Advisory Opinion #27

Parties: Fred & Janet Love and Salt Lake City

Issued: December 7, 2007

TOPIC CATEGORIES:
K: Compliance with Mandatory Land Use Ordinances
R(v): Other Topics (Interpretation of Ordinances)

City's interpretation of ordinance is entitled to deference because of the expertise and specialized knowledge of City staff. The City's approach avoids disputes because it ensures a greater degree of certainty for property owners.

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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ADVISORY OPINION

Advisory Opinion Requested by:	Fred and Janet Lowe
Local Government Entity:	Salt Lake City
Applicant for the Land Use Approval:	Rolando Bazail & Sarah Barber
Project:	Single Family Residence
Date of this Advisory Opinion:	December 7, 2007
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

Did the City correctly apply its ordinances when calculating the setback for a new home?

Summary of Advisory Opinion

The City's approach to how it calculates setbacks is justifiable and should not be abandoned or overturned. While the interpretation advocated by the property owners is equally valid, the City is entitled to deference in how it administers and interprets its ordinances. The City's interpretation is plausible under the ordinance's plain language, fulfills its purpose, reduces disputes, and promotes greater certainty for property owners. For these reasons, there is no reason to abandon or overturn the City's interpretation.

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 §13-43-205 of the Utah Code. The 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.

The request for this Advisory Opinion was received from Fred and Janet Lowe on October 23, 2007. A letter with the request attached was sent via certified mail, return receipt requested, to Christine Meeker, Salt Lake City Recorder, at 415 S. State, Salt Lake City, Utah 84111. The return receipt was signed and was received on November 1, 2007, indicating that the City had received it. A response was received from the Salt Lake City Attorney's Office on November 29, 2007.

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 filed October 23, 2007 with the Office of the Property Rights Ombudsman by Fred and Janet Lowe, including exhibits.
2. Response letter from Lynn Pace, Deputy Salt Lake City Attorney, received November 29, 2007.
3. Letter from Scott Sabey, Counsel for the Property Owners, dated November 16, 2007.

Statutes and Ordinances

1. Sections 18.64.040 and 21A.24.070 of the Salt Lake City Code.

Assumed Facts

For the purposes of the Opinion, it is assumed that the setbacks advanced by the parties have been accurately determined based on correct measurements. There has been no suggestion that the calculations are incorrect.

Background

Rolando Bazail and Sarah Barber own a ¼ acre parcel located at 1137 S. Douglas Street in Salt Lake City (the "Subject Parcel"). The Subject Parcel had an existing home and a separate garage when the owners purchased it. They decided to demolish that home and garage and construct a new single family residence on the property. Douglas Street is a residential neighborhood, and all other lots in the immediate vicinity also have homes on them. The area is zoned for single-family residences.

Section 21A.24.070 of the Salt Lake City Code governs new construction, and imposes minimum yard requirements, including setbacks for front yards:

> The minimum depth of the front yard for all principal buildings shall be equal to the average of the front yards of existing buildings within the block face. Where there are no existing buildings within the block face, the minimum depth shall be twenty feet (20'). Where the minimum front yard is specified in the recorded subdivision plat, the requirement specified on the plat shall prevail. For buildings legally existing on April 12, 1995, the required front yard shall be no greater than the established setback line of the building.

Salt Lake City Code, § 21A.24.070 (E)(1). The City, applying this subsection, determined the minimum front yard setback for the new home on the Subject Parcel by averaging the front yards of the seven homes on that side of Douglas Street.[1] The City did not include the setback for the existing home (the home that would be demolished). The average front yard setback of the seven homes was 25 feet. The City approved the property owner's building permit, with a front yard setback of 25 feet.

Fred and Janet Lowe, who own the home to the north of the Parcel, disagreed with how the City applied the setback ordinance. They contend that the ordinance requires that the City include the setback of the old home on the Subject Parcel along with the other homes on the street. Including the Parcel's setback would increase the average front yard by seven feet.[2] The Lowe's object to the City's approach, because they feel that if the new home were built at the 25 foot setback, their home would be "cut off" from the remainder of the street. On the other hand, the additional seven feet would make the setback of the new home nearly equal to the Lowe's front yard.[3]

A third possible approach complicates the dispute even further. The Subject Parcel had a garage located 3 feet from the front lot line. Section 21A.24.070(E)(1) requires that the setback be based on the average front yards for existing buildings on the block face. Since the garage was an "existing building," the setback could be calculated using it as a reference instead of the home, by a strict interpretation of the ordinance. Using the 3 foot front yard reduces the setback for the new home to about 19.5 feet. This approach was not used in the calculation of the setback, and neither party advocates it.

The Lowes filed an appeal of the City's interpretation of § 21A.24.070(E)(1), which was considered by the Salt Lake City Board of Adjustment. While that appeal was pending, the Lowes also filed their request for this Advisory Opinion. The Board of Adjustment has since met and upheld the City's interpretation. The City's response was not received by the Property Rights Ombudsman until after the Board of Adjustment issued its decision. In the meantime, construction on the new home has proceeded.

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[1] A "block face" is all of the lots facing one side of a street between two intersecting streets. *See* Salt Lake City Code, § 21A.62.040. As applied in this situation, the "block face" is all of the parcels on the same side of the street as the proposed construction.

[2] The front yard of the home originally built on the parcel was 85 feet deep.

[3] The Lowe's front yard is 34 feet deep. Their home is located on the street corner.

Analysis

The question to be addressed by this Opinion is whether or not Salt Lake City correctly applied and interpreted § 21A.24.070(E)(1) of its zoning code. Specifically, should the setback calculation required by that section include the parcel upon which a new building is proposed, or may the City ignore buildings on that parcel?

A. Standards of Statutory Interpretation

Statutory interpretation begins with the language of the ordinance. *See Biddle v. Washington Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875, 879. The "primary goal . . . is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Foutz v. City of South Jordan*, 2004 UT 75 ¶ 11, 100 P.3d 1171, 1174. Statutes should be construed so that "all parts thereof [are] relevant and meaningful." *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996). Furthermore, it must be presumed "that each term included in the ordinance was used advisedly." *Carrier v. Salt Lake County*, 2004 UT 98, ¶30, 104 P.3d 1208, 1216.

The expertise of local zoning authorities bestows a degree of validity upon their interpretation of ordinances

> Due to the complexities of factors involved in the matter of zoning, as in other fields, where courts review the actions of administrative bodies, it should be assumed that those charged with that responsibility . . . have specialized knowledge in that field. Accordingly, they should be allowed a comparatively wide latitude of discretion; and their actions endowed with a presumption of correctness and validity . . ..

Cottonwood Heights Citizens Ass'n v. Board of Commissioners, 593 P.2d 138, 140 (Utah 1979). The Utah Supreme Court further elaborated on this rule and held that zoning agencies are allowed broad discretion in policy and factual decisions, but when a local government interprets the terms of its zoning ordinance, "a better approach is [to] . . . review [the] interpretation of ordinances for correctness, but . . . afford some level of non-binding deference to the interpretation advanced by the local agency." *Carrier*, 2004 UT 98, ¶28, 104 P.3d at 1216.[4]

B. Interpreting and Applying § 21A.24.070(E)(1) of the Salt Lake City Code.

The language of § 21A.24.070(E)(1) does not explicitly require that the Subject Parcel be included or excluded in the setback calculation. The City argues for exclusion, reasoning that because new construction is proposed, the lot should be considered vacant. On the other hand,

[4] In the *Carrier* decision, the court applied that rule to an ordinance interpreted by a "lay" planning commission, rather than by a professional staff. Using the reasoning of the *Carrier* decision, the approach should be the same, however, and the interpretation advanced by the City's zoning staff should be given the same non-binding deference. *See Carrier*, 2004 UT 98, ¶¶ 25-28, 104 P.3d at 1215-16.

the Lowes contend that the ordinance requires that all "existing buildings" be included, whether or not they are slated for demolition.

The Lowes "inclusion" argument derives from the plain language of the ordinance. The first sentence of § 21A.24.070(E)(1) states that "[t]he minimum depth of the front yard for all principal buildings shall be equal to the average of the front yards of existing buildings within the block face." On the surface, the ordinance seems to require inclusion of all standing buildings on the block face. However, the plain language must be approached from the goals the ordinance is meant to achieve. *See Foutz*, 2004 UT 75, ¶ 11, 100 P.3d at 1174. That purpose, as stated by the Salt Lake City Council, includes "harmonious development of residential communities" and compatible fill development. *See* Salt Lake City Code, § 21A.24.010(A). The ordinance fulfills this purpose by requiring setbacks that are similar to neighboring homes. Including all existing buildings in the setback calculation, including those to be demolished (as advocated by the Lowes) is consistent with this purpose.

The City, arguing in favor of exclusion, explains that if the parcel were empty, only neighboring buildings would be factored into the calculation, because there would be no "existing" building on the parcel. The plain language of the ordinance supports this conclusion. However, it is conceivable that a property could recently have had a building that has already been demolished, or lost through fire or natural disaster. Should the City be expected to include such a building in its calculations? The City also notes that a property owner could demolish a building, and wait to apply for a building permit to take advantage of a more favorable calculation of the setback. This may lead to disputes over whether a building "existed" or not. The City contends that exclusion avoids this situation, and treats all properties equally, whether there is an existing building or not. This ensures a uniform approach to all properties, as well as a level of certainty in the setback calculations. The City's approach is plausible under the plain language of the ordinance, supports the purpose of the ordinance, reduces disputes, and encourages uniformity in application.

In essence, the question reduces to a choice between the two approaches, both valid, and both supportable by the ordinance's language and purpose. As indicated by the Utah Supreme Court in the *Carrier* decision cited above, the City's position is entitled to deference, because of the expertise and specialized knowledge of the City staff. That deference "tips the scales" in favor of the City's interpretation.

Therefore, it is the opinion of the Office of the Property Rights Ombudsman that the City's application of § 21A.24.070(E)(1), excluding the parcels being developed, is a justifiable interpretation of the ordinance. The City's approach is reasonably supported by the ordinance's language, helps fulfill the purpose of the ordinance, avoids disputes, and ensures a greater degree of certainty for property owners.

Conclusion

The City's application of § 21A.24.070(E)(1) is plausible, and justifiable. Both the "exclusion" and "inclusion" approaches are supported by the plain language of the ordinance, and both fulfill the purpose of the ordinance. However, the City's specialized knowledge and expertise entitle its

interpretation to deference. Because of this deference, and because the City's approach also promotes greater certainty in how the ordinance is administered, the Office of the Property Rights Ombudsman finds that the City's application is justifiable and should not be overturned.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, §13-43-205. 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

U.C.A. §13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. §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:

Christine Meeker
Salt Lake City Recorder
451 S. State, Room 415
Salt Lake City, UT 84111

On this ___________ Day of December, 2007, 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