will not consider them.

II. Analysis of Conditions Imposed by Riverton City

Condition No. 1: The parking area include a minimum of 220 parking stalls, with stall dimensions and landscaped islands compliant with Riverton City standards and ordinances, with all parking areas accessible from the north access point.

There are two parts to this condition: (1) a minimum of 220 parking spaces, and (2) a requirement that all parking areas be accessible from the north access point. This section will address the first part; the second part will be addressed below with Condition No. 13.

Riverton City Code Chapter 18.145 establishes general standards and requirements for all parking lots within the City, regardless of whether the lot is associated with a permitted or conditional use. Accordingly, Reeves' proposed parking lot must comply with any applicable standards or requirements in that Chapter. If the City deems the generally applicable parking standards and requirements inadequate to address reasonably anticipated detrimental effects of the conditional use to clear health, safety or welfare considerations, it may impose additional reasonable parking requirements as conditions of approval. The conditions must be directly and clearly related to health, safety, or general welfare—the City Code's applicable standards for conditional uses.

Riverton City Code § 18.145.120 establishes minimum parking space requirements for general land use categories. The City has categorized the proposed use as a "recreational use". The minimum parking requirement for a recreational use is one space per three persons "based on the maximum anticipated capacity of all facilities capable of simultaneous use *as determined by the planning director*." RIVERTON CITY CODE § 18.145.120 (emphasis added). It does not appear the City has determined a "maximum anticipated capacity" on which to calculate a minimum parking requirement. The standard is discussed, but the record gives no indication that the planning director ever entered findings regarding the maximum anticipated capacity of *all* facilities capable of simultaneous use, including the playing fields, the volleyball pit, playground, general open space, etc.

Consequently, the City needs to gather the necessary information and make an evidence-based determination regarding the maximum anticipated capacity of all facilities within Reeves' proposal to calculate a minimum parking requirement according to the 1-to-3 ratio. This will provide a baseline for the Planning Commission to work from that may be higher or lower than the 220 spaces the Commission has required as a condition of approval.

Since the park is a conditional use, the Commission may require more parking than the minimum, but *only if* the Commission finds, supported by substantial evidence, that any on-street parking is a detrimental effect in light of clear health, safety, or welfare considerations. The record provides no evidence that *some* on-street parking is detrimental to health, safety, or welfare. On-street parking is not generally or inherently unsafe, unhealthy, or contrary to the general welfare in residential neighborhoods. To the contrary, on-street parking is commonplace and, in most cases, an efficient use of shoulder space.

Reeves argues that it should only be required to provide 100 parking spaces in accordance with a minimum parking space recommendation provided by Hales Engineering in a traffic study it conducted for the project. While a traffic study prepared by a reputable source[7] constitutes an excellent source of credible evidence to support a decision, it is not the only legitimate source upon which the Commission may rely for evidence.

The record suggests, however, that the Commission imposed the 220 spaces requirement based not on evidence that any on-street parking is detrimental to health, safety, or welfare, but on suggested best practices, recommendations, and a preference that the use fully accommodate parking on-site to discourage parking on adjacent residential streets. The record provides no evidence that the standard parking limitation is detrimental to health, safety, or general welfare. Consequently, the imposed parking requirement is unsupported by the evidence presented, and the City has overstepped its authority in imposing the condition.

Condition No. 2: The parking area be paved with an asphalt or concrete surface.

This condition is unnecessary since Riverton City Code § 18.145.020 already requires parking areas within the City to be paved with asphalt or concrete. Reeves must comply with this requirement.

Condition No. 3: Drive aisle widths and turn radiuses comply with the requirements of the International Fire Code.

This condition is also not necessary since all development in Utah must comply with International Fire Code requirements. *See* UTAH CODE §§ 15A-1-403(1), 15A-5-103(1).

Condition No. 4: No gates on drive accesses are allowed.

This condition was not recommended by staff, but was imposed by the Commission during the August 25, 2016 Planning Commission meeting. The Commission considered the matter only briefly, and the record does not provide any evidence to support imposing the condition. It appears to be related to preferences for open and easy access to the park. The staff report alludes to a need for emergency vehicle access, but does so in the context of a condition requiring access keys for gates, as opposed to no gates at all. Since there is no clear evidence that a gated access will produce detrimental effects to health, safety, or welfare, the condition is inappropriate and should be rescinded.

Condition No. 5: Permanent plumbed restroom facilities be provided compliant with the International Building Code and Americans with Disabilities Act.

Reeves initially proposed temporary, portable restroom facilities on its concept site plan in its conditional use permit application. In response, the Commission imposed the requirement that restroom facilities be "permanent" and "plumbed." We can find no evidence in the record that adequate temporary facilities would constitute a detrimental impact to health, safety, or welfare

[7] Both parties agree that Hales Engineering is a reputable and credible source.

that permanent facilities would alternatively mitigate. Consequently, the condition is inappropriate.

We acknowledge, however, that the building code will apply and may require permanent facilities due to the fact that the applicant seeks approval for a permanent use, as opposed to time-limited or temporary use. This may have implications on what type of structures the building code will or will not allow. Reeves will need to comply with any such requirements that may be imposed as site plan and code review move forward. Reeves will also need to comply with any applicable ADA and County Health Code requirements for restroom facilities.

Condition No. 6: Irrigated landscaping compliant with all applicable Riverton City standards and ordinances be installed on all unpaved areas of the property, with a landscaped plan approved as part of the site plan.

The evidence in the record suggests that this condition is related to the City's preference that the park be irrigated to ensure the groundcover is neat and attractive, and to prevent weeds. The City points out that section 8.10.070 of the City Code makes it unlawful "to allow weeds to grow or exist on…property" and requires property owners to remove weeds. RIVERTON CITY CODE § 8.10.070. Reeves will certainly need to comply with this and any other code provisions related to weed abatement and nuisances. The City may address violations of the section as they occur through its administrative code enforcement process. Nonetheless, the record provides no evidence that *unirrigated* landscaping, in this case, will be detrimental to health, safety, or welfare. Therefore, the condition is inappropriate.

Condition No. 7: Eight (8) foot solid masonry fencing be installed on the west and south property lines, with fencing be extended adjacent to the existing sand volleyball pit.

The City Code definition of "noncompatible zone" specifically states that a residential zone is incompatible with an agricultural zone. RIVERTON CITY CODE § 18.05.030. Section 18.155.080 of the Code further states that a "solid core decorative precast concrete or integrally colored and textured block, brick, or other masonry fence with a minimum height of six feet shall be required between noncompatible zones." RIVERTON CITY CODE § 18.155.080. Reeves must comply with these mandatory provisions. The provisions do not, however, grant independent discretion to the City to raise the fence height for any reason. If a proposed fence is 6 feet in height, it will meet this requirement.

Since the park in this case is a conditional use, the City may impose a condition to increase the height requirement if it finds by substantial evidence a detrimental effect of the proposed use directly relates to health, safety, or welfare, and the height increase will substantially mitigate the effect. The record provides no evidence in this regard. Consequently, Reeves' project will comply if it includes a six foot masonry fence along the boundary of noncompatible zones, in compliance with City Code requirements.

Condition No. 8: Parking lot and site lighting comply with Riverton City standards and ordinances, and be designed to minimize impact to the surrounding properties.

This condition appears unnecessary since Riverton City Code Chapter 18.215 addresses these considerations at the site plan stage of the approval process.

Condition No. 9: Any necessary permits and/or permissions be secured prior to connection to the existing trail to the east.

This unnecessary condition simply restates other independent requirements.

Condition No. 10: The site plan application include information on the existing pond in the northeast corner of the site, including fencing.

It appears that this condition is also unnecessary, since such information should be provided in the ordinary course of site plan review.

Condition No. 11: The access to the parking area from Reeves Lane be widened to accommodate two-way flow of traffic in compliance with all applicable Riverton City standards and ordinances.

Reeves has stated it will comply with this condition, and that it is satisfied with the justification the City has provided in its response to the Advisory Opinion request. We therefore decline to address the condition further.

Condition No. 12: The trash container/dumpster be enclosed, with enclosure and solid gating approved with site plan application.

In the record, the City indicates that city ordinance requires trash receptacles to be enclosed. Reeves points out that the referenced section—Riverton City Code § 18.215.030—applies only to commercial buildings. Regardless, the City's nuisance section does not allow "trash, rubbish or debris" to "remain on any lot outside of approved containers." RIVERTON CITY CODE § 18.135.080(4). Reeves must comply with this provision. Unless the City can show by substantial evidence that failing to enclose such containers will produce a detrimental effect on health, safety, or welfare, the City may not impose additional conditions related to enclosures and gating.

Condition No. 13: Access to and from the site include the public right-of-way at the north end of the property.

There is sufficient evidence in the record to support the conclusion that this condition is directly related to legitimate health and safety considerations. The record indicates the condition was imposed to provide a more direct route to the site from a signalized intersection on 114th South, as well as a "more efficient access point" that would "take traffic off of Reeves Lane and avoid some of the issues that may come."

The City reviewed and discussed this matter extensively, *see Springville Citizens v. City of Springville*, 1999 UT 25, ¶¶ 25-30, and using substantial evidence, reasonably concluded that requiring an access at the north end of the property will provide more efficient access to a higher capacity road, improve traffic circulation and overall traffic safety. These are appropriate safety concerns, and the number of anticipated vehicles accessing the site provides further evidence to support the condition. The condition will appropriately mitigate a reasonably anticipated detrimental effect related to legitimate traffic safety concerns. Accordingly, the condition is appropriate. It follows that the second part of Condition No. 1, requiring all parking areas to be accessible from the north access point, is reasonable and in line with the legitimate purpose of this condition.

CONCLUSION

The City's only valid standard vaguely references preserving the health, safety, and general welfare. Accordingly, the City may only impose reasonable condition on Reeves' development proposal to the extent that the conditions mitigate the use's reasonably anticipated detrimental effects on health, safety, or general welfare. We have provided an analysis of the extent to which each of the conditions the City has imposed complies with these standards.

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 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:

Virginia Loader
City Recorder, Riverton City
12830 South 1700 West
Riverton, UT 84065

On this _____ Day of _____, 2017, 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

GARY R. HERBERT
Governor

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State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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

ADDENDUM TO ADVISORY OPINION
IN RESPONSE TO REQUEST FOR RECONSIDERATION

Reconsideration Requested By:	Bruce R. Baird Attorney for Reeves' Riverton Ranch, LLC
Local Government Entity:	Riverton City
Date of Advisory Opinion:	September 19, 2017
Date of this Addendum:	November 21, 2017
Addendum Authored By:	Brent N. Bateman Office of the Property Rights Ombudsman

SUMMARY

On September 19, 2017, this Office issued *Advisory Opinion #191, Reeves Riverton Ranch v. Riverton City* (the "Advisory Opinion"). A few days later, Reeves Riverton Ranch submitted a Request for Reconsideration of that Advisory Opinion, and counsel for Riverton City responded in opposition. This Office has accepted and carefully considered this Request for Reconsideration. This Addendum to Advisory Opinion represents this Office's response thereto.

This Addendum supplements the Advisory Opinion, and both parts should together be considered Advisory Opinion #191, under UTAH CODE § 13-43-205. Neither the Advisory Opinion nor this Addendum should be given any effect independent of the other. If any portion of this Addendum is found to directly conflict with the Advisory Opinion, this Addendum will control. Narrative facts and legal analysis contained in the Advisory Opinion will not be repeated here except as needed.

ANALYSIS

We decline to amend the conclusions in Advisory Opinion #191.

1. Condition No. 13

On the surface, the Advisory Opinion appears to be very favorable to Reeves, who requested reconsideration, and very disfavorable to Riverton, who opposed it. The Advisory Opinion found twelve of the thirteen conditions imposed by Riverton City either unnecessary or invalid. Some conditions lacked evidence in support, some lacked a sufficient link to the City's standard, and some exceeded the authority of the City. Nevertheless, Condition No. 13: *Access to and from the site at the north end of the property,* is apparently a critical condition to the developer. We found substantial evidence in the record and a sufficient relationship to the City's health, safety, and welfare standard to support Condition No. 13. This loss has apparently overshadowed the other twelve[1] victories.

We agree with the developer that much public clamor appears to have been gathered and unwisely employed by the City in imposing those conditions, including Condition No. 13. Nevertheless, as summarized in the Advisory Opinion, through the clamor there existed that modicum of evidence necessary to convince a reasonable mind that the additional entrance mitigated a reasonably anticipated detrimental effect and advanced the City's standard of public safety. Therefore, we have no occasion to amend that conclusion.

2. Thurston

The developer's objections run deeper, however, than the individual conditions. As stated in the Advisory Opinion, Riverton City's only meaningful standard upon which it could craft conditions is "Protection of adjacent property and public welfare" and "not detrimental to the health, safety, or general welfare or persons residing or working in the vicinity." Riverton City had no other standards upon which to base a valid conditional use permit. The developer argues that this standard is invalid and insufficient.

The Advisory Opinion likewise does not speak highly of this standard: "While we agree that this vague standard, in a practical sense, may encourage imposition of inapplicable or illegal conditions because it lacks a degree of specificity, it is nonetheless legally sufficient." It might help now to be more direct. This standard is very weak. We feel that it is fraught with the potential for abuse. The general inadequacy of this standard resulted in many conditions being invalidated. It allows only the barest possibility that it might support a condition – and only then

[1] Much of Reeves' request for reconsideration addressed their objection to our supposed finding on Condition No. 1: *220 parking stalls*. However, as has been observed, the Advisory Opinion found Condition No. 1 invalid and unsupported, and that the City overstepped its authority in imposing it.

with a strong showing of a relationship between the conditions and legitimate health, safety and welfare concerns. Cities can and should do better.

Nevertheless, this standard has been held by the Utah Supreme Court in *Thurston v. Cache County*, 626 P.2d 440, 444 (Utah 1981) to minimally suffice. *Thurston* is unambiguous in its similarity and application to the standard under consideration:

> The Cache County Planning Commission is empowered by the County Zoning Ordinance to issue or deny conditional use permits . . . under the proviso that "the proposed use will not be detrimental to the health, safety, or general welfare of persons residing in the vicinity, or injurious to property in the vicinity." Such statutory standards adequately channel the discretionary activities of the Planning Commission, and do not support a claim of denial of equal protection.

This Office is obligated to follow the existing law. *See* UTAH CODE § 13-43-206(9). *Thurston* is valid law and directly applicable precedent that we are not free to ignore. Thus, despite the insufficiencies of the City's public safety standard, it is not invalid.

3. HB232

We likewise cannot find that HB232 (2017) overturned *Thurston*, either overtly or by implication. HB232 formalized a statutory procedure for interpreting local ordinances:

> 10-9a-306. Land use authority requirements -- Nature of land use decision.
> (1) A land use authority shall apply the plain language of land use regulations.
> (2) If a land use regulation does not plainly restrict a land use application, the land use authority shall interpret and apply the land use regulation to favor the land use application.[2]

These statutory changes require a land use authority to rely upon an ordinance's plain language. Where the language is not plain, the ordinance should be interpreted to favor the land use application.

HB232 cannot have overturned *Thurston*. In the first place, the HB232 language simply restates and codifies long-existing and well-established caselaw. It is not new. This language concerning the interpretation of ordinances coexisted with *Thurston* long before HB232.

Moreover, although section 10-9a-306 may have significant application in a conditional use context, in order for this language to overturn *Thurston*, the entire conditional use permit scheme would need to be discarded. The reason lies in the difference between language that is *vague* and

[2] Reeves cited HB232's changes to Utah Code § 10-9a-707 as overturning *Thurston*. Section 707 addresses the standards to be used by local appeal authorities in hearing an appeal of a land use decision. More appropriate in our opinion is HB232's changes to UTAH CODE § 10-9a-306, which addresses the land use decision process for the land use authority. It is the decision of the land use authority, and not the appeal authority, being examined here. Nevertheless, the two sections are very similar in relevant part, so the analysis and result are identical.

language that is *discretionary*. When language is vague, it can be reasonably interpreted as having more than one meaning. When language is discretionary, the *result* will depend on individual perspective and opinions. Very plain language, not vague at all, can be extremely discretionary. The "substantial evidence in the record" standard itself is an example.

A certain amount of discretion is central to the scheme of conditional use permits. Conditional use standards present varying degrees of discretion. Perfectly objective standards eliminate all discretion, and are thus not standards at all, but are simply requirements. Discretion requires some subjectivity. However, subjectivity does not make the conditions vague. Many perfectly plain legal statements are subjective. For example, the taking standard sates that "if regulation *goes too far* it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). This is not vague. It is subject to only one possible interpretation. However, it is extraordinarily subjective.

In the Opinion of this Office, the best conditional use standards are minimally subjective, and thus give narrow discretion. Increasing discretion makes for worse standards. However, there exists a range of legally acceptable discretion. However some discretion is appropriate and desirable in a conditional use context. *Thurston* set the baseline of acceptable discretion. HB232 primarily addresses vagueness. To say that HB232 requires perfect objectivity is to say that it eliminates discretion. Removing all discretion disables the Conditional Use Permit scheme.

Riverton City's public safety standard is extremely subjective, and nearly too subjective to be useful. Nevertheless, under *Thurston*, it "adequately channel[s] the discretionary activities" of the City. HB232 addresses vagueness but does not eliminate discretion. Thus, HB232 did not overturn *Thurston*.

4. Remand

Finally, the developer argues that the Advisory Opinion allows the City to "gin up grounds for imposing virtually any condition on a CUP" and "make up requirements without any evidence." The Advisory Opinion does neither. The Advisory Opinion does contain the statement that "While a traffic study [offered by Reeves] prepared by a reputable source constitutes an excellent source of credible evidence to support a decision, it is not the only legitimate source upon which the Commission may rely for evidence." This statement is an accurate statement of the law. Reeves offered apparently good and reliable evidence on the amount of parking needed for safety. The City's only evidence related to a best practice for parking at a soccer field. The City's evidence did not support the health, safety, and welfare standard. We agree that the City based its number upon clamor rather than relying on substantial evidence related to the City's only standard. Nevertheless, had the City offered other credible substantial evidence that did support the standard, it would have been within its purview to weigh both pieces of evidence. The City may rely on any credible substantial evidence it receives.

Unlike *McElhaney v. Moab*, 2017 UT 65, which was released some days after the Advisory Opinion, nothing in an Advisory Opinion affords a City an extra opportunity to gin up reasons to support their findings. An Advisory Opinion is just that, an opinion, and in force, advisory. There

is no remand. The developer's recourse after an Advisory Opinion is legal action, with the possibility of an award of fees. UTAH CODE § 13-43-206(12). The Advisory Opinion held that 12 of the 13 conditions were unnecessary or invalid. Riverton does not now get another chance to find grounds to support its invalid conditions.

CONCLUSION

The Advisory Opinion and this Addendum together represent Advisory Opinion #191. No changes will be made to the conclusions in the Advisory Opinion.

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 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:

Virginia Loader
City Recorder, Riverton City
12830 South 1700 West
Riverton, UT 84065

On this _____ Day of _____, 2017, 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