

Advisory Opinion #124

Parties: Randy Hughes, The Gun Vault, LLC and South Jordan City

Issued: April 30, 2013

TOPIC CATEGORIES:

B: Conditional Use Applications

Other Topics: (v) Interpretation of Ordinances

A city must issue a conditional use permit (“CUP”) for an allowed conditional use when a project’s anticipated detrimental effects can be mitigated in accordance with standards set forth in the city’s ordinances. A city’s decision to issue a CUP is proper unless it is arbitrary, capricious or illegal. A decision to issue a CUP is not arbitrary and capricious if supported by substantial evidence in the record. A decision to issue a CUP is not illegal if a city follows its ordinances and other applicable law. In interpreting a zoning ordinance, 1) a party must give effect to the plain meaning of the words, 2) a city’s interpretation of its own ordinance receives some level of non-binding deference, and 3) Utah law favors an interpretation allowing uses.

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:	Randy Hughes
Local Government Entity:	South Jordan City
Applicant for the Land Use Approval:	John Maynard (The Gun Vault, LLC)
Type of Property:	Commercial Development
Date of this Advisory Opinion:	April 30, 2013
Opinion Authored By:	James S. Wright Office of the Property Rights Ombudsman

Issues

Did a city properly issue a conditional use permit for an indoor gun range where the applicable zoning ordinance lists “amusement, recreational activities” and “educational and training activities” as permissible conditional uses?

Summary of Advisory Opinion

A city must issue a conditional use permit (“CUP”) for an allowed conditional use when a project’s anticipated detrimental effects can be mitigated in accordance with standards set forth in a city’s ordinances. A city’s decision to issue a CUP is proper unless its decision is arbitrary, capricious or illegal. In this case, South Jordan City’s (“South Jordan” or the “City”) decision to issue the CUP is supported by substantial evidence, and is therefore not arbitrary and capricious. In addition, the City properly determined that the indoor gun range fell into the definition of the permissible conditional uses of “amusement, recreational activities” or “educational and training activities” and the City otherwise followed its ordinances and applicable state law relating to the approval of the CUP. This means the City did not act illegally in approving the CUP. A Utah court therefore would not overturn the issuance of the CUP.

Review

Under the provisions of UTAH CODE ANN. § 13-43-205, a party may file a Request for an Advisory Opinion with the Office of the Property Rights Ombudsman (“Office”) at any time prior to the rendering of a final decision by a local land use appeal authority. An Advisory Opinion provides an early review of significant land use questions before any duty to exhaust administrative remedies arises so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. This review hopefully 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 Advisory Opinion, may have some effect on the long-term cost of resolving such issues in the courts.

The Office received a Request for an Advisory Opinion from Randy Hughes on October 11, 2012. A copy of that request was sent via certified mail to Anna West, City Recorder of South Jordan City, at 1600 West Towne Center Drive, South Jordan City, Utah 84095. The City received that copy on October 17, 2012.

Evidence

The Office reviewed the following relevant documents and information in preparing this Advisory Opinion:

1. Request for an Advisory Opinion with attachments, submitted by Randy Hughes and received by the Office on October 11, 2012.
2. Planning Commission Report with attachments, South Jordan City Planning Commission (October 9, 2012), submitted by Randy Hughes (the “October 9th Report”).
3. Response from John Maynard, received by the Office on December 5, 2012.
4. Decision of the South Jordan City Council, Utah, dated December 18, 2012 (the “December 18th Decision”).
5. Response from South Jordan City with attachments, submitted by Ryan Loose, dated February 12, 2013 (the “February 12th Response”).

Background

The Gun Vault, LLC (“The Gun Vault”) desires to operate an indoor gun range (the “Range”) on lots 2 and 3 (collectively, the “Parcel”) of the Parkway Corner Subdivision, located at 1203 and 1231 West South Jordan Parkway, in South Jordan.¹ The Parcel is located in the Commercial-Community zone (“C-C Zone”). The City established the C-C Zone to provide for large scale community or regional retail and service uses designed in a manner to buffer neighboring residential areas. SOUTH JORDAN MUNICIPAL CODE (“SJMC”) § 17.52.010.

¹ We understand that the lot line between these two lots will be adjusted so that the building will sit entirely on lot 2 and lot 3 will be used as the parking lot.

The proposed Range includes 15 shooting lanes, retail space for firearms sales, classrooms for educational activities, a VIP member's lounge, basic storage and a custom shop with machinery to modify certain gun parts in conjunction with the retail sales of firearms. The C-C Zone allows "hobbies and crafts retailing" and "miscellaneous retail sales" as permitted uses. SJMC § 17.52.020. The C-C Zone also allows "educational and training activities" and "amusement, recreational activities" as conditional uses. SJMC § 17.52.020.

John Maynard applied for a CUP on behalf of The Gun Vault on July 27, 2012. The South Jordan Planning Commission approved the application on August 14, 2012. Randy and Karen Hughes, who live in close proximity to the Parcel, and others (collectively, the "Appellants") filed an appeal with the South Jordan City Council. The City Council heard the appeal on October 2, 2012 and tabled the matter. Mr. Maynard also applied for a second CUP on behalf of The Gun Vault on August 24, 2012 based on additions and alterations to the Range. The Planning Commission approved that application on October 9, 2012. The Appellants appealed this decision as well, and based on the agreement of The Gun Vault and the Appellants, the City Council consolidated the appeals. The City Council heard the appeal on November 20, 2012 and issued a written decision dated December 18, 2012 granting the issuance of the CUP.

Analysis

South Jordan's Decision to Issue the Conditional Use Permit Is Proper Because It Is not Arbitrary, Capricious or Illegal.

Utah law states:

- (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.

UTAH CODE ANN. § 10-9a-507(1)-(2)(a). This provision requires a city to approve a CUP application for an allowed conditional use when a project's anticipated detrimental effects can be mitigated in accordance with standards set forth in a city's ordinances.

Utah law also provides that a city's CUP application decision is entitled to a degree of deference. When reviewing a municipal land use authority's land use decision, a district court must presume that the land use decision is valid and the court's determination is limited to determining "whether or not the decision, ordinance or regulation is arbitrary, capricious or illegal." UTAH CODE ANN. § 10-9a-801(3)(a)(i-ii). A decision to grant a CUP "is arbitrary and capricious [only] if it is not supported by substantial evidence." *Ralph L. Wadsworth Constr., Inc. v. West Jordan City*, 999 P.2d 1240, 1242 (Utah Ct. App. 2000) (alterations in original) (other citations omitted).

Utah courts have defined substantial evidence as “that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *Bradley v. Payson City*, 70 P.3d 47, 52 (Utah 2003) (citation omitted). “A determination of illegality requires a determination that the decision . . . violates a law, statute or ordinance in effect at the time the decision was made. . .” UTAH CODE ANN. § 10-9a-801(3)(d).

South Jordan determined that the Gun Vault could mitigate the reasonably anticipated detrimental impacts of the Range in accordance with its ordinances and approved the CUP pursuant to UTAH CODE ANN. § 10-9a-507(2)(a). This decision is proper because it is supported by substantial evidence on the record and it is not illegal.

A. *South Jordan’s Decision Is not Arbitrary and Capricious.*

South Jordan’s decision to approve the CUP allowing The Gun Vault to operate the Range is not arbitrary and capricious because it is supported by substantial evidence. Utah courts have given some analysis of what constitutes substantial evidence and what does not. In *Springville Citizens v. Springville*, 979 P.2d 332 (Utah 1999), the Utah Supreme Court analyzed whether substantial evidence supported a municipality’s decision to approve a P.U.D. The court noted that the decision to approve the P.U.D. came after an extended time, multiple public meetings, documentation in support of the decision, and ultimately, multiple imposed conditions. *Springville Citizens*, 979 P.2d at 337. The court held that a reasonable mind could have reached the same conclusion as the municipality given the nature and extent of the evidence. *Id.*

By contrast, in *Ralph L. Wadsworth Constr., Inc. v. West Jordan City*, 999 P.2d 1240 (Utah Ct. App. 2000), the Utah Court of Appeals examined whether substantial evidence supported a city’s decision to deny a CUP. The court held that substantial evidence did not support the City’s decision when the evidence in the record consisted primarily of adverse public comment. *Ralph L. Wadsworth Construction, Inc.*, 999 P.2d at 1243.

In this matter relating to the Range, South Jordan held multiple public hearings at the planning commission and city council level, including appeals. The City considered evidence and testimony on safety, emissions, sound, property values, and compatibility with the surrounding area, among other topics and listened to the concerns of its citizens opposed to this project. The record contains multiple studies and reports, along with expert testimony, considered by the City when determining whether to grant the CUP.² In addition, South Jordan imposed multiple conditions on the conditional use. The evidence considered by the City, as in *Springville Citizens*, consists of significantly more than unsubstantiated public comments or opinions. Considering the foregoing, the record contains adequate information to convince a reasonable mind to approve the conditional use. This means the City’s decision is supported by substantial evidence in the record and is therefore not arbitrary and capricious.

² The record contains multiple acoustical studies, testimony from James Bennett from the Salt Lake Valley Health Department relating to emissions and acoustics, a written security plan submitted by The Gun Vault, testimony by Jordan McCormick, a gun range consultant, among other testimony and studies.

Given the amount of well-organized and substantive information provided by the Appellants, it is important to stress that substantial evidence is not necessarily the best or most convincing evidence. To reach the level of substantial evidence simply requires enough relevant evidence to convince a reasonable mind to support a conclusion. *Bradley v. Payson City*, 70 P.3d 47, 52 (Utah 2003). Under Utah law, a land use authority's decision relating to a CUP is presumed valid and will be upheld unless it is arbitrary, capricious or illegal. The law does not contain any provision allowing a court to compare and weigh opposing evidence to determine the side of the issue with the best or most convincing evidence or to substitute the court's judgment for that of the municipality. *See Springville Citizens v. Springville*, 979 P.2d 332, 337 (Utah 1999). This means that despite the fact that the Appellants have presented valid and convincing arguments along with studies and research in opposition to the issuance of the CUP, the decision to issue the CUP is not arbitrary or capricious because substantial evidence on the record supports it, and a court will not weigh the evidence anew to overturn this decision.

B. South Jordan's Decision Is not Illegal.

South Jordan's decision to grant the CUP is not illegal because it followed the laws, statutes and ordinances in effect at the time of its decision. SJMC § 17.52.030 lists the permitted conditional uses in the C-C Zone. SJMC § 17.84.010 *et seq.* provides the City's requirements for reviewing and approving a CUP.

1. The Range is a proper conditional use in the C-C Zone.

The City determined that the Range was a proper conditional use under SJMC § 17.52.030 because it either fit under the "Educational and training activities" or the provision for "recreational activities" in that ordinance.³ In interpreting an ordinance, the law requires to "begin first by looking to the plain language of the ordinance." *Carrier v. Salt Lake County*, 104 P.3d 1208, 1216 (Utah 2004). Utah law further provides that a city's interpretation of its own zoning ordinances is allowed "some level of non-binding deference." *Fox v. Park City*, 200 P.3d 182, 185 (Utah 2008) (other citations omitted). In addition, because zoning laws "are in derogation of a property owner's use of land . . . any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use." *Carrier*, 104 P.3d at 1217. In this case, the City's interpretation will be upheld because the plain meaning of the words "recreational", "industrial" and "training" support its determination, the law gives that determination by South Jordan some deference and Utah law favors interpreting zoning ordinances in favor of allowing uses.

In determining whether it should classify the Range as a recreational or training use, and therefore allowed in this zone, the City looked at the zoning where other indoor gun ranges exist in Salt Lake County. The City found that all of these indoor ranges exist in commercial zones. South Jordan City Council Report October 2, 2012, p. 3. The City Council also questioned the applicant about the purpose of the Range and was told it was recreational. The February 12th Response, p. 85. The City ultimately concluded that the Range was a proper conditional use

³ The South Jordan Municipal Code does not contain definitions of these terms.

under the ordinance as either a recreational use or a training use. Decision of the South Jordan City Council, December 18, 2012, p. 3. The Appellants argue that the Range should be classified as an industrial use, which is prohibited in the C-C Zone under SJMC § 17.52.055(A)(3), or as special training, which is a conditional use under the commercial-industrial zone in the City.⁴

The plain meaning of the words “recreational,” “industrial” and to “train,” supports the City’s decision to classify the Range as a “recreational” or “training” activity. The Merriam-Webster Dictionary defines “industrial” as “of or relating to industry.” Merriam Webster Dictionary, www.merriam-webster.com/dictionary/industrial. It defines “industry” as:

2a: systematic labor especially for some useful purpose or the creation of something of value; b: a department or branch of a craft, art, business, or manufacture; *especially*: one that employs a large personnel and capital especially in manufacturing; c: a distinct group of productive or profit-making enterprises; d: manufacturing activity as a whole.

Merriam Webster Dictionary, www.merriam-webster.com/dictionary/industry. This definition focuses on industrial activity actually manufacturing something of value. Shooting a gun does not manufacture anything of value. The Appellants argued the City should classify the Range as industrial primarily because of their view that it would cause nuisances and pollution, including through the processing of bullets into recyclable lead. *See, e.g.*, February 12th Response, p. 132. While industrial uses certainly include activities that pollute and cause nuisances, this argument does not seem to match the plain meaning of the word *industrial* because it misses the main point of an industrial activity: manufacturing or creating something of value. The plain meaning of industrial does not support a characterization of the Range as an industrial use.

The Merriam-Webster Dictionary defines “recreation” as “refreshment of strength and spirits after work; *also*: a means of refreshment or diversion: HOBBY.” Merriam Webster Dictionary, www.merriam-webster.com/dictionary/recreation. This suggests people would come to the Range for fun or for a hobby. This is consistent with people paying to shoot there, as people oftentimes pay to frequent recreational establishments. This contrasts with an industrial establishment that would be typically paid for the items it manufactures. The plain meaning of “recreation” supports the City’s determination that the Range fits under a recreational use.

In addition, the Merriam-Webster Dictionary defines to “train” as “3a: to form by instruction, discipline, or drill; b: to teach so as to make fit, qualified, or proficient; to make prepared (as by exercise) for a test of skill.” Merriam Webster Dictionary, www.merriam-webster.com/dictionary/train. This also fits why people may come to the Range—to drill or become more prepared for a test of skill in shooting. This plain meaning also supports the City’s determination that the Range also fits under a training use.

The plain meaning of the words at issue supports the City’s classification of the Range as a proper conditional use in the C-C Zone. In addition, the City’s interpretation of its own zoning

⁴ The South Jordan Municipal Code does not contain a definition of “industrial” or “special training.”

ordinances is allowed some level of non-binding deference, and Utah law requires interpreting zoning ordinances in favor of allowing uses. For these reasons, the City properly determined that the Range is an appropriate potential conditional use in the C-C Zone.

2. South Jordan did not violate applicable law in approving the CUP.

South Jordan followed SJMC § 17.84.010 *et seq.*, which provides the requirements for reviewing and approving a CUP. Under SJMC § 17.84.020(A), an applicant must meet the following three standards to have a CUP approved: 1) general welfare, 2) Nuisance, and 3) General Plan Consistency. Based on the evidence presented to it, the City found that The Gun Vault had met these standards. See pages 3-6 of the December 18th Decision and pages 3-4 of the February 12th Response.⁵

In addition, the Appellants argued that the shop attached to the retail sales portion of the Range should not be allowed. The Range's retail firearms sales area will have this shop where it will make "minor modifications to existing firearms and previously manufactured parts" to add the Range's company name and logo for the purpose of augmenting retail sales. Letter from John Maynard to Jake Warner, contained in the October 9th Report. "Hobbies and crafts retailing" and "Miscellaneous retail sales" are allowed uses in the C-C Zone, and this shop will be permissible if it is an "accessory use" to the permitted use of retail sales. The SJMC defines "accessory use" as "a use which is incidental and subordinate to the principal permitted or conditional use of the property. . ." SJMC § 17.08.010. Given that the role of the shop is to make minor modifications to guns and accessories "meant to augment retail sales," the shop activity is both incidental and subordinate to the principal permitted use in this case and is not illegal. The City otherwise followed its ordinances and applicable law, and therefore the decision to issue the CUP and approve the Range was legal.⁶

Conclusion

South Jordan had a legal requirement to issue a CUP for the Range if it was a proper conditional use in the C-C Zone and if the Range's anticipated detrimental effects could be mitigated in accordance with standards set forth in the City's ordinances. A court will uphold the City's decision to issue the CUP unless the decision was arbitrary, capricious or illegal. In this case, the City's decision to issue the CUP is supported by substantial evidence, and is therefore not arbitrary and capricious. The plain language interpretation of the City's ordinances supports the conclusion that an indoor gun range is a permissible conditional use in the C-C Zone. In addition, a court will grant some non-binding level of deference to South Jordan's interpretation

⁵ The City did not set forth the findings in a clear response to the three specific standards, but the necessary findings are contained in the December 18th Decision's analysis and conclusions relating to the requirements to add conditions to the CUP found in SJMC § 17.84.020(B).

⁶ Utah Code Ann. § 47-3-1 *et seq.* does not change the legality or propriety of the City's decision to issue the CUP. This statute does not require the City to do anything and does not establish the operation of the Range as a *de facto* nuisance, thereby violating other applicable provisions of the South Jordan City Code. As discussed above, the City had substantial evidence on the record to support its decision to issue the CUP, including by finding that the operation of the Range would not be a nuisance in violation of the applicable provisions of the South Jordan City Code.

of its own ordinances and will construe zoning ordinances in favor of allowing uses and will therefore not find that an indoor gun range is an improper conditional use in the C-C Zone. The City otherwise followed its ordinances and applicable state law relating to the approval of the CUP and therefore the decision was not illegal. A Utah court will uphold the issuance of the CUP because the decision was not arbitrary, capricious or illegal.

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. § 63G-7-401.

These provisions of state code require the delivery of the Advisory Opinion to the agent at the address 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.

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

Anna M. West
City Recorder
1600 West Towne Center Drive
South Jordan City, Utah 84095

On this 30th day of April, 2013, I caused the attached Advisory Opinion to be delivered to the foregoing 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