

Advisory Opinion #117

Parties: Cottonwood Partners and City of Cottonwood Heights

Issued: October 15, 2012

TOPIC CATEGORIES:

B: Conditional Use Applications

Other Topics(v): Interpretation of Ordinances

As long as the approval process follows required procedures, a local government's choice of conditions imposed when a conditional use permit is approved is within the government's discretion. A local government's interpretation of its own ordinances is entitled to a level of deference, and, as long as the interpretation is reasonable, there is no reason to overturn it.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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

GREG BELL
Lieutenant Governor

State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Cottonwood Partners
By: Gregory L. Cropper, Esq.

Local Government Entity: City of Cottonwood Heights

Applicant for the Land Use Approval: Cottonwood Partners

Type of Property: Commercial

Date of this Advisory Opinion: October 15, 2012

Opinion Authored By: Elliot R. Lawrence
Office of the Property Rights Ombudsman

Issues

Did a city correctly interpret and apply ordinances governing how conditional use permit applications are processed?

Summary of Advisory Opinion

Statutory interpretation begins with the plain language of the ordinance, and the objective is to give effect to the legislative intent. A city's reasonable interpretation is entitled to some deference. The City's interpretation of ordinances applicable to the conditional use approval process was reasonable and acceptable. There is no reason to disturb the procedural process that followed those ordinances.

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 ANN. § 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 Gregory L. Cropper, on behalf of Cottonwood Partners on June 8, 2012. A copy of that request was sent via certified mail to Linda Dunlavy, City Recorder of Cottonwood Heights, at 1265 East Fort Union Blvd., Cottonwood Heights, Utah. 84047. The City received that copy on June 12, 2012.

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 Gregory L. Cropper, on behalf of Cottonwood Partners, received June 8, 2012.
2. Decision of the Cottonwood Heights Board of Adjustment, dated September 6, 2012.

Background

Cottonwood Partners owns a parcel of about 8.86 acres in the City of Cottonwood Heights, which is zoned “O-R-D” (Office, Research, and Development). The parcel is located next to the Cottonwood Corporate Center, a commercial development with office towers. The parcel is also adjacent to a residential neighborhood, “Mill Hollow,” on the south and west. Thirteen homes back directly onto the parcel, with several more homes in the immediate vicinity. The parcel is currently vacant, although the owners have maintained it with minimal landscaping for several years.

The O-R-D Zone allows office buildings, and garages associated with a principal use.¹ Cottonwood Partners have proposed two office towers on the parcel, similar to the adjacent existing office towers. One of Cottonwood Partners’ proposed towers will be six stories, and the other four stories. The two towers will be connected by a lobby on the ground floor, and the site includes a two-story parking structure.

The maximum permitted height for buildings in the O-R-D Zone is 35 feet, but additional height up to six stories is a conditional use that may be approved by the City’s Planning Commission: “The planning commission may allow additional height to a maximum of six stories upon finding that the additional height will not adversely affect the surrounding land uses, and subject to the requirements of the conditional use chapter of this title.” COTTONWOOD HEIGHTS CODE OF ORDINANCES, § 19.46.070.² Cottonwood Partners applied for a conditional use permit to exceed

¹ Office buildings and garages associated with the buildings are both permitted uses within the zone. *See* COTTONWOOD HEIGHTS CODE OF ORDINANCES, § 19.46.020 (List of Permitted Uses in the O-R-D Zone).

² “This title” refers to Title 19 of the City’s Code, which governs zoning. *See also id.*, § 19.46.025 (additional height is a conditional use). Conditional uses are governed by Chapter 19.84.

the 35-foot height limit, as provided in § 19.46.070. After preliminary review of the application, the City’s Planning Commission held a public hearing on March 21, 2012.

A group of homeowners in the Mill Hollow area (“Neighbors”) opposed the application at the planning commission meeting, and presented arguments against approval.³ Their objections before the planning commission focused on four arguments: (1) The City code required a “two-step” analysis rather than simple approval as a conditional use (“The Two-Step Approval Argument”); (2) The application was not consistent with a master development plan, as required by the City’s code (“The Master Development Plan Argument”); (3) The development had negative visual, light, and trail impacts; and (4) The development would have a measurable impact on property values in the Mill Hollow area.

The Two-Step Approval Argument was based on the language of § 19.46.070. The Neighbors argued that the language required two separate findings: First, the planning commission would have to find that the extra height “will not adversely affect the surrounding land uses . . .” *Id.* After that finding, the Neighbors argued, the planning commission could consider the additional height as a conditional use. The Planning Commission rejected that argument, concluding that the conditional use approval process includes consideration of the how the additional height impacts neighboring land uses.

The Master Development Plan Argument stemmed from § 19.46.050, which requires an approved master plan. “Any development in the O-R-D zone shall be subject to a master development plan approved by the planning commission.” *Id.*, § 19.46.050. The Neighbors pointed out that no master development plan had been approved for the Cottonwood Partners parcel. The Planning Commission noted that the term “master development plan” is not defined in the City code, but felt that the proposed development was consistent with the neighboring commercial development.⁴ In addition, Cottonwood Partners submitted a design plan which was approved by the Planning Commission. In short, the Planning Commission felt that the master development plan requirement was satisfied.

The remaining arguments against approval were addressed through the conditional use approval process. The Planning Commission acknowledged the light and visual impacts, and adopted conditions aimed at mitigating those impacts. The Planning Commission concluded that the development had little impact on a nearby trail system, which was part of the Cottonwood Corporate Center.

Finally, the Commission rejected the argument that the development impacted property values. The Commission reasoned that the property was zoned for commercial development for several years, and has been considered part of the neighboring office complex, so the potential for

³ The Neighbors, collectively or individually, have neither participated in this Advisory Opinion nor submitted any information or arguments in response to Cottonwood Partners’ request for Advisory Opinion, and are thus not a party hereto.

⁴ The property is next to the “Cottonwood Corporate Center,” a commercial development which was approved by Salt Lake County in the early 1990s, before Cottonwood Heights was incorporated. Evidently, the Cottonwood Partners parcel was to be included as part of that corporate center, but was not developed.

development on the property has existed for some time.⁵ The Neighbors presented a study showing that their properties would lose value if the parcel were developed. The City, on the other hand, pointed out that commercial development is a permitted use, and showed that there was little impact due to the additional height that was sought in the conditional use permit. The Planning Commission accepted the City's approach, concluding that property values were adequately preserved.

The Planning Commission approved the application on June 6, 2012, and adopted a detailed written decision. Some Mill Hollow property owners appealed to the City's Board of Adjustment.⁶ On September 6, 2012, the Board of Adjustment upheld the Planning Commission's decision.

Analysis

The City Correctly Applied its Ordinances to the Procedure to Determine Whether the Application Should be Granted.

Because the City's application of its ordinances enjoys a level of deference, its interpretation §§ 19.46.050 and 19.46.070 is acceptable, and is consistent with the language of the City Code. The procedure used to approve the application was thus correct, and the decision to grant the application was a proper exercise of the discretion of the City's Planning Commission.

A. Standards of Statutory Interpretation.

The issues presented for this Opinion boil down to whether or not the City correctly interpreted and applied its ordinances. Statutory interpretation begins with the plain language of the ordinance. "When interpreting statutes, our primary objective . . . is to give effect to the [legislative] intent. To discern legislative intent, we look first to the statute's plain language. In doing so, we presume that the [legislative body] used each word advisedly and read each term according to its ordinary and accepted meaning. Additionally, we 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 (quotations and alterations omitted). In addition, a local government's interpretation of its own ordinances is allowed "some level of non-binding deference . . ." *Fox v. Park City*, 2008 UT 85, ¶ 11, 200 P.3d 182, 185.

The City's interpretation of §§ 19.46.050, 19.46.070, and Chapter 19.84 of its ordinances did not constitute approval of the Cottonwood Partners conditional use permit, but the application of those sections established guidelines which the Planning Commission used to consider the whether the permit should be granted. Therefore, it is important to analyze whether the City's interpretations were correct.

⁵ The Commission also noted that the Mill Hollow neighborhood was developed at approximately the same time at the Cottonwood Corporate Center, so the potential impact from additional commercial development has existed from the beginning of the neighborhood.

⁶ The Cottonwood Heights Board of Adjustment is designated as the Appeal Authority for decisions of the City's Planning Commission. COTTONWOOD HEIGHTS CODE OF ORDINANCES, §§ 19.92.010; 19.92.070(B).

B. Consideration as a Conditional Use.

Additional height for an office building is listed as a conditional use in the City's ordinance. "Office building applications requesting an increase in height from the standard 35 feet, or a decrease in setback . . . as allowed in this chapter, shall be considered a conditional use." COTTONWOOD HEIGHTS CODE OF ORDINANCES, § 19.46.025.⁷ Section 10-9a-507 of the Utah Code authorizes cities to designate conditional uses, provided that standards are also adopted to guide decisions on whether or not to grant the uses.

- (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 ANN. § 10-9a-507. A conditional use is a land use with unique characteristics or impacts that warrants special consideration, and conditions may be imposed to mitigate negative impacts. *See* UTAH CODE ANN. § 10-9a-103(5). All property is subject to land use regulation, and local governments may impose controls or standards which regulate how, where, and when a use may be carried out. *See Western Land Equities v. City of Logan*, 617 P.2d 388, 390 (Utah 1980); *see also* UTAH CODE ANN. § 10-9a-102(1)(b). The standards required by § 10-9a-507(1) apply to conditional uses, and guide consideration of proposed conditional use permits. Section 19.84.080 lists 15 specific inquiries that must be satisfied before a conditional use permit may be granted.⁸

Buildings up to 35 feet are permitted uses in the O-R-D Zone. By enacting § 19.46.025, the City Council determined that additional height on a building may be allowed as a conditional use. In § 19.46.070, the City added that conditional use approval may increase the height up to six stories, and expressly stated that such a request would be "subject to the requirements of the conditional use chapter" COTTONWOOD HEIGHTS CODE OF ORDINANCES, § 19.46.070. Thus, the City's statutes establish that an office tower may exceed 35 feet, if conditional use approval is granted.

⁷ Office buildings up to 35 feet high and parking structures are permitted uses in the O-R-D Zone. *See id.*, § 19.46.010(1).

⁸ In addition, a conditional use permit requires an approved site plan. *Id.*, § 19.84.030.

C. A “Two-Step” Analysis is Not Required by § 19.46.070.

Because there is no need to separately analyze the impact of additional height on neighboring properties, the City’s rejection of the “Two-Step Approval Argument” was correct. The Two Step Approval Argument is based on a sentence found in § 19.46.070, which states that “[t]he planning commission may allow additional height to a maximum of six stories upon finding that the additional height will not adversely affect the surrounding land uses, and subject to the conditional use chapter of this title.” The Neighbors argued that this sentence requires two separate findings: First, that additional height will not adversely affect neighboring land uses; and second, compliance with the conditional use chapter.

The City rejected that argument, interpreting the sentence as requiring compliance with the conditional use provisions. This interpretation is consistent with the language of the section, and is further bolstered by § 19.46.020, which designates additional height as a conditional use. Since the City’s interpretation is entitled to some deference, and is consistent with the plain language of the ordinance, it is an acceptable approach.

Furthermore, the provisions applicable to conditional use permits include consideration of the impacts on neighboring properties. These provisions include the following: “That the [proposed] use will not . . . be detrimental to the health, safety, comfort, order or general welfare of persons residing or working in the vicinity.” *Id.*, § 19.84.080(2)(b).⁹ If additional height has been requested, this provision effectively requires a finding that the height will not adversely affect neighboring land uses. In other words, the process to consider a conditional use includes the same consideration that the Neighbors sought. Since either approach yields the same result, the City’s interpretation is valid.¹⁰

D. *The Application Satisfied the Master Development Plan Requirement.*

The City’s conclusion that the application’s site plan satisfies the development plan required by § 19.46.050 is reasonable. The City code requires a “master development plan” for any proposed development in the O-R-D Zone. *Id.*, § 19.46.050. However, there is no definition provided for “master development plan.” The City concluded that the site plans submitted as part of the approval process satisfied the development plan requirement.

The Neighbors argued that a development plan for the Cottonwood Corporate Center was adopted in the early 1990s by Salt Lake County. The Neighbors were unable to find any approved plan, only a draft site plan. Evidently, that draft proposed smaller buildings on the parcel.¹¹ The Neighbors argued that this draft is sufficient evidence of an approved plan which governs development of the parcel. The City rejected the Neighbors’ position, stating that there was no proof that Salt Lake County adopted any development plan. Even if there were a plan, it could be changed by the City, which is now the governing authority.

⁹ See also § 19.84.080(2)(d) (Proposed use should be harmonious with neighboring uses in the same zoning district).

¹⁰ The City’s approach also avoids unnecessary duplication of approval steps, which is more efficient.

¹¹ It appears that the draft proposal had two-story buildings on the parcel.

The City is correct in stating that even if there were a development plan, it could be changed to allow taller buildings. It also appears that despite a diligent search by the Neighbors, no development plan for the parcel can be found. Nevertheless, a plan is required by § 19.46.050. The City's conclusion that the site plan submitted along with the application satisfies the requirement is within the City's discretion. As has been stated, the City's interpretation of its ordinances is entitled to some deference. A site plan is also required for consideration of a conditional use permit application.¹² The plan that was submitted addresses the elements that would ordinarily be expected in a development plan, such as parcel configuration, location of buildings, traffic flow, parking, landscaping, etc. The plan was acceptable to the City, and was approved by the Planning Commission. There is no reason to conclude that the site plan does not sufficiently satisfy the City's ordinance.

E. The Planning Commission Imposed Conditions to Mitigate Impacts.

The Planning Commission determined that the proposed towers had detrimental impacts, because of light intrusion and because the project affected the view from the Mill Hollow neighborhood. Because the project had negative effects, the Planning Commission imposed conditions to offset those impacts. For example, exterior lighting will be directed away from the residential area, and a wall is required on the parking structure to block automobile lights. The setbacks were increased, and the towers placed to minimize the visual impact. There are several more conditions specifically directed to reduce the impact on the surrounding properties.¹³

F. The Planning Commission Applied the Correct Analysis to the Impact on Neighboring Property Values.

The City's approach to determine how the conditional use permit might impact property values was reasonable. Preservation of property values is one of the standards applicable to a conditional use permit. COTTONWOOD HEIGHTS CODE OF ORDINANCES, § 19.84.080(2)(f). Any development or any change in zoning can affect property values. "Almost all zoning decisions have some economic impact on property values." *Cornish Town v. Koller*, 817 P.2d 305, 312 (Utah 1991). The question is not how to measure that impact, but where the impact begins.¹⁴

The Neighbors argued that the impact begins with any development on the parcel. The City, on the other hand, noted the level of development that is already permitted on the parcel, and maintains that the impact begins with the additional height being proposed as a conditional use. The City's approach is supported by the plain language of § 19.84.080(2)(f), which applies to the conditional use being considered, not to permitted uses. Subsection (2) lists the standards used

¹² See *id.*, § 19.84.030 ("Site plan review is a process designed to address . . . adverse impacts and minimize them where possible").

¹³ The parking structure was a particular focus of the neighborhood. However, the structure is a permitted, rather than conditional, use, and so the ability to impose conditions on that structure is technically limited. The impacts of the parking structure were also addressed in the site plan.

¹⁴ The impact on property value can be fairly easily ascertained through an appraisal or other similar analysis.

for the analysis of all conditional uses. Limiting the impact on property values to the conditional use only is consistent with the language and intent of that subsection.¹⁵

Cottonwood Partners applied for a conditional use permit to allow additional height on two office towers. All other development on the parcel is permitted in the O-R-D Zone, and would not be subject to approval by the Planning Commission, regardless of the impact on property values. By designating buildings up to 35 feet as permitted uses, the City accepted the impact of such buildings on neighboring properties.¹⁶ It appears that the parcel has been designated for commercial development for quite some time, and that the neighborhood was developed simultaneously with the adjacent commercial area. In other words, commercial development of the parcel was possible and known when the residential area was built, and has existed for nearly 20 years. The values of the neighboring properties reflect that reality.¹⁷

To reiterate, any zoning change or development decision will impact nearby properties, but that does not mean that the zoning change or development should be denied. As Justice Oliver Wendell Holmes explained: “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change . . .” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The City’s approach, which considers the impacts of the additional height on property values, is supported by the plain language and intent of the City’s ordinance, and is thus an acceptable interpretation.

G. The Decision Granting the Conditional Use Permit is up to the City’s Discretion and This Opinion Will not Disturb it.

This Opinion is limited to whether the City correctly interpreted and applied its ordinances when considering the application for a conditional use permit. The final decision to grant the permit, the conclusions that were made, and the conditions that were imposed are not reviewed. Such decisions are entirely within the discretion of the City, and, as long as procedural guidelines are followed, the City’s decision should not be disturbed. As has been stated, the City’s interpretation of its ordinances is acceptable and reasonable, and it appears that the City followed correct procedure when it processed the application for the conditional use permit. This Opinion will therefore not disturb the factual findings and conclusions adopted by the City’s Planning Commission.

¹⁵ It should also be remembered that the impact on neighboring property values is only one of the factors to be considered. Even a significant impact would not necessarily lead to rejection of an application.

¹⁶ This does not mean that the City made a specific finding balancing benefits of development against potential impact on property values, only that the City designated this parcel as an O-R-D Zone, and approved certain uses as permitted. Deference must be given to the City’s choice, which hopefully is intended to best promote the overall well-being of the community.

¹⁷ The Neighbors also contended that the parcel should remain undeveloped but maintained, because it is an appealing amenity. However, the property is privately owned, and the owner may develop it consistent with the O-R-D Zone. It is also worth noting that even a public park would impact neighboring properties, by attracting vehicles and pedestrians.

Conclusion

The City's interpretation of its ordinances is supported by the plain language of its ordinances, and the City thus reasonably applied the ordinances to the process to evaluate a conditional use permit. Statutory interpretation begins with the language of the ordinance, and the objective is to give effect to the legislative intent. In addition, the interpretation advanced by the City is entitled to a level of deference. Given those guidelines, the City's approach to the ordinances in question is reasonable and acceptable. The City's interpretation is consistent with the plain language of the ordinance, and is harmonious with other provisions in the City's code. There is no reason to disturb the process used by the City to consider the conditional use permit. Because a decision to grant a conditional use permit is entirely within the City's discretion, this Opinion does not analyze the decision, but only agrees that the process used was a reasonably acceptable.

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.

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:

Linda W. Dunlavy, City Recorder
City of Cottonwood Heights
1265 E. Fort Union Blvd., #250
Cottonwood Heights, UT 84047

On this _____ day of October, 2012, 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