

# Advisory Opinion 220

Parties: Jenna Madsen and Stuart Young / Lehi City

Issued: March 31, 2020

## TOPIC CATEGORIES:

**Conditional Use Applications**

**Interpretation of Ordinances**

The City wrongfully denied the applicants' conditional use application to operate a bed and breakfast out of the basement of their home. The City's Planning Commission, after public comment consisting of significant neighborhood opposition, denied the application stating the proposed bed and breakfast was not harmonious with the general plan despite bed and breakfast inns being listed among allowable conditional uses in the applicant's zone. The Commission also stated that the injurious effects of the proposed use could not be mitigated, but made no findings to identify any injurious effects. Because the City's denial was not supported by substantial evidence in the record, and relied on incorrect interpretation of its ordinances, it was arbitrary and capricious, and illegal.

## 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.



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## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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### ADVISORY OPINION

Advisory Opinion Requested By: Jenna Madsen and Stuart Young  
Local Government Entity: Lehi City  
Applicant for Land Use Approval: Jenna Madsen and Stuart Young  
Type of Property: Residential  
Date of this Advisory Opinion: March 31, 2020  
Opinion Authored By: Richard B. Plehn, Attorney  
Office of the Property Rights Ombudsman

### ISSUE

Did Lehi City wrongfully deny a conditional use permit to operate a bed and breakfast inn by finding that its potential impact on the welfare, safety and convenience of the surrounding neighborhood could not be ameliorated because it was determined not to be harmonious with the general plan?

### SUMMARY OF ADVISORY OPINION

Lehi City wrongfully denied the applicant's conditional use permit application to operate a bed and breakfast. The applicant's property is located in a zone that provides for Bed and Breakfast Inns as a conditional use. A proposed 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. A decision of a land use authority to impose conditions or to deny a conditional use is arbitrary and capricious if not supported by substantial evidence in the record.

While the City's planning commission staff recommended approval of the Property Owner's conditional use with suggested reasonable conditions, the Planning Commission, after public comment consisting of significant neighborhood opposition, did not adopt the proposed recommendations and instead actively looked for a basis in code to be able to deny the application, and denied on the basis that the proposed bed and breakfast was not harmonious

with the general plan and that its injurious effects could not be mitigated by imposing conditions. This was improper. The Property Owners are entitled to approval of the proposed land use. Both the decision to deny on the basis of noncompliance with the general plan, and the failure to adopt proposed reasonable conditions for approval, were arbitrary and capricious.

## 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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 Jenna Madsen and Stuart Young on November 18, 2010. A copy of that request was sent via certified mail to Marilyn Banaski, Lehi City Recorder, 153 North 100 East, Lehi Utah 84043 on November 13, 2019.

## 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 Jenna Madsen and Stuart Young received November 8, 2019, and subsequent additional information.
2. Email from Douglas J. Ahlstrom, Lehi Assistant City Attorney, received November 26, 2019 and embedded links and attachments, including:
  - a. Video record of the October 10, 2019 Planning Commission Meeting;
  - b. Lehi Planning Commission Meeting Agenda, October 10, 2019, including embedded linked material:
    - Madsen Bed and Breakfast Conditional Use and Site Plan Planning Commission Report (and accompanying images);
    - Davenport Bed and Breakfast Conditional Use and Site Plan Planning Commission Report;
  - c. Minutes of the Regular Session of the Planning Commission held October 10, 2019.

## BACKGROUND

Jenna Madsen and Stuart Young ("Property Owners") own a residence at 511 North 1375 West, within the newly developed Sage Vista subdivision in Lehi City. The new community is situated in the R-1-22 zone, designated in the General Plan as VLDRA—Very Low-Density Residential Agriculture. The Property Owners finished their basement with the intention of renting it out,

and applied for and received approval for an Accessory Dwelling Unit (“ADU”) permit. They began renting the basement through the online platform, Airbnb. However, following neighborhood complaints, the Property Owners became aware that their ADU allowed only for long-term rental and did not allow for short-term rental. They ceased operations through Airbnb, secured a long-term tenant, and subsequently applied for a Conditional Use Permit for the ability to operate a Bed and Breakfast Inn, which is allowed as a conditional use within the R-1-22 zone, for periods in which they do not have a long-term tenant.

The application was reviewed by the City’s Design Review Committee (DRC). The DRC identified two concerns for the Planning Commission to consider: (1) that the home not be used for an ADU long-term rental and a Bed and Breakfast Inn short-term rental at the same time; and (2) that all associated parking for the Bed and Breakfast Inn must remain off the street. With these proposed conditions, the DRC recommended the application for approval and scheduled it to be heard by the Planning Commission.

At the Planning Commission Meeting, the matter was opened up for public comment, and for over a half an hour the Commission heard from several Sage Vista neighborhood residents who listed a number of concerns spanning from fear for children’s safety with transient strangers entering the neighborhood, to worries about the number of extra vehicles, increased traffic, and potential devaluation of neighboring properties. General concerns were also raised about the prior history of the Property Owners having operated the Airbnb without first obtaining a permit. A common sentiment was that neighbors were not opposed to long-term rentals through an ADU, but were strongly opposed any short-term rentals or lodging.

The Commission closed public comment and discussed whether the Commission liked the idea of bed and breakfasts in general in residential areas. Commission members expressed worry about setting a precedent of this kind of use in this zone going forward. They were concerned that the applicants took advantage of a loophole in the code as it was written, and concluded that what the applicants proposed was not what the City had intended by the ordinance allowing Bed and Breakfast Inns as a conditional use in residential zones. To that end, discussion turned to ways the Commission could support a denial of the proposed use by citing to authority within the municipal code.

After significant debate, an initial motion was made to deny the application, but did not pass. At a later point, a commission member made a separate motion to approve the conditional use permit including all DRC comments and based on findings stated in the report, with stated conditions including (1) screening by way of a fence between neighboring properties; (2) adequate off-street parking in place before permitting the use; (3) daylight hours for arrivals/departures; and (4) that both permitted uses could not be used at the same time. That motion also did not pass, and discussion continued.

Ultimately, the Commission reconsidered the original motion to deny, with additional reference to Section 09.050(B)(6) of the development code—asserting that the proposed conditional use was not in harmony with the General Plan. The Commission made the following findings: (1) the property was already being economically used as an ADU and met that standard; (2) the proposed use potentially impacted the welfare, safety and convenience of the remainder of the

neighborhood and was not in harmony with the general plan—being located in a residential neighborhood in a VLDR zone, which purpose under the general plan is to be a residential neighborhood and not a “commercial, for-rent or room-for-rent, type of property”;<sup>1</sup> and (3) there was a history of practice and consistent usage of being operated as an Airbnb and not a Bed and Breakfast Inn.

Having stated its findings for consideration of the motion, the Commission added that it could not ameliorate the injurious effects of the proposed use, and by a vote of 3-2 the application was denied. Later in the same meeting, the Commission heard—and approved—another application for a conditional use permit for a Bed and Breakfast Inn under nearly identical circumstances.<sup>2</sup>

Ms. Madsen and Mr. Stuart have requested that this Office provide an Advisory Opinion to determine whether the conditional use application is entitled to approval under applicable law and if the City wrongfully denied their application.

### ANALYSIS

The State of Utah, by way of the Municipal Land Use, Development, and Management Act (MLUDMA), gives municipalities authority to adopt land use ordinances that include conditional uses and accompanying provisions requiring compliance with applicable standards by ordinance, subject to the parameters of that delegated authority set forth in MLUDMA. Namely, a land use authority “shall approve a conditional use 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.”<sup>3</sup> Notably, the requirement to reasonably mitigate anticipated detrimental effects of the proposed conditional use does not require elimination of the detrimental effects.<sup>4</sup>

If the anticipated detrimental effects of the proposed use simply cannot be mitigated by proposing or imposing reasonable conditions to achieve compliance, the conditional use may then be denied. However, any decision of a land use authority—either imposing conditions or denying a proposed use—must be supported by substantial evidence in the record; if not, the decision is arbitrary and capricious and not a lawful use of land use authority.

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<sup>1</sup> Minutes of the Regular Session of the Planning Commission held October 10, 2019, 3.3, at page 7 (altered from original—punctuation added).

<sup>2</sup> Minutes of the Regular Session of the Planning Commission held October 10, 2019, item 3.5, starting at page 8. The later applicant was likewise located in a Very Low Density Residential (R-1-8) zone and also asking to qualify under the Bed and Breakfast Inn provision to operate an Airbnb in the basement of their home, accessible by an outside door and connected to the rest of the house by stairs with a door that can be closed and locked—nearly identical circumstances to the Property Owner’s proposal. When this later application was opened for public comment, in contrast to the public opposition to the Madsen/Young application, the sole comment came from the immediate neighbor of the applicant who expressed support of the bed and breakfast. The Commission discussed and distinguished this application from the Madsen/Young application in that there was no ADU in place, and that unlike the Madsen/Young application, there was neighborhood support rather than opposition. Based only on these distinctions, the Commission approved the later applicant.

<sup>3</sup> UTAH CODE ANN. § 10-9a-507(2)(a)(i).

<sup>4</sup> UTAH CODE ANN. § 10-9a-507(2)(a)(ii).

Lehi City’s denial was not lawful for two reasons: (1) it attempted to forego the need to consider conditions by interpreting the municipal code to completely outlaw Bed and Breakfast Inns in the Property Owners’ zone; and (2) where reasonable conditions could have been imposed—and in fact were proposed—to substantially mitigate any anticipated detrimental effects of the use to comply with applicable standards, the Planning Commission voted down the opportunity to approve despite countervailing evidence in the record that appropriate conditions could be imposed.

## I. Harmony with the General Plan

The Commission, in concluding that the proposed use was unwanted, looked for a basis in the development code to deny the application, settling on Section 09.050(B)(6), which provides, among other considerations to determine whether a proposed use is detrimental or injurious to the health, safety, or general welfare, that a proposed use “will not be in harmony with the General Plan.”<sup>5</sup> Because of the residential nature of the R-1-22 zone, it was determined that the commercial use of the residence as a Bed and Breakfast Inn would not be in harmony with the General Plan for that zone.

A decision to approve or deny a proposed conditional use is an administrative land use decision.<sup>6</sup> It is not an opportunity to legislate broad, competing policy considerations that are generally applicable to other landowners, but rather involves the limited application of existing standards to the property in question.<sup>7</sup> Because zoning ordinances are in “derogation of a property owner’s common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner.”<sup>8</sup>

A General Plan constitutes the goals and policies of a city, which are then implemented by the codified ordinances containing substantive standards, provisions and requirements.<sup>9</sup> An ordinance cannot be interpreted to be in conflict with the General Plan, or, if a conflict exists, the General Plan cannot be used to overrule those requirements that are expressed by ordinance. Lehi City’s Development Code states that its intent is “to provide a means of ensuring predictability and consistency in the use of land and individual properties.”<sup>10</sup> Such predictability cannot be achieved where the land use authority can use a mere statement of purpose contained in the General Plan to impose an unstated restriction upon land use that, in its judgment, goes against that purpose, without regard to expressed conditions.

The City is entitled to further its purposes, and if Lehi City desires to preserve a strict residential nature of a particular zone, the City should do so. However, this is done by adopting ordinances that impose requirements and restrictions that a land use applicant must follow. In this matter, the

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<sup>5</sup> Lehi City Development Code Section 09.050(B)(6).

<sup>6</sup> UTAH CODE ANN. § 10-9a-507(3).

<sup>7</sup> See *Carter v. Lehi City*, 2012 UT 2, ¶ 34, 269 P.3d 141 (discussing the difference between legislative and administrative powers of municipalities, generally).

<sup>8</sup> *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995).

<sup>9</sup> See Lehi City Development Code Section 01.030 (stating the purpose of the Code is to implement the goals and policies of the Lehi City General Plan).

<sup>10</sup> *Id.*

City has adopted ordinances allowing Bed and Breakfast Inns—an arguably commercial use—within the R-1-22 zone as a conditional use. It therefore cannot be said that operating a Bed and Breakfast Inn is inconsistent with the General Plan for that zone.<sup>11</sup> If the City decides that such a use is no longer appropriate for residential zones, it must first pass an ordinance wherein such uses are no longer listed as permitted or conditional uses in that zone before restricting a property owner’s intended use on that basis. In doing so, the City can effectuate its purposes by adopting specific ordinances and standards that meet its ends but provide the necessary predictability.

## II. Arbitrary and Capricious

The City’s decision to deny the Property Owners’ application was arbitrary and capricious because the denial was not supported by substantial evidence in the record, but contravened the evidence in the record that conditions could have been imposed to mitigate any injurious effects of the proposed use.

Lehi City provides an approval process for conditional uses by which the Commission “may grant, conditionally grant, or deny . . . Alternatively, the commission may require the applicant to return at a continued public hearing to provide additional information before the commission renders its final decision.”<sup>12</sup>

Other than a straightforward approval, any decision to conditionally grant or deny must include in the record the stated conditions or else reasons for denial, which must reasonably relate to mitigating the anticipated detrimental effects of the proposed use (or the inability to do so).<sup>13</sup> If there is not substantial evidence in the record to support the decision, the decision is arbitrary and capricious.<sup>14</sup>

Lehi City’s development code provides that “[c]onditional use permits shall be granted or conditionally granted by the commission, unless:

1. the proposed conditional use will be detrimental or injurious to the health, safety, or general welfare of persons or properties within the vicinity of the proposed conditional use; and
2. the reasonably anticipated detrimental or injurious effects of the proposed conditional use cannot be mitigated by the imposition of reasonable conditions upon said proposed conditional use.”<sup>15</sup>

Lehi City considers a conditional use to be “detrimental or injurious to the health, safety, or general welfare . . . if:

1. the proposed conditional use will cause unreasonable risks to the safety of persons or properties because of vehicular traffic, parking, or large gatherings of people;

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<sup>11</sup> For a similar example, see *McElhanev v. City of Moab*, discussed *infra* Section II, overturning the Moab City Council’s decision to deny a conditional use for a bed and breakfast as being inconsistent with the general plan: “[I]t is difficult to see how placing a bed and breakfast in an area zoned R-2—which specifically permits bed and breakfasts—is inconsistent with Moab’s general plan.” 2017 UT 65, ¶ 39, 423 P.3d 1284.

<sup>12</sup> Lehi City Development Code Section 09.040.

<sup>13</sup> UTAH CODE ANN. § 10-9a-507(2).

<sup>14</sup> UTAH CODE ANN. § 10-9a-801(3)(c).

<sup>15</sup> Lehi City Development Code Section 09.050(A).

2. the proposed conditional use will unreasonably interfere with the lawful use of properties within the vicinity of the proposed conditional use;
3. the proposed conditional use will create an additional need for essential City or public services including utilities, law enforcement, and fire prevention, which cannot be met without unreasonable efforts or expenditures of City or public resources;
4. the proposed conditional use will be noncompliant with Chapters 12 and 13 of this Code.
5. the proposed conditional use will present an unreasonable detriment or injury to the health, safety, or general welfare of persons or properties in the vicinity of the proposed conditional use; or
6. the proposed conditional use will not be in harmony with the General Plan.”<sup>16</sup>

In denying the Property Owners’ application, the Planning Commission cited to Section 09.050 (B)(6)—that the use is not in harmony with the General Plan, as the basis for denial. However, determining that a proposed conditional use will have detrimental or injurious effects is only the first step in the approval process. The Commission is also required to state findings as to whether or not the reasonably anticipated detrimental or injurious effects can be substantially mitigated by imposing reasonable conditions.<sup>17</sup>

In stating the basis for denial, the Commission made no specific findings as to any of the conditions proposed by the DRC, or any additional conditions that were suggested or discussed by the Commission prior to the deciding vote—let alone whether the proposed conditions either could or could not mitigate the identified detrimental effects. Rather, the Commission made some generalized findings that did not expressly touch on whether reasonable conditions could mitigate identified detrimental effects, namely (1) that the property was already being economically used as an ADU; (2) that the proposed use potentially impacts the welfare, safety and convenience of the remainder of the neighborhood and was not in harmony with the general plan; and (3) that there was a history of practice of being operated as an Airbnb and not a Bed and Breakfast Inn. Without any explanation of how these findings applied toward proposed conditions, the denial was merely accompanied by a conclusory statement that the injurious effects could not be ameliorated.

In *McElhanev v. City of Moab*,<sup>18</sup> the Utah Supreme Court addressed whether the Moab City Council wrongfully denied a conditional use permit for a bed and breakfast in a residential neighborhood under circumstances very similar to these. As in this matter, the *McElhanev* application was also recommended for approval with proposed conditions by the planning commission, but the Moab City Council voted 3-to-1 to deny the application despite the recommendations following a public comment period which likewise resulted in significant voiced opposition.<sup>19</sup>

The Moab City Council concluded that the proposed bed and breakfast use did not meet the required criteria, but prepared no written findings of fact, though each council member explained the rationale behind his or her vote, respectively, as follows: (1) the use was inconsistent with the

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<sup>16</sup> Lehi City Development Code Section 09.050(B).

<sup>17</sup> Lehi City Development Code Section 09.050(A); *see also* UTAH CODE ANN. § 10-9a-507(2).

<sup>18</sup> *McElhanev v. City of Moab*, 2017 UT 65, 423 P.3d 1284.

<sup>19</sup> *Id.* at paragraphs 2-7.

general plan which stated a goal of restricting commercial development in residential zones; (2) concern from locals regarding the “character” of the town as being overtaken by tourism; (3) the use didn’t meet a “minimal negative impact” requirement and was going to be an impact on neighborhoods.<sup>20</sup>

Each reason provided by the Moab City Council members in opposition, however, did not address whether the applicants could mitigate the potential adverse impacts or why the conditions recommended by the planning commission would be insufficient to ameliorate the bed and breakfast’s negative effects. Because of this, the district court, upon review, overturned the Council’s denial as not supported by substantial evidence in the record.<sup>21</sup>

Here, as in *McElhaney*, the denial by Lehi’s Planning Commission was not supported by substantial evidence in the record. The findings made by the Planning Commission either did not actually identify detrimental, injurious effects, or else did not adequately address whether any identified detrimental effects could be mitigated by condition.

*A. Existing economic use for long-term rental through permitted ADU*

The first finding made by the Planning Commission was that the residence already had a permitted ADU. The Property Owners explained that they currently have a long-term tenant, but were applying for a conditional use permit to operate the Bed and Breakfast Inn so that they could also have that option available to them for periods in which they may not have a long-term tenant. The DRC had recommended that because of parking requirements for the respective uses, the property not be utilized as both an ADU rental and a Bed and Breakfast Inn at the same time. The Planning Commission was concerned about a “toggle” back and forth, and worried about how the City would be able to police which use was in place.

It is unclear what exactly was concerning to the Commission about alternating between two permitted uses. One comment was made that the Property Owners already had one economic use of the property through the ADU, implying that the Property Owners had no need for a second economic use. Whatever the issue was, it did not make its way into the Commission’s findings.

The fact that the Property Owners’ could have two permitted uses, one allowing for long-term rentals as an ADU, and one allowing for short-term guests as a Bed and Breakfast Inn, was only a concern to the DRC as it related to parking requirements in the case of simultaneous use. When the Commission asked the staff about how the uses would be policed or monitored, the response was that enforcing compliance would likely depend on complaints or an investigation. The Property Owners never indicated that they intended to operate both uses at the same time. In fact, they explicitly said that their purpose in seeking a permit for a Bed and Breakfast was so that they could use the property in between periods of ADU uses.

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<sup>20</sup> *Id.* at paragraphs 7-10.

<sup>21</sup> On appeal, the Utah Supreme Court held that the district court correctly concluded that the Council failed to issue findings sufficient to support its denial. However, the Supreme Court nevertheless vacated the district court’s order and remanded the issue, finding that the court erred in trying to fill in the gap of the faulty record by doing its own fact finding to determine what it felt constituted the basis for the Council’s denial, rather than simply remanding to the council to enter appropriate findings sufficient for judicial review. *Id.* at paragraphs 39-41.

Ultimately, there was no consideration of how simultaneous use—as a detrimental effect—could be ameliorated by condition. The DRC proposed a condition stating that both uses not be operated at the same time. It was even discussed that if the Property Owners did not comply with a required condition after approval, the conditional use permit could be revoked. Despite this clear solution, the Commission failed to approve with this condition, nor did they make findings adequately explaining why such proposed condition would not mitigate the detrimental effect.

The arbitrary and capricious nature of the Commission’s denial partly on the basis of this finding regarding the Property Owners’ ADU is highlighted by the Commission later approving a nearly identical conditional use permit for a Bed and Breakfast Inn in the same meeting.<sup>22</sup> The Commission distinguished the later application from the Property Owners’ proposed use by stating that the later applicant did not have an ADU in addition to the proposed use, so there was not the same worry with simultaneous use. However, when it was brought up that this later applicant could likewise apply for and receive an ADU permit, ironically, the response was that as long as they meet code, it was “not [the Commission’s] place to tell them what they can do with their private property.”<sup>23</sup> This later application was conditionally approved upon adoption of DRC recommendations similar to those made regarding the Property Owners’ application.

It is therefore unclear how the Commission determined that the Property Owners’ having an existing ADU constituted a detrimental or injurious effect, or else why such effects could not be mitigated by imposing conditions so that the Property Owners’ proposed use could be approved like the subsequent applicant.

*B. Potential Impact to welfare, safety and convenience of the remainder of the neighborhood*

The Commission next found that the proposed use “*potentially* impacts the welfare, safety and convenience of the remainder of the neighborhood.”<sup>24</sup> The only explanation in the finding as to the detrimental or injurious nature of the impact on the welfare, safety and convenience of the remainder of the neighborhood centered on the conclusion that the proposed use was not in harmony with the General Plan. As explained in Section I, above, the proposed use cannot be considered to conflict with the General Plan if it is provided as a conditional use. While the public offered several claims regarding negative impacts, none of these were including in the Commission’s findings, in that harmony with the General Plan appears to be the sole explanation of negative or injurious impact.

In *Ralph L. Wadsworth Construction, Inc. v. West Jordan City*, the court of appeals ruled that a city council failed to support a denial of a conditional use permit with substantial evidence.<sup>25</sup> The court found that while the city council stated that the proposed use might be considered by neighbors to be a nuisance, “the City Council *did not find that appellants’ storage would actually constitute a nuisance.*”<sup>26</sup> The city council had also claimed, based on issues raised by neighboring property owners, that the use would be “injurious to the goals of the city” but that

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<sup>22</sup> See *supra* note 2.

<sup>23</sup> Video record of the October 10, 2019 Planning Commission Meeting, at 2:28:00.

<sup>24</sup> Minutes of the Regular Session of the Planning Commission held October 10, 2019, 3.3, at page 7 (emphasis added).

<sup>25</sup> 2000 UT App 49, ¶ 16, 999 P.2d 1240.

<sup>26</sup> *Id.* ¶ 18 (emphasis in original).

the city council had not investigated these claims, nor had it stated why the use would be injurious.<sup>27</sup>

Here, similar to *Ralph L. Wadsworth Construction*, while the public made several claims regarding injurious effects, there was no explanation in the findings as to *how* the proposed use would have an injurious or detrimental impact besides harmony with the General Plan. Even had the Commission included the reasons provided by the public in its findings, per the standard in *Ralph L. Wadsworth Construction*, without any further inquiry of those claims on the Commission's part, such reasons would not constitute substantial evidence. The Commission has authority to continue the hearing to gather additional information before rendering its final decision.<sup>28</sup> It did not do so, but moved forward with denying the application. Therefore, denial upon this finding is not supported by substantial evidence in the record.

### *C. History of Practice as Airbnb*

The final finding provided by the Commission was that the Property Owners had a consistent practice, prior to the application, of operating an Airbnb and not a Bed and Breakfast, that “although can be changed and moved forward, [] it was brought to our attention.”<sup>29</sup> This finding appears largely to center both on (1) complaints about prior operations without first obtaining a permit, and (2) the Commission concluding there to be a significant difference between an Airbnb operation and a Bed and Breakfast Inn, and that the Property Owners' intended use was consistent with an Airbnb short-term rental, but did not match the intent of the City in allowing Bed and Breakfast Inns as a conditional use.

For purposes of this opinion, an analysis of the difference between a typical Airbnb rental and whether such a use could also be considered a Bed and Breakfast Inn, and whether the City correctly interprets its ordinances defining Bed and Breakfast Inns, is not necessary. Though it should be noted that later in the same meeting the Commission approved an application for a conditional use as a Bed and Breakfast Inn where the applicant explicitly stated she was asking to operate an Airbnb. Regardless, the finding regarding the Property Owners' prior usage is insufficient for the reason that no conditions to mitigate were discussed.

While neighboring residents were quick to point out that the Property Owners had previously operated a short-term rental through Airbnb without first obtaining a permit, the Property Owners explained that initially they were unaware that their ADU permit did not allow for short-term rentals, and upon learning this, they appropriately discontinued short-term rentals within a time frame provided by the City. The evidence in the record was clear that any unpermitted use had been discontinued, and that the Property Owners were operating under a permitted ADU at the time of the application and hearing. Despite this, the Commission commented that it simply did not believe that the Property Owners would not resume use as a regular Airbnb going forward.

Failing to propose or consider any conditions to mitigate an identified detrimental impact makes this finding insufficient as a basis to deny an application. If conditions are imposed on the

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<sup>27</sup> *Id.* ¶ 17.

<sup>28</sup> Lehi City Development Code Section 09.040.

<sup>29</sup> Minutes of the Regular Session of the Planning Commission held October 10, 2019, 3.3, at page 7.

Property Owners, and they subsequently fail to adhere to required conditions, this allows the City to revoke the conditional use permit. However, the City cannot prejudge the Property Owners' future compliance and simply deny them an opportunity for approval under reasonable conditions.

### CONCLUSION

Lehi City's denial of the Property Owners' conditional use application was not supported by substantial evidence in the record. The decision was therefore arbitrary and capricious. Because the evidence in the record was clear that reasonable conditions could be imposed to substantially mitigate any identified detrimental or injurious effects of operating a Bed and Breakfast Inn as a conditional use, the Property Owners are entitled to approval of the proposed land use.



Jordan S. Cullimore, Lead Attorney  
Office of the Property Rights Ombudsman

**NOTE:**

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

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

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

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

**The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in UTAH CODE § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.**

## MAILING CERTIFICATE

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

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

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

Teisha Wilson, City Recorder  
Lehi City  
153 North 100 East  
Lehi, Utah 84043

On April 1, 2020, 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.

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Office of the Property Rights Ombudsman