Advisory Opinion #62

Parties: Alliance Youth Services and City of Pleasant Grove

Issued: February 11, 2009

TOPIC CATEGORIES:
E: Entitlement to Application Approval (Vesting)
J: Compliance with Mandatory Land Use Ordinances
R(v): Other Topics (Interpretation of Ordinances)
R(viii): Other Topics (Appealing Land Use Decisions)

An appeal authority has inherent power to fashion a remedy, including the power to remand a decision for new consideration. The City correctly interpreted its ordinance as prohibiting the youth home at the proposed location, because the plain meaning of the word "temporary" means limited in time or not permanent. The mere purchase of property is not sufficient reliance to invoke the doctrine of zoning estoppel.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Denial of Conditional Use Permit for Residential Treatment Facility

Advisory Opinion Requested by:	Alliance Youth Services
Local Government Entity:	Pleasant Grove City
Applicant for the Land Use Approval:	Alliance Youth Services
Project:	Residential Treatment Facility for Youth
Date of this Advisory Opinion:	February 11, 2009
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

I. Did the Pleasant Grove Planning Commission rely upon substantial evidence that would permit them to deny an application for a conditional use permit, as required by § 10-9a-507 of the Utah Code?

II. May an appeal authority remand a matter back to a land use authority for reconsideration?

III. If a matter is remanded, may the land use authority conduct a new public hearing and take new evidence?

IV. Is the Applicant entitled to a conditional use permit?

V. Has the Applicant exhausted its administrative remedies so that it can proceed to an appeal in district court?

VI. Is the City's interpretation of its Supplemental Development Standards correct?

VII. Is the City estopped from enforcing the Supplemental Development Standards?

Summary of Advisory Opinion

I. Did the Pleasant Grove Planning Commission rely upon substantial evidence that would permit them to deny an application for a conditional use permit, as required by § 10-9a-507 of the Utah Code?

The City's Board of Adjustment has already determined that the Planning Commission erred. The City concedes the error. Therefore, there is no need for further analysis in this Opinion.

II. May an appeal authority remand a matter back to a land use authority for reconsideration?

An appeal authority has discretion to remand a matter back to a land use authority, particularly when the land use authority did not properly consider all evidence or there was a procedural error. An appeal authority's quasi-judicial authority to hear and decide appeals necessarily includes the power to fashion a remedy. That power inherently includes discretion to remand a matter to a land use authority for further consideration.

III. If a matter is remanded, may the land use authority conduct a new public hearing and take new evidence?

Since any decision by a land use authority (or an appeal authority) must be made after a public hearing, the City's Planning Commission must conduct a new public hearing and may consider new evidence. In this matter, the Board of Adjustment found that the Commission erred because it did not properly address all required standards for a conditional use permit. In order to correct that error, the Planning Commission must consider new evidence. The Applicant will not be unduly prejudiced by this action, because it will also be able to present evidence and argument.

IV. Is the Applicant entitled to a conditional use permit?

Because the Planning Commission has not fully considered all evidence, it would be inappropriate for the Office of the Property Rights Ombudsman to express an opinion on whether the Applicant is entitled to a conditional use permit.

V. Has the Applicant exhausted its administrative remedies so that it can proceed to an appeal in district court?

Full consideration of a land use application may require more than one hearing. The Board of Adjustment held that the Planning Commission did not properly consider the conditional use application, and has remanded the matter back for further consideration. The Applicant's administrative remedies are therefore not yet exhausted.

VI. Is the City's interpretation of its Supplemental Development Standards correct?

The City's interpretation of § 10-15-35 of its code is supported by the plain language of the ordinance and its intent, as expressed in the entirety of its language. The word "temporary"

means lasting for a limited time, and the relevant clause of the ordinance indicates the City's intent to impose regulation on treatment centers and rehabilitation facilities. Moreover, local governments are afforded a level of deference when interpreting their own ordinances. Therefore, the City's interpretation is reasonable and supportable.

VII. Is the City estopped from enforcing the Supplemental Development Standards?

The Applicant has not established that the City had an affirmative duty to inform them of any provision of its ordinances. All property is subject to zoning, whether a property owner is aware of a regulation or not. Furthermore, the Applicant has not incurred the level of extensive obligations or expenses necessary to invoke zoning estoppel against the City.

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 Alliance Youth Services on October 27, 2008. A copy of that request was sent via certified mail to Amanda R. Fraughton, City Recorder for Pleasant Grove. The City received the request on October 30, 2008. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on December 8, 2008. A reply was submitted by Alliance, which was received on December 22, 2008.

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, including attachments, filed October 27, 2008 with the Office of the Property Rights Ombudsman by Gregory Simonsen, representing Alliance Youth Services.
2. Response from Pleasant Grove City, submitted by David L. Church, received on December 8, 2008, with attachments.
3. Reply submitted by Gregory Simonsen, received December 22, 2008.
4. Sections 10-9a-507 and 10-9a-701 through -708 of the Utah Code.

5. Sections 2-4-1 through -7, Section 10-2-4, and Section 10-15-35 of the Pleasant Grove City Code.

Background

In the first part of 2008, Alliance Youth Services ("Alliance") began seeking a location in Pleasant Grove for a Residential Treatment Facility for teenaged boys with drug, alcohol, or sexual addiction issues. Most of the young men being treated would live at the facility for 12 to 18 months, while they completed therapy and training. Alliance operates a similar facility in American Fork. Alliance ultimately selected a site located at 560 South 300 East.[1] The property is zoned commercial (C-S), but there are residences in the area. There are residences on two sides of the parcel, with commercial properties to the rear. The parcel is located near State Street, the main artery through Pleasant Grove, although it does not have frontage on that highway. There is a home on the parcel.

In order to gain approval for the proposed Facility, Alliance petitioned to amend the City's zoning ordinance to add "Behavior, drug, and alcohol treatment centers" as a conditional use in C-S zones. Alliance explained to the City that they were seeking the amendment so that they could apply for approval to construct a treatment center.[2] The Pleasant Grove Planning Commission recommended approval, and the City Council approved the amendment on July 1, 2008.[3] At the two public hearings conducted on the proposed amendment, only one citizen spoke, and he was in favor of the change.

Alliance applied for conditional use approval shortly after the zoning amendment was approved. The proposed Facility would treat up to 18 young men for sex addiction or improper sexual conduct.[4] On August 14, 2008, the Planning Commission conducted a public hearing on the proposed conditional use. City staff recommended approval, with proposed conditions. Alliance generally agreed with the conditions, although they suggested changes.[5] A large number of citizens attended the hearing, and most opposed the facility. The neighbors expressed concerns about safety, decline in property values, and the size of the facility. Several citizens commented

[1] It is not clear when Alliance actually purchased the property. The City believes that Alliance closed on the parcel on August 15, 2008, a day after the City's Planning Commission considered the conditional use permit application.
[2] It appears that Alliance had not decided on the type of treatment center at that point. The minutes of the June 12, 2008 Planning Commission meeting state that Alliance identified the property as the site they had chosen for the treatment center, but that specific plans for the nature of the center had not been determined.
[3] At the City Council meeting, Alliance again indicated that it had chosen the site for its parcel, although the City's staff had recommended other commercial zones.
[4] Alliance proposed using the existing home on the parcel while a new building was constructed. During this phase, the treatment facility would operate at less than full capacity. The City indicated that Alliance would be subject to additional conditional use approval when the new building was designed and built.
[5] The Alliance staff stated that residents would be supervised at all times; that alarms would be installed on all doors and windows; there would be a 1:3 staff to resident ratio; and that the facility would comply with all state regulations. Alliance also agreed to install an 8 foot high masonry wall in the rear yard of the property.

that the Facility would mark an irrevocable transition from a residential neighborhood to a commercial area.[6]

After receiving public comments, the Planning Commission discussed the Facility's impact. Ultimately, they felt that concerns for neighborhood safety justified denying the conditional use application, because the welfare of the community would be compromised, regardless of any measures to enhance the security of the facility. The Commission voted unanimously to deny the application.

Alliance appealed that decision to the City's Board of Adjustment, arguing that the Planning Commission did not find that there were any reasonably foreseeable detrimental impacts that could not be adequately mitigated. The Utah Code requires such a finding before a conditional use application may be denied. Instead, Alliance contended, the Planning Commission based its decision on public opposition, and unfounded fears about the Facility. In its analysis, Pleasant Grove's City Staff recommended that the Board overturn the Planning Commission's decision, and grant the conditional use permit.[7]

The Board of Adjustment conducted a public hearing on September 18, 2008, and like the Planning Commission hearing, it was attended by a large group of citizens. The Board took comments from the citizens for over three hours. The citizen's comments continued along the same lines as those heard by the Planning Commission; *i.e.*, that the Facility was not appropriate for the area, and that the clientele would pose a danger to the neighbors. Alliance's representatives also attended the meeting, and presented arguments that the conditional use application should have been granted.

The Board of Adjustment decided to remand the matter back to the Planning Commission. In its motion, the Board stated that "the Planning Commission [made] an error in their August 14, 2008 meeting in denying the request for a conditional use permit . . . ." The Board also directed the Planning Commission to "address each of the standards from the City Code section 10-2-4B on granting a conditional use permit."

Following the Board of Adjustment's decision, Alliance proposed that the Board reconsider the motion to remand, because the Board did not have authority to remand a matter, only to affirm, deny, or modify a decision. This proposal was considered by the City, but rejected. The City also informed Alliance that its application was in question because of the language of Section 10-15-35 of the City Code, which the City states would prevent Alliance from operating its Facility.[8] The City indicated that it planned to invoke that section to block Alliance's application. Alliance states that it is not a "service organization," and that the ordinance would therefore not apply to its Facility.

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[6] Some residents stated that they did not know that the area was already zoned commercial.

[7] City Staff stated that the Planning Commission had not followed the "process to evaluate curative [*i.e.*, mitigating] measures." The Staff also proposed some conditions for the Facility.

[8] Section 10-15-35 of the Pleasant Grove City Code governs service organizations that provide temporary housing as part of a rehabilitation program. The ordinance prevents such activity within 400 feet of a residential zone.

Alliance objects to the Board's decision to remand the matter back to the Planning Commission, arguing that a board of adjustment does not possess the authority to remand a matter. Alliance argues that the Board should have approved the conditional use permit.

Analysis

I. The Board of Adjustment may Remand the Matter to the Planning Commission.

The City's Board of Adjustment has authority to remand Alliance's conditional use permit application back to the Planning Commission for further consideration. Remand by a board of adjustment is consistent with its role as a quasi-judicial body, and is also consistent with the statutes that govern appeal authorities. The Utah Code requires municipalities to establish some type of an appeal authority, which has traditionally been a board of adjustment.[9] Appeal authorities are authorized to hear and decide "appeals from decisions applying . . . land use ordinances." UTAH CODE ANN. § 10-9a-701(1)(b).[10] The Pleasant Grove City Code specifically authorizes its Board of Adjustment to hear and decide appeals from decisions of the Planning Commission to grant or deny conditional use permits. PLEASANT GROVE CITY CODE, § 2-4-4(C).

An appeal authority, such as a board of adjustment, is a "quasi-judicial" body, UTAH CODE ANN. § 10-9a-701(3)(a)(i), with limited authority to consider appeals from land use decisions. "[B]oards of adjustment have no legislative powers and are not permitted to have those powers." *Harmon City, Inc. v. Draper City*, 2000 UT App. 31, ¶ 16, 997 P.2d 321, 326. Furthermore, "the powers of zoning and rezoning cannot be delegated to a quasi-judicial body such as a board of adjustment." *Sandy City v. Salt Lake County*, 827 P.2d 212, 221 (Utah 1992). [11]

The Pleasant Grove City Code delineates the authority of the City's Board of Adjustment:

> In exercising its powers, the board of adjustment may reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination as ought to be made, and to that end shall have all of the powers of the officer from whom the appeal is taken. The concurring vote of three (3) members of the board shall be necessary to reverse any order, requirement or determination of any such administrative official, or to decide in favor of the appellant on any matter upon which it is required to pass under any such ordinance, or affect any variation from such ordinance.

[9] Until 2005, local governments were required to establish boards of adjustment. In that year, however, the Utah Legislature amended the Land Use, Development, and Management Act to authorize other types of "appeal authorities," which may include hearing officers or other panels authorized to hear and decide appeals.

[10] *See* also UTAH CODE ANN. § 17-27a-701 (applicable to counties). Appeal authorities are also specifically authorized to hear variance requests.

[11] *See also Salt Lake County Cottonwood Sanitary Dist. v. Sandy City*, 879 P.2d 1379, 1383 (Utah Ct. App. 1994) (examining differences between legislative and quasi-judicial powers).

PLEASANT GROVE CITY CODE, § 2-4-6(H). This is consistent with the language of the Utah Code which authorizes appeal authorities: "The appeal authority shall determine the correctness of a decision of the land use authority in its interpretation and application of a land use ordinance." UTAH CODE ANN. § 10-9a-707(3). Thus, the Board of Adjustment may review whether the decision of the Planning Commission correctly interpreted and applied a land use ordinance.[12] It may modify an order or requirement imposed by a decision of the Planning Commission, provided substantial evidence justifies the modification.[13]

The authority to determine the correctness of a decision includes not only the ability to decide if a decision is supported by substantial evidence, but also the ability to determine whether the correct process was used to arrive at that decision. A decision is procedurally incorrect if the land use authority did not consider evidence it was obligated to consider, if it did not address all questions mandated by an ordinance, or if it did not adhere to required procedure.[14] However, a decision by the Board of Adjustment that proper procedure was not followed does not necessarily mean that the outcome would be different if the process had been carried out properly. Correction of the procedural error is often necessary to determine whether a decision was proper. Often the appropriate correction of a procedural error can only be achieved by remanding the matter.[15] Therefore, in order to fully carry out its quasi-judicial function, the Board of Adjustment must necessarily possess the discretion to remand a decision back to the Planning Commission.[16]

The authority to remand a matter is not expressly stated in the Utah Code or in the City's ordinance. However, the authority to remand is consistent with the language of both the Utah Code and the Pleasant Grove City ordinance.[17] The Utah Code states that the appeal authority shall "act in a quasi-judicial manner." UTAH CODE ANN. § 10-9a-701(3)(a)(i). The City's ordinances state that the Board of Adjustment "may modify the order, requirement, decision or determination as ought to be made." PLEASANT GROVE CITY CODE, § 2-4-6(H). The power to modify an order "as ought to be made" provides the Board of Adjustment with wide latitude of judgment, and may appropriately be exercised to correct legal errors or to relieve inequitable burdens of a decision based on the land use authority's proper consideration of the evidence. A

[12] Note that this limitation does not apply to a variance application, a unique provision allowing an appeal authority to vary certain provisions of a zoning ordinance when circumstances warrant. *See* UTAH CODE ANN. § 10-9a-702. A variance is not an appeal from a particular decision by a land use authority, but is rather a request for relief from generally applicable provisions of a zoning ordinance, so there is no call to review a decision for "correctness."

[13] *Bradley v. Payson City*, 2003UT 16, ¶ 15, 70 P.3d 47, 52 ("Substantial evidence" test applies to administrative and quasi-judicial land use decisions).

[14] For example, it is within an appeal authority's authority to determine that a land use authority did not conduct a public hearing or give proper notice on an issue.

[15] For example, remand of a procedural error is sometimes necessary to correct a due process error, or provide the appeal authority with a complete and proper record for review.

[16] *See e.g., Osterhues v. Board of Adjustment, Washburn County*, 2004 WI App 101, ¶ 12, 680 N.W.2d 823, 827. (A board of adjustment's authority to hear and decide appeals "is meaningless without the corresponding authority to fashion a remedy . . .").

[17] A local government possesses "a reasonable latitude of judgment and discretion" in the exercise of its powers, and may take measures designed to carry out the authority conferred by a state statute. *See State v. Hutchinson*, 624 P.2d 1116, 1124 (Utah 1980). This power extends discretion to a board of adjustment to choose and carry out the best remedy for an improper action by a land use authority, including remand.

determination to remand a decision back to a land use authority for further consideration is within the reasonable latitude of judgment and discretion afforded to the appeal authority.[18]

Pointing to language in the Utah Code stating that an appeal authority shall "serve as the final arbiter" of issues involving land use ordinances, Alliance argues that this language prohibits a remand from an appeal authority.[19] This language does not impose such a restriction. This language merely states that an appeal authority is highest level of administrative appeal, and that a local government may not impose additional review.[20] The statute does not preclude an appeal authority from remanding a matter back to a land use authority.[21] Additionally, remand does not mean that an appeal authority is relinquishing its responsibility to be the final arbiter. An appeal may still be taken, after reconsideration by the land use authority. Finally, the interests of judicial economy and timely resolution of land use disputes is better served by allowing remand in appropriate situations.[22]

The Pleasant Grove Board of Adjustment determined that the Planning Commission did not sufficiently address the standards for a conditional use permit that are found in the City's ordinances.[23] The Board expressed this in two motions: The first stated that the Planning Commission committed an error; and the second identified the error as procedural, the failure to address the conditional use standards. As has already been discussed, the Board has the discretion to remand a matter back to the Planning Commission, particularly to correct procedural errors. Since the Board determined that the Planning Commission did not adequately address all of the standards for a conditional use permit, the decision to remand was within its discretion, and was an acceptable means to correct the error.[24]

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[18] Section 10-9a-707(2) of the Utah Code, which provides that an appeal authority may consider matter *de novo* if a municipality fails to state a standard of review for factual matters, should not be read as preventing the appeal authority from determining that remand is the appropriate remedy. That provision requires *de novo* review only in cases where no standard of review is stated in a factual matter. It does not mandate *de novo* review rather than remand in cases of procedural errors.

[19] UTAH CODE ANN. § 10-9a-701(3)(a)(ii).

[20] *Scherbel v. Salt Lake City*, 758 P.2d 897, 899 (Utah 1988) (Final administrative appeal authority vests in a board of adjustment, under previous, but essentially identical, statutory language).

[21] This Opinion recognizes the need for timely final decisions by an appeal authority. Remands and rehearings are acceptable options for appeal authorities that should be used wisely when warranted, and should not be used as a means to avoid a decision on a controversial matter.

[22] In general, a remand would consume less time and expense than an appeal to a district court. In addition, remand may encourage applicants and local governments to resolve differences in an amicable manner.

[23] Alliance raised the issue that the Planning Commission's decision to deny the conditional use permit was not based on substantial evidence, as required by the Utah Code and the City's ordinances. The City does not dispute the Board of Adjustment's determination that the Planning Commission acted incorrectly. Since there is no dispute on this question, further analysis in this Opinion is unnecessary.

[24] This conclusion also dictates the answer for another question posed by Alliance: Because the order to remand the matter back to the Planning Commission has been found to be appropriate, Alliance is still in the process of exhausting its administrative remedies. After a rehearing by the Planning Commission, an appeal may be taken to the Board of Adjustment. Following a final determination by the Board, the matter may then be appealed to district court.

II. The Planning Commission Should Reconvene a Public Hearing on the Conditional Use Permit.

In order to comply with the Board's order, the Planning Commission must conduct another public hearing on the conditional use permit. Since the Board determined that the Commission did not fully consider all the evidence that it was obligated to, the only way to correct the error is to consider all of the evidence, and issue a decision based on that consideration. This may only be done at a public hearing where all concerned parties may submit evidence and make arguments.

Alliance objects to a second public hearing as unfair, because "the opponents of the conditional use permit have been educated as to the type of evidence that the Planning Commission needs to hear in order to able to deny" the permit. Applicants are entitled to a decision based on a fair consideration of all relevant evidence and the correct application of laws and ordinances governing the application. Even if another public hearing gives opponents the opportunity to gather more information to argue against an application, the applicant has the same opportunity to gather supporting evidence and arguments. To conclude, a second public hearing before the Planning Commission is required and is not inherently unfair.[25]

III. The Proposed Facility is Subject to the Supplemental Development Standards found in § 10-15-35 of the City Code.

Like any other land use, Alliance's proposed facility is subject to the City's zoning regulations, including the regulations found in § 10-15-35 of the City Code. The City's interpretation and application of the ordinance is reasonable, and the City is not estopped from enforcing it.

Section 10-15-35, "Service Organizations," regulates the design and location of facilities providing "temporary housing or substance to those in need; or temporary board or room for youth or adults in a rehabilitation status." Along with regulations governing parking, lighting, and noise restrictions, the ordinance requires that facilities must be at least 400 feet from a residential zone, and bordered on all three sides by commercial zones. PLEASANT GROVE CITY CODE, § 10-15-35(F). This restriction prohibits Alliance's Facility, because the property is too close to a residential zone.

A. Standards of Statutory Interpretation

Statutory interpretation begins with the plain language of the ordinance, and to "give effect to the plain language unless the language is ambiguous." *Lovendahl v. Jordan School Dist.*, 2002 UT 130, ¶ 21, 63 P.3d 705, 710; *see also Mountain Ranch Estates v. Utah State Tax Comm'n*, 2004 UT 86, ¶ 9, 100 P.3d 1206, 1208. 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*

[25] It should be noted that Alliance's proposal that the Board of Adjustment reconsider its decision would require that the Board of Adjustment hold a public hearing in which all parties would be allowed an opportunity to present evidence and make arguments.

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 and application 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 refined 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.[26]

B. The City's Interpretation and Application

Alliance argues that § 10-15-35 does not apply to its Facility, because they do not house individuals on a "temporary" basis. In their Facility, individuals would expect to stay for 12 to 18 months, much longer than the normal stay at drug and alcohol treatment facilities. In addition, Alliance states that the young men assigned to their Facility would be in the legal custody of the state, and that all records would indicate residence at the facility, including driver's licenses, court documents, and any property records. Since the Facility would be their legal residence for up to 18 months, the young men would not receive "temporary" room or board.

The City, on the other hand, points out that the plain meaning of the word "temporary" is "something lasting for a limited time." Since individuals will only stay at the Facility during the course of the treatment, and then be required to leave, the Facility provides temporary housing, bringing it within the scope of § 10-15-35. The length of the actual stay is not relevant, but the stated temporary nature of the program is.

[26]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 degree of non-binding deference. *See Carrier*, 2004 UT 98, ¶¶ 25-28, 104 P.3d at 1215-16.

There is no dispute that "temporary" means "lasting for a limited time; . . . not permanent; transient; made to supply a passing need."[27] This tends to support the City's interpretation. The Facility provides treatment and counseling in addition to room and board. The Facility will only accept clients who stay for a limited period of time; when that time expires, the client must leave. The length of the stay is not as determinative as its nature. Residency at the Facility is not voluntary, and clients are not allowed to leave until their treatment is complete. Alliance states that the young men in their care are "in the legal custody of the state," and thus not empowered to choose their residence. It is also noteworthy that the Facility is not available to members of the general public seeking lodging.

The analysis, however, does not stop at the definition of "temporary" standing alone. The entire statute is to be interpreted, and all parts should be given meaning and effect, starting with the plain meaning and the intent of the statute. "[E]ffect should be given to each such word, phrase, clause, and sentence where reasonably possible." *Sindt v. Retirement Board*, 2007 UT 16, ¶ 8, 157 P.3d 797, 799. With that in mind, Alliance's proposed Facility falls squarely within the definition for a Service Organization: "[T]hose [organizations] that provide . . . temporary board or room for youth or adults in a rehabilitation status." Even the owners refer to the proposed building as a "sex rehabilitation facility." In short, Alliance will provide rehabilitation-type treatment to clients who reside in the Facility for a limited, non-permanent, temporary period of time. It is therefore a "service organization," and is subject to § 10-15-35 of the Pleasant Grove City Code.

Excusing the Facility from the plain language from § 10-15-35 simply because clients stay for a longer period than other rehabilitation facilities is not supportable from the plain language of the ordinance, and does not give effect to the intent of the statute. It is evident that the statute regulates the placement and operation of all rehabilitation facilities. No distinction is made for the length of a client's stay. In order to give effect to the plain language of the statute, the Facility must be subject to the statute's restrictions.[28]

Finally, the City's interpretation of its own ordinances is imbued with a level of deference that must be respected. The City's interpretation and application is supported by the plain meaning of the term "temporary," as well as the meaning and intent of the statute. Given the deference allowed to the City, the interpretation that § 10-15-35 applies to the Facility is reasonable.

IV. The City is not Estopped From Enforcing Section 10-15-35.

A. The Doctrine of Zoning Estoppel.

Alliance cannot claim that the City is prohibited from enforcing § 10-15-35 because it cannot claim sufficient reliance on the City's acts or omissions to rely upon the principle of zoning estoppel.

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[27] THE OXFORD ENGLISH DICTIONARY, 2ND ED. (1989). Other dictionaries generally agree. *See e.g.*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, 11TH ED. (2003). According to word historians, the definition of "temporary" has—somewhat ironically—remained stable for at least 450 years.

[28] Requiring clients to change their address on official documents and records does not change the nature of the Facility, nor does it change the temporary nature of the residency.

> To invoke the doctrine [of zoning estoppel] the [local government] must have committed an act or omission upon which the developer could rely in good faith in making substantial changes in position or incurring extensive expenses. The action upon which the developer claims reliance must be of a clear, definite, and affirmative nature. If the claim be based on an omission of the local zoning authority, omission means a negligent or culpable omission where the party failing to act under a duty to do so. Silence or inaction will not operate to work an estoppel. Finally, and perhaps most importantly, the landowner has a duty to inquire and confer with the local zoning authority regarding the uses of the property that would be permitted.

Utah County v. Young, 615 P.2d 1265, 1267-68 (Utah 1980).

Zoning estoppel protects property owners who have substantially relied upon acts or omissions by a government entity.

> The focus of zoning estoppel is primarily upon the conduct and interests of the property owner. The main inquiry is whether there has been substantial reliance by the owner on governmental actions related to the superceded [sic] zoning that permitted the proposed use. The concern underlying this approach is the economic hardship that would be imposed on a property owner whose development plans are thwarted.

Western Land Equities v. City of Logan, 617 P.2d 388, 391 (Utah 1980). The Utah Supreme Court has stated that zoning estoppel will be invoked in exceptional circumstances, when a property owner "has made a substantial change in position or incurred such extensive obligations or expenses that it would be highly inequitable to deprive the owner of his right to complete his proposed development." *Id.*, 617 P.2d at 391.[29]

Alliance states that it relied upon actions by the City which implied that the Facility could be located on the property, specifically the following:

- The approval of the zoning ordinance amendment which allowed group home treatment centers in commercial zones.

- The application and site plan were accepted by the City staff, which recommended approval of the conditional use permit.

- The Board of Adjustment ruling that the Planning Commission erred when it considered the conditional use permit application.

[29] *See also Xanthos v. Board of Adjustment of Salt Lake County*, 685 P.2d 1032, 1037 (Utah 1984); *Salt Lake County v. Kartchner*, 552 P.2d 136 (Utah 1976). Both cases state that estoppel is available only in exceptional circumstances.

Alliance states that it not only purchased the property in reliance on the City's actions, but it passed on opportunities to purchase other sites, began to prepare the property for the Facility, and incurred expenses to prepare plans for the Facility.

The City, on the other hand notes that the City's action to change the zoning ordinance did not entitle Alliance to approval, but only provided that treatment center was a conditional use in the C-S zone. The zone change was not an indication that a treatment center would be approved on any specific parcel. The City also notes that Alliance closed on the parcel at the very time the Planning Commission considered the application. The City states that purchasing the property does not constitute substantial reliance on an act or omission of the City. Finally, the City points out that Alliance is presumed to know the law, including the City's ordinances.

B. Application of Zoning Estoppel to the City's Actions.

Reiterating the sequence of important events is useful to this analysis. Based on the materials which were submitted, including the minutes of the Planning Commission, Board of Adjustment, and City Council meetings, it appears that Alliance investigated possible sites for a treatment facility in the Spring of 2008. They consulted with the City's staff, who suggested sites located in commercial zones, specifically properties located along State Street. Alliance evidently settled on the property located at 560 E. 300 South, but the C-S zone did not allow treatment centers. Alliance requested that the City's zoning ordinance be amended (not the zoning for the property), to allow treatment centers in the C-S zone as conditional uses. When the Planning Commission considered this amendment, Alliance indicated that it was considering operating a treatment center of some sort on the parcel. City staff recommended approval, although they stated that they considered the City's other commercial zones to be more appropriate for such treatment centers. At the City Council meeting where the zoning amendment was considered, Alliance again stated that they intended to construct and operate a treatment center on the parcel.

Following approval by the City Council, Alliance apparently finalized the purchase of the parcel, and submitted an application for a conditional use permit. According to a statement made by the City at the Planning Commission hearing on August 14, 2008, Alliance closed on the parcel either on that date or August 15. The Planning Commission's denial was appealed to the Board of Adjustment, which issued its decision on September 18, 2008.

Based on an understanding of these facts, this Opinion cannot conclude that Alliance substantially relied upon an act or omission on the part of the City. The question boils down to whether or not the City was obligated to disclose or explain § 10-15-35 before Alliance purchased the property. It has not been shown that the City was obligated to explain any part of its zoning ordinance, therefore, Alliance cannot claim estoppel based on the City's failure to disclose or explain that § 10-15-35 might prohibit the Facility on Alliance's parcel.

Alliance has not cited to any authority which imposes the duty to disclose all land use regulations to a potential applicant. "It is established that an owner of property holds it subject to zoning ordinances . . . ." *Smith Investment Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct. App. 1998); *see also Western Land Equities*, 617 P.2d at 390. There is no question that § 10-15-35 was enacted by the City and was applicable at the time Alliance applied for the conditional use

permit.[30] Ignorance of a law (or a zoning ordinance) does not excuse a property owner from compliance.

The decision in *Alta v. Ben Hame Corp.* illustrates this point. In that case, a city was not estopped from enforcing its zoning ordinances, even though the property owner had received annual business licenses to operate a business that was not allowed under the zoning ordinances. The property owner began using its building as temporary lodging, and was given business licenses from the city for nearly two years. The city then discovered that the lodging business violated the city's zoning ordinances, and so it obtained an injunction. The Court of Appeals held that mistakenly granting the business licenses did not justify good faith reliance by the property owner. *See Town of Alta v. Ben Hame Corp.*, 836 P.2d 797, 803 (Utah Ct. App. 1992).

In *Utah County v. Young*, *supra*, property owners built a "barn" on property that was zoned for agricultural activities only. The owners intended to use the building for a commercial business, and the building was designed as such, including public restrooms and commercial-quality electrical wiring. The county prosecuted the property owners for operating a business in violation of the county's zoning code. The owners argued that the county knew that the building was for commercial purposes, because they informed the building inspector of their intent when the inspections were conducted. The Utah Supreme Court rejected that argument, holding that the county was not estopped simply because the county may have been aware of the owner's intent. *See Utah County v. Young*, 615 P.2d at 1267-68.

Another case from Utah County reinforces this position. In *Utah County v. Baxter*, 635 P.2d 61 (Utah 1981), a property owner obtained a permit to renovate a residence, and then was prohibited from converting that residence into a restaurant. Another building, which had operated as a restaurant on the same property, had been destroyed by fire, but the county's ordinances prohibited restaurants in that zone. The property owner claimed that the county was aware that she was renovating the home for use as a restaurant, and so the county was estopped from prohibiting the use, especially after she had expended a great deal of money on the renovations. The Utah Supreme Court rejected her estoppel argument, holding that the owner had not shown that "exceptional circumstances" existed to justify the use of zoning estoppel. *Baxter*, 635 P.2d at 65.

These cases illustrate the type of culpability imposed upon local governments. Like Alliance, each of the property owners had a claim that the government entities involved had actual notice of their intent.[31] Those owners had also incurred expenses, evidently confident that their respective projects were permissible. Unlike Alliance, however, the three property owners in the cases just discussed had actually obtained a building permit (or a business license), and the action to prevent the use started only after the local governments discovered that the uses were not permitted. Alliance, on the other hand, had not been granted any kind of permit. They had successfully petitioned for a change in the City's zoning ordinances, but that is not permission for a specific project. Even though Alliance made its intentions clear when it requested the

[30] The ordinance indicates that it was enacted in July of 2000, and amended in 2003.

[31] The level of knowledge in the three cases vary, but the argument is essentially the same as Alliance's: Since the local government entities should have been aware of the property owner's intent, they should be estopped from enforcing the zoning ordinance that prohibited the uses.

zoning amendment, they have not shown the kind of exceptional circumstances that must exist in order to successfully invoke zoning estoppel.

Furthermore, Alliance has not suffered the kind of extensive obligations or economic hardship that would make enforcing § 10-15-35 highly inequitable. Alliance purchased the property, evidently because it was sure that it could get permission to construct its Facility, not necessarily because of any act or omission on the part of the City. However, purchasing property, even in reliance on a governmental representation, does not constitute an extensive expense. "[T]he mere purchase or actual ownership of land [is] inadequate to establish a substantial change in position or the incurrence of extensive expenses. Rather, something beyond mere ownership of the land is required before the doctrine of equitable estoppel will apply, and in most cases the doctrine will not apply absent exceptional circumstances." *Stucker v. Summit County*, 870 P.2d 283, 290 (Utah Ct. App. 1994).[32]

To conclude, Alliance has not established that the City should be estopped from enforcing § 10-15-35. Alliance has not shown that the City had a duty to disclose and explain all of its zoning ordinances, even if the City were aware of Alliance's plans. In addition, Alliance has not shown that it incurred extensive obligations or expenses because of the City's omission. Because Alliance has not shown that it is entitled to estop the City, it cannot claim that § 10-15-35 may not be enforced.[33]

Conclusion

The Pleasant Grove City Board of Adjustment has discretion to remand a matter to the Planning Commission for further consideration. An appeal authority acts with quasi-judicial authority. An appeal authority may remand a matter, particularly when it determines that the land use authority (*i.e.*, a planning commission) did not fully consider all evidence. The power to remand a matter is inherently part of the authority to hear and decide an appeal of a land use decision, and an appeal authority has discretion to order remand and reconsideration when appropriate.

The City's Planning Commission should reconsider the conditional use permit application in a public hearing in which new evidence and argument may be presented. Since the Board of Adjustment determined that the Planning Commission failed to address the standards required by the City's ordinances, the proper remedy is for the Planning Commission to address those standards and make its decision based on a full consideration of all evidence. Alliance will also be able to participate in this public hearing, so there is only minimal danger of prejudice against their application.

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[32] The Utah Supreme Court also indicated that preconstruction activities, such as preparation of architectural drawings, may not be sufficient to constitute substantial reliance. *See Western Land Equities*, 617 P.2d at 392.

[33] Insofar as the application of § 10-15-35 is concerned, please note that this Opinion simply states that (1) The City's interpretation and application of the section are supported by the language of the ordinance, and (2) The City is not estopped from enforcing that section. How § 10-15-35 applies to Alliance's project, and whether there are other legal issues impacting the applicability of that section are not addressed in this Opinion.

The City's interpretation and application of § 10-15-35 is supported by the plain language of that section, and acceptable under the standards of statutory interpretation. The word "temporary" means non-permanent or lasting for a limited time. Alliance admits that its clients will stay at the Facility for a limited time, albeit a longer period than other types of rehabilitation centers. Moreover, § 10-15-35 applies to rehabilitation facilities providing room and board on a temporary basis. Alliance's proposed Facility squarely fits that definition, so the City may apply the provisions of that section.

Finally, the City is not estopped from enforcing § 10-15-35, because Alliance has not shown that the City had a duty to inform them of that section when they were considering sites for the Facility. Property is subject to zoning ordinances. Section 10-15-35 was enacted several years before Alliance proposed its Facility. A local government does not have an affirmative duty to inform every applicant about every possible zoning ordinance. Even if the City were aware of Alliance's plans and intentions, they may still enforce their zoning ordinances. In addition, Alliance has not incurred the kind of extensive obligations or expenses necessary to justify estoppel of the City's zoning ordinances.[34]

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

[34] Alliance also requested a determination of whether or not it is entitled to the conditional use permit. However, this Opinion has already determined that the Board of Adjustment had discretion to remand the matter back to the Planning Commission for proper consideration. It would be inappropriate for this Opinion to state whether or not the conditional use permit should have been granted, since the Planning Commission has not fully considered all evidence pertaining to Alliance's application.

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:

Amanda R. Fraughton, City Recorder
Pleasant Grove City
70 S. 100 East
Pleasant Grove, Utah 84062

On this _____ Day of February, 2009, 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