Advisory Opinion #2

Parties: Lorin Parks and Riverdale City

Issued: July 11, 2006

TOPIC CATEGORIES:
E: Entitlement to Application Approval (Vesting)
J: Requirements Imposed upon Development
R(v): Other Topics (Interpretation of Ordinances)

Expressions of concern over soil stability, even if grounded in factual evidence, were not enough to overcome the conclusions of an expert study. The Developers presented expert testimony addressing the geologic concerns. In the absence of equally reliable evidence to the contrary, the City was obligated to accept the geotechnical study and proceed with processing the application.

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Advisory Opinion

Advisory Opinion Requested by:	Lorin Parks
Local Government Entity:	Riverdale City
Applicant for the Land Use Approval:	Lorin Parks and Kent Hill
Project:	Peacock Ridge PRUD
Date of this Advisory Opinion:	July 11, 2006

Issue: Did the decision by the Riverdale City Council to deny approval of the Peacock Ridge PRUD comply with the state land use management act and local ordinances?

Review:

The request for an advisory opinion in this matter was received by the Office of the Property Rights Ombudsman on Wednesday, May 3, 2006. A letter with the request attached was sent by certified mail, return receipt requested, to the City of Riverdale on May 9, 2006. The letter was addressed to Larry Hansen, City Administrator, at the address shown on the Governmental Immunity Act Database at the Utah State Department of Commerce, Division of Corporations and Commercial Code as required by statute. The letter was received by the City on May 10, 2006. No response was received about the appointment of a person to prepare this opinion was received from the City within four business days of the receipt of that letter. My decision to proceed with the preparation of the opinion was made on May 23, 2006 and the parties were notified of that decision on that date.

Prior to the preparation of this opinion, I met with Kent Hill and Lorin Parks, applicants who submitted the application to the City of Riverdale for the Peacock Ridge PRUD. I also met with Stevin Brooks, Riverdale City Attorney; Randy Daily, Director of Community Development, and Jan Ukena, Planner for Riverdale City. I also had conversations prior to the assignment to write this opinion with Robert Froerer, the attorney for the applicants, and during the preparation with Randy Daily and Lorin Parks.

The following documents were reviewed by the author prior to completing this advisory opinion:

1. Riverdale City Ordinances:
   a. Chapter 1, General Provisions
   b. Chapter 13, Special Use Districts, Article F. Hillside
   c. Chapter 22, Planned Unit Development
2. Letter from N. Scott Nelson, P.E., the Riverdale City Engineer to Randy Daily dated April 25, 2005.
3. Minutes of the Riverdale Planning Commission:
   a. May 11, 2004
   b. January 10, 2006
   c. February 14, 2006
   d. February 28, 2006
4. Minutes of the Riverdale City Council, April 4, 2006
5. Staff Reports – Agenda Item 4 - Planning Commission meeting of March 14, 2006
6. Findings of Fact and Final Order – Riverdale Planning Commission. Date March 28, 2006.
7. Letter of March 3, 2006 to Don Farr from Ivan Ray, Manager of the Davis and Weber Canal Companies
8. Application for an appeal to the Riverdale City Board of Adjustment related to the Peacock Ridge PRUD, dated May 3, 2006, by Kent Hill and Lorin Parks.

Assumed facts:

1. The proposed Peacock Ridge PRUD is located at approximately 5633 South 1200 West in Riverdale, Utah and would include approximately 28 residential building sites on approximately 9.7 acres.
2. Kent Hill and Lorin Parks discussed concept plans for their application for approval of the Peacock Ridge PRUD under the land use ordinances of the City of Riverdale before the planning commission on May 11, 2004.
3. On January 10, 2006 the Planning Commission discussed a conceptual plan again and approved the setting of a public hearing related to approval of the PRUD.
4. A public hearing was held on February 14, 2006 before the Planning Commission.
5. The Planning Commission also heard comments by an official of the Utah Geological Survey on February 28, 2006 related to the PRUD.
6. The PRUD was also discussed by the Planning Commission on February 28, 2006. The applicants were present and participated in the discussion.
7. The commission heard the matter again on March 14, 2006 and voted on that date to recommend to the City Council that the application for the PRUD be denied.

8. The Riverdale City Council met on April 4, 2006 and voted to deny the application for the PRUD.
9. On May 3, 2006, Lorin Parks and Kent Hill appealed the decision of the City Council to the Riverdale Board of Adjustments.

Analysis:
Right to Approval:

According to Utah Code Annotated, Section 10-9a-509(1)(a):

> An applicant is entitled to approval of a land use application if the application conforms to the requirements of an applicable land use ordinance in effect when a complete application is submitted and all fees have been paid, unless:
> (i) the land use authority, on the record, finds that a compelling, countervailing public interest would be jeopardized by approving the application; or
> (ii) in the manner provided by local ordinance and before the application is submitted, the municipality has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted.

(Note that the term "land use authority" refers to any body designated in the local ordinances to act on land use applications. In this opinion the term will be used to describe either the planning commission or the city council or both. See Utah Code Ann. 10-9a-103(13)) In this matter, the applicants who were seeking approval of the Peacock Ridge PRUD claim that their application met all the requirements and provisions of the land use ordinances of Riverdale City, and that the denial of their application was not supported by substantial evidence on the record, nor consistent with the relevant provisions of the local ordinances or state law.

The statute cited allows for three justifications for the denial of a land use application: 1) if the application does not conform to the ordinance; 2) if a compelling, countervailing public interest is jeopardized or 3) if there is an ordinance that would prohibit approval under consideration when the applicant applies for approval.

In the information provided to me in preparing this opinion there is no record of any "pending ordinance" that would give rise to a consideration under justification 3). There were apparently no proceedings to amend the ordinances in a manner that would affect the grounds for denial of the PRUD application for Peacock Ridge.

A denial, therefore, could only be legally justified under the two other provisions of the statute cited: 1) if the application did not conform to the requirements of the applicable land use ordinance as provided in the statute, or 2) if the land use authority, on the record, finds a compelling, countervailing public interest would be jeopardized by approving the application.

Denial based on a "Compelling, Countervailing Public Interest"

In reviewing the record created in the consideration of the Peacock Ridge Subdivision, there are "Findings of Fact and Conclusions of Law" attached to the staff report provided for the council's review at the time of their meeting where the project was denied. These findings were adopted by the Planning Commission to support its recommendation for denial of the PRUD application.

The findings did not include a specific "finding" mentioning a specific "compelling, countervailing public interest" that would be jeopardized by approving the application. Since that essential element is missing from the record, there could be no justification for denial of the PRUD under the provisions of subsection (i) of the statute unless a court found that by raising the issue of geological hazards, the council and planning commission had found a compelling, countervailing issue by implication.

While there is no question that geological hazards could qualify as a compelling, countervailing public interest if established by sufficient factual evidence, a pivotal issue is whether there must be a specific finding in the record that includes the phrase "compelling, countervailing public interest". Could a court use the findings in the record involving this PRUD which related to geological hazards as sufficient to satisfy the statutory requirement for a "finding" that the city had identified an issue of such a compelling nature that the application could be denied on some basis not found in an applicable ordinance? As one would expect, the evidentiary standard for such a denial would be significantly higher than for a run-of-the-mill administrative denial that is grounded in some provision of the ordinance, where the ordinance provides standards upon which a denial can be justified. This is in line with the tradition of American jurisprudence that the duty to impose a "compelling public interest" is one of the most onerous burdens imposed on government entities.

While I believe in the right circumstance that a court may not demand the specificity that the statute could be read to require, I would think that the court would only allow a municipality to skip the procedural formality of specifically identifying a "compelling, countervailing public interest" in the record when not only the interest but the evidence supporting the hazards is truly "compelling".

As will be discussed below, the record indicates that the applicant provided the opinion of an expert professional that had reviewed site-specific geologic data and declared that the site was safe. In the process of review, others came forth to question whether the site was safe, but no expert declared the proposed project would be unsafe. There was no time taken to bolster those apprehensions with specific studies or analysis. In light of the concerns expressed, the planning commission and council simply denied the application outright.

The statute says specifically that a land use authority may deny an application that conforms with the ordinance if "the land use authority, on the record, finds that a compelling, countervailing public interest would be jeopardized by approving the application." Since there is no such finding on the record, the question becomes whether a court would review the record and determine that the "jeopardy to the public interest" rises to a level that the court itself should make such a finding. Despite the predictable problems with the specific statutory language requiring the land use authority to make specific findings on the record, and not the court, I can envision a court attempting to support the City in any manner that is legally permissible if there were actual evidence of an imminent threat to lifesafety.

In this record there is no conclusive proof of any threat to a compelling public interest, but only reservations and apprehensions, albeit by individuals who appear credible and knowledgeable, that there might be a problem with the development. The statute was written to grant some vested rights to property owners. In light of the high standard that the courts have set for the use of the term "compelling public interest" in dealing with the justification for very limited interference with the protected rights of free speech and other essential rights, the City needed to do more than just raise the issue and note there might be problems before depriving the applicants of their vested rights to approval if their proposal met the terms of the ordinance.

Denial Based in Provisions of the Ordinance

The other basis that the City could turn to in supporting its denial of the PRUD is to claim that the application did not conform to the ordinance or that the City was given discretion in the ordinance to deny the application.

Both the legislature and the courts have indicated that there is a presumption that applications for land use permits should be approved unless 1) there are provisions of the ordinance which prohibit the approval of the application as proposed or 2) the local land use authority is given discretion to approve or deny based on standards in the relevant ordinance. In either case, when acting in the administrative arena, the decision by the land use authority must be supported by substantial evidence in the record, as will be discussed later.

There are two chapters of the Riverdale Land Use Ordinances (excepts from which are attached to this opinion) that are of particular relevance in this review. They are Chapter 22, Planned Unit Developments and Chapter 13(F), Hillsides.

In Chapter 22 the ordinances describe the process of review. A list of considerations is provided:

> In reviewing the proposed planned residential unit development, the planning commission shall consider:

A. Building Design . . .
B. Streets . . .
C. Landscaping . . .
D. Signs . . .
E. Density . . .
F. Financial Ability . . .

Riverdale Land Use Ordinances, Section 10-22-6. This section provides specific issues that must be considered in approving a PRUD. The applicant argues in the appeal filed in this matter that the language restricts the land use authority's review of the PRUD application to only that list of items. In considering this issue, we can use guidelines stated by the Utah Court of Appeals in a recent case:

> "In interpreting the meaning of . . . ordinance[s], we are guided by the standard rules of statutory construction." Brendle v. City of Draper, 937 P.2d 1044, 1047 (Utah Ct. App. 1997). However, "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." Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602, 606 (Utah Ct. App. 1995). We first look to the plain language of the ordinance to guide our interpretation. See Brendle, 937 P.2d at 1047. Only if the ordinance is ambiguous need we look to legislative history to ascertain legislative intent.
>
> In other words, "we will not find a violation of law simply because [the permitted use may appear] inconsistent with the general intent statement . . . when [the use] is in compliance with the substantive provisions of the ordinance." Id.

Brown v. Sandy City Board of Adjustments, 957 P.2d 207 (Utah Ct App 1998). Based on this guidance from the Court, it would appear that if the Peacock Ridge application conforms to these provisions and other requirements of the PRUD ordinance, and there is no evidence in the record indicating that the application does not conform, then the applicant is entitled to approval under the PRUD ordinance. References to less specific provisions of the ordinance such as the general goals and objectives stated in the first section would not supercede these more specific standards and guidelines.

Streets Issues

In denying the application for the PRUD, however, the planning commission and the city council did not refer to the itemized standards in the PRUD section and only mentioned one issue related to one of those standards, which is the road configuration. In the "Findings of Fact and Conclusions of Law" that is part of the record, item "f" refers to the city ordinance section 10-21-9-F relating to the length of dead-end streets.

This appears not to be a basis for denial, but simply an acknowledgement that among the several options presented by the applicants, the one that conforms to the ordinances is the one presented for final consideration. That option shows a private road that connects an existing platted cul-de-sac to 1200 West street through property that would be part of the PRUD. In order to meet the street standard, the applicants would have to remove an existing home. The record therefore shows no basis for the denial that would arise from the PRUD chapter of the ordinance.

Hillside Issues

In denying the application, however, the planning commission and the city council went beyond the listed standards or other provisions of the PRUD ordinance at Chapter 10-22 and based the denial on geological concerns. This implicates the Hillside chapter of the ordinances found in chapter 13F, which provide, in part:

> The requirements imposed by this article shall take the place or supercede any other building or review requirements that have been previously adopted by the city.

Riverdale City Ordinances 10-13F-1. This language clearly makes the Hillside provisions applicable to the Peacock Ridge application, but neither the commission nor the council cited this provision of the Hillside section of the land use ordinances in their decisions.

Did the application comply with the mandatory provisions of the Hillside ordinance?

As stated above, when referring just to an ordinance-based denial, an application can be denied for two reasons, the first of which is that the application did not conform to mandatory provisions of the ordinances. The Hillside section of the ordinances provides that a geotechnical study is required when the property involved in a development is characterized by sloping terrain that exceeds 20%, (10-13F-3(A)(1).

In response to this provision of the ordinance, the applicant submitted information in the form of geotechnical studies prepared by experts in the field of geology and testimony from the engineers that had prepared the studies. The record seems to indicate that the applicant complied with the ordinance by providing a geotechnical study. In fact it appears that several studies were supplied by the applicant. The record does not indicate that they are insufficient, and at one point Ms. Ukena, the city planner, verifies that they were from a qualified professional and "had the appropriate certification." (Minutes of the City Council, April 4, 2006).

It would appear from the record that the applicant did meet the mandatory provisions of the Hillside ordinance by providing a qualified geotechnical study. No deficiencies are noted in the record of any submittals that did not comply with the ordinances nor of any basis for denial of the application because a mandatory provision of the ordinance was not met.

Did the land use authority have discretion to deny the PRUD based on the hillside ordinance?

The Hillside ordinance also provides that "Submission of said information does not guarantee that a critical hillside development will be allowed." (10-13F-3). This is as close as the ordinance comes to granting some discretion to the land use authority to deny an application based on geological concerns. There are no standards for reviewing a geotechnical study in the ordinance, nor any statement about what other justification might be sufficient to deny a "critical hillside development."

If it is argued that this provision gives the land use authority the option to deny an application, it would likely flow that the reason for the denial must be based in the required study, since the study is referred to in the same sentence where discretion is claimed. Assuming for the sake of argument that the authority may deny an application based on the information provided, I would also assume that under the substantial evidence rules, there must be some evidence supporting denial which comes from a source that is as credible as the information that is required by the ordinance.

In other words, a study that meets the requirements of the ordinance would be presumed adequate unless countered by evidence that would also meet the minimum city requirements of expertise on the issue. That is, if a qualified geotechnical engineer's opinion is needed to establish that the project is safe, another geotechnical study or at least the opinion of another qualified engineer would be required to establish that the project is not safe.

This conclusion is a narrow one, based on the dearth of any standards or statements to the contrary in the ordinance and also given that the only provision in the ordinance related to any discretion to disregard the study is in the same sentence where the required professional study is mentioned.

The conclusion that the City demands professional expertise on geological issues from applicants is supported by the record of the conversation at the meeting of the city council on April 4, 2006, where Councilor Griffiths inquired about whether the engineers who provided the geological opinions in support of the PRUD had "the appropriate certificates." If a high level of professional education was required of those providing evidence in favor of approval, perhaps the same qualifications should be expected of those providing geological evidence in favor of denial under the provisions of the Hillside article of the land use ordinances.

Was there substantial evidence sufficient to support a denial?

The Hillside article of the ordinance also provides that the City Engineer is to review the study and make recommendations prior to a final decision on approval of development in a hillside area (10-13F-3(C). In a letter dated April 25, 2005, N. Scott Nelson, P.E., the City Engineer, listed "the following issues which will need to be resolved before approval from Engineering." Item 6 of the list of 20 items states: "all conditions of the geotechnical report must be followed. Several areas on this site are marginally stable and additional study is highly recommended."

It would appear that the required recommendation of the city engineer in the record is for additional study, not denial of the application.

Other engineers and concerned individuals also spoke at the several hearings held in the approval process, particularly at the planning commission hearing held on February 14, 2006. The engineers included Bob Barton from Earthtec; Leland Marttineau from Pinnacle Engineering; and Lee Cammack, from J-U-B Engineering;

Officials of the Utah Geological Survey were also quoted as stating in May of 2005 that "geologic hazards associated with slope stability have not been adequately addressed for the Riverdale housing development and warrant further evaluation." (Statement by Cherie Crezee in the planning commission minutes of Febuary 14, 2006, quoting a letter from Francis Ashland and Greg McDonald of the UGS dated May 5, 2005).

That same Greg McDonald also appeared before the planning commission on February 28, 2006 and spoke about the proposed PRUD. He responded to questions but apparently made no recommendations in the record as to approval or denial. He indicated that some of the issues are engineering issues, which I would take to mean that a concern might be properly addressed by an engineered solution.

The record that I have reviewed includes conclusive statements by professional engineers with "the appropriate certifications" that the proposed PRUD can be built in a safe and responsible manner if each residence is properly engineered and additional studies of those lots which have not received a full geotechnical review support construction.

There is no conclusive statement in the findings of fact and conclusions of law relied on to support the denial of Peacock Ridge by any other professional engineer or state official that the residences to be located in the proposed PRUD will be unsafe. The statements by professionals were not statements predicting certain failure, but only stating that additional studies should be done to verify that safety. These other professionals also did not do site-specific studies of the property involved in the PRUD, but may have been involved in more general studies of a larger part of the area. The more specific study is apparently the one that supports the development.

Although he does not identify himself as an engineer, Ivan Ray, the manager of the Davis and Weber Counties Canal Company, submits a letter of March 3, 2006, "not to oppose development, but to confirm that any development near the canal does not create an increased risk to the stability of the canal." His letter indicates that the company "has not seen sufficient data and analysis" of several items. The letter does not state that the canal company's engineers have concluded that the proposed development will fail if properly engineered, but asks for the delay of any approvals until there is "a consensus of experts that such development will not increase the risk of failure of the hillside." Mr. Ray clearly opposes approval but recommends more study rather than an outright denial.

In making the motion to deny:

> "Commission Hunt stated based on the evidence and information the Planning Commission has been presented and gone over and tried to weigh the pros and cons; the evidence is inconclusive. The hillside is instable due to snowmelt and rainfall; he would move to recommend to deny the application for the Planned Residential Development Unit (PRUD) for Peacock Ridge. In addition, there are uncontrollable landslides, undocumented natural springs and water in the area shown by the existing trees and vegetation and uncontrollable natural soil saturations. Furthermore I know the petitioners have the rights to develop the three lots they have but to develop this PRUD is not in the best interest of the City or its residents."

City Council Minutes, April 4, 2006. This statement makes conclusions that the record does not support with substantial evidence. The opinion of the person making the motion goes beyond what the engineers expressing concern had testified.

Substantial Evidence

In the documents prepared to support the council and commission's decision, there are findings of fact that were intended to identify the "substantial evidence" that must be in the record if a decision by the local land use authorities is to be upheld. According to the Utah appellate courts, administrative land use decisions will only be considered valid if supported by substantial evidence in the record. See Utah Code Ann. Sec. 10-9a-801(3)(c), *Bradley v. Payson City Corp*, 2003 UT 16 and *Wadsworth Construction v. West Jordan*, 2000 UT App 49.

Substantial evidence is defined to be "more than a scintilla of evidence, but less than the weight of the evidence". *Patterson v. Utah County Board of Adjustments*, 893 P.2d 602 (UT App. 1995). By this standard, if there is credible evidence on both sides of an issue, the land use decision maker will be supported and its decisions upheld whichever way the decision goes. On the other hand, if there is no credible evidence to support the decision, then it will be overturned.

Substantial evidence is not "the concerns expressed by neighboring landowners" (*Wadsworth,* at para. 16). It is also not "vague reservations expressed by either the (neighbors) or the commission members. . . (The) reasons did not justify denial of the permit even though they would have been legally sufficient if the record demonstrated a factual basis for them. . . the denial of a permit is arbitrary when the reasons are without sufficient factual basis . . ." (*Davis County v. Clearfield,* 756 P.2d 704 (Utah Ct. App. 1988). Local government must rely on facts, and not mere emotion or local opinion in making such a decision. According to one prominent litigator, "substantial evidence is that evidence, which if standing alone and without contradiction, would be sufficient to support the decision."

This boiler-plate language about substantial evidence is not meant to characterize the comments made in the process of reviewing this application as irrelevant or without merit, but the decision in an administrative land use decision must be based on evidence, not conjecture or speculation. The appropriate response to concerns expressed by the public and others in the land use approval process is for those making decisions to translate that concern into a quest for appropriate evidence to either substantiate or dismiss the concern. The concern itself is not evidence unless the person expressing an opinion does so professionally or is otherwise qualified to have his or her comments viewed as substantial evidence.

Geological Evidence

In reviewing the record, I have noted that the minutes refer to "seven geotechnical studies" that were considered by the land use authorities in making the decision. (Minutes, Riverdale City Council, April 4, 2006; comments by Councilor Jenkins.) Apparently of those seven, three were produced by the applicant. One was by Hill Air Force Base, which was, according to the minutes, of the area in general. Another is the "canal company's report". Two were provided, according to the minutes, by the Utah Geological Survey. It was stated that "none of the reports would guarantee the stability of the hillside." (Id., comments by Ms. Ukena).

As substantial evidence in support of denial, the findings include excerpts from the applicant's own geotechnical studies that are cited in the record and interpreted in the record by those who do not identify themselves as professional geotechnical engineers. The quotes are cited to discredit the professional engineer that is being quoted although that engineer, after making the supposedly damaging statements about the potential risk of development, goes on to express a conclusion that is contrary to the conclusions drawn by the non-professionals who are quoting him.

The findings of fact and conclusions of law cited to support the denial include a list of quotes from studies completed by firms that produced geotechnical studies of the general area, including Earthtec, Applied Geotechnical Engineering Consultants, and Terracon.

The statements cited are in reports where the person making the statement, after expressing the views quoted, recommended approval of the Peacock Ridge PRUD or recommended further study of the area but did not recommend denial of this specific project.

Conclusion:

Although there is a lot of discussion in the record about the geologic features of the site where the Peacock Ridge PRUD is proposed and the potential threat the application poses to health, safety and welfare, I am not relying on subsection (i) of the statute I quoted at the beginning of this opinion to justify denial in this instance. There was no specific reference in the record to a "compelling, countervailing public interest", no finding of the same, and because of the lack of credible expert testimony of an imminent risk to life safety and the inconsistency in allowing any use of the property in the face of a potential threat, I do not find that there was such an interest at risk. Any denial must therefore be based on the provisions of the ordinance and not on a compelling, countervailing public interest which, if found, would allow the local body to make decisions outside the local ordinance.

The legislature provided the City with a clear opportunity to solve problems like the current matter through either one of two options: 1) specifically declare the matter a "compelling, countervailing public interest" and then take measured steps to fairly resolve the issues which rise to such importance that a "time out" is justified, or 2) take the opportunity to specifically disprove the applicant's experts by providing the testimony of equally qualified experts doing the same level of site-specific analysis as the applicant's experts did. The City did neither. Had the city done either of these actions, or had the ordinances better reflected the level of concern that the city officials obviously have for geologic issues to the extent that they mandated consensus among the experts, the City could have prevailed in this issue.

As stated above, both the legislature and the courts have indicated that there is a presumption that applications for land use permits should be approved unless 1) there are mandatory provisions of the ordinance which prohibit the approval of the application as proposed or 2) the local land use authority is given discretion to approve or deny based on standards in the relevant ordinance, and in the legitimate exercise of that discretion chooses to deny the application. In either case, when acting in the administrative arena, the decision by the land use authority must be supported by substantial evidence in the record.

I believe that a court would rule that the application conformed to the mandatory provisions of the ordinance and that the record does not reflect any finding to the contrary. As far as the denial being based on the appropriate use of local discretion, I believe that a court would conclude that the City had some discretion, but did not act properly to use it.

There is no clear opportunity in the language of the ordinance allowing the land use authority to disregard the study that the applicant must provide. In assuming that there was an opportunity for the council to make a decision that contradicts the study, I am supporting a reading of the ordinance in favor of the City's position that may be counter to the established standard set by the courts. Case precedent cited above promotes the interpretation of the ordinances in favor of the use of land. Where the issues are as significant as geological hazards, however, I believe that a court would likely grant some discretion to the City and work to uphold the City's decisions allowed by that discretion if legally permissible to do so. In saying that, however, I am not saying that the language in the Hillside article stating that there is no "guarantee of approval" confers a broad right to review and deny applications in the face of supportive geological studies without reference to other equally credible evidence in the record. The applicants here provided the opinion of a qualified expert that the project would be safe.

Without standards in the ordinance that are to be applied in exercising administrative discretion, that discretion may not be sufficient to enable a denial in most contexts. Even with articulated standards, local land use authorities must support their decisions as responsive to those standards and supported by substantial evidence. In reviewing the required study without standards, a land use authority's denial based on flaws in that study would be more difficult to sustain.

The only specific reference in the ordinances to the evidence that is to be used to review the required geotechnical study is that the city engineer is required to "make a recommendation" on hillside developments. He did so in this case and recommended only "additional study". He even "highly recommended" additional study. He did not recommend denial.

Absent any standards or specific discretion in the ordinances to ignore the study, I conclude that where expert opinions are mandated, if the recommendations of the applicant's expert are to be disregarded, they should be countered in the record by someone with professional expertise in the field who undertakes some specific study of the site itself and does not simply express reservations.

In the Davis County case cited above, the court stated that the ". . . reasons did not justify denial of the permit even though they would have been legally sufficient if the record demonstrated a factual basis for them." That is my determination in the present matter as well.

Since the record does not reflect any statement by another professional engineer stating that development of the property will not be safe if properly engineered, I have concluded that the decision to deny is not supported by substantial evidence in the record and would therefore be ruled invalid if this matter proceeds to court.

I also conclude that the decision by the Riverdale City Council to deny approval of the Peacock Ridge PRUD would be found to not comply with the state land use management act and local ordinances.

This opinion only states what I believe a court would conclude based on the same facts and circumstances. Courts are notoriously unpredictable, and it would not be a major surprise if a court later decided this matter in another manner. I would hope that the local appeals process would come to a fair resolution of the matter and the parties might seek some common resolution of the concerns shared by all involved without resorting to litigation.

I also note that both the applicants, their experts, and those who oppose them discussed the opportunity and necessity for additional studies and engineering analysis that should be completed prior to the issuance of building permits on any given building site which may have not already received clearance by geotechnical experts. Both the developers and the City have a continuing opportunity and responsibility to ensure that any residences built are safe and well-constructed.

Craig M. Call, Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, 13-42-205. 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.

Riverdale Land Use Ordinances:
Excerpts

CHAPTER 1
GENERAL PROVISIONS:

10-1-2: PURPOSE: This title is designed and enacted for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of the city, including, amongst other things, lessening congestion on the streets or roads, securing safety from fire and other danger, providing adequate light and air, the classifying of land uses and distribution of land development and utilization, protecting the tax base, securing an economy in governmental expenditures, fostering commercial, industrial and agricultural growth, protecting the environment, and protecting both urban and non urban development of the city.

CHAPTER 13
SPECIAL USE DISTRICTS
ARTICLE F. HILLSIDE

10-13F-1: PURPOSE AND INTENT: The following establishes the required process to determine whether property on or adjacent to certain critical slopes can be developed in a safe, orderly and beneficial manner.

Due to the nature of the property located in certain hillside areas, the following are requirements that are in addition to noncritical hillside building requirements. The requirements imposed by this article shall take the place or supercede any other building or review requirements that have been previously adopted by the city. Noncritical hillside development matters, defer to the city's standard subdivision ordinance development requirements.

10-13F-3: STUDY REQUIREMENTS: The following shall be provided to Riverdale City to determine whether a proposed critical hillside property development will be considered by the city. Submission of said information does not guarantee that a critical hillside development will be allowed.

A. During conceptual discussion:

1. Identify the area to be developed. In the event the proposed development is in a sloped area greater than twenty percent (20%) the development requires a geotechnical report, paid for by the applicant, to be submitted to the city engineer for review, prior to proceeding to a preliminary review by the applicant.

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8. Geotechnical study including soil and soil constraints, water and seismic concerns, erosion control and development recommendation to include items specified by the city engineer

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C. Final Review: Any additional engineering requirements must be completed prior to request for final review and determination by Riverdale City planning commission. The Riverdale City engineer shall review all items and make a recommendation prior to final approval by the planning commission.

CHAPTER 22
PLANNED UNIT DEVELOPMENTS

10-22-1: PURPOSE AND INTENT:

A. A planned residential unit development (PRUD) is intended to allow for diversification in the relationship of various uses and structures, to permit more flexibility, and to encourage new and imaginative concepts in the design of neighborhood and housing projects in urban areas. To this end, the development should be planned as one complex land use rather than an aggregation of individual, unrelated buildings located on separate lots.

B. Substantial compliance with zone regulations and other provisions of this title in requiring adequate standards related to the public health, safety and general welfare shall be observed, without unduly inhibiting the advantages of large scale site planning for residential and related purposes.

10-22-6: PLANNING COMMISSION CONSIDERATION:

In reviewing the proposed planned residential unit development, the planning commission shall consider:

A. Building Design . . .
B. Streets . . .
C. Landscaping . . .
D. Signs . . .
E. Density . . .
F. Financial Ability . . .

(details and rest of the section not copied)

10-22-7: ACTION BY PLANNING COMMISSION:

The planning commission, subject to the requirements of this chapter, may recommend approval or denial, or approval with conditions, of the proposed planned residential unit development to the city council.

10-22-8: ACTION BY THE CITY COUNCIL:

The city council, after holding a public meeting thereon (which shall require written notification mailed to property owners within 500 feet of proposed PRUD), may approve, modify or disapprove the application for a planned residential unit development. In approving an application, the city council may attach such conditions including a limitation of time during which the permit remains valid, as it may deem necessary to secure the purposes of this chapter. Approval of the city council, together with any conditions imposed, constitutes approval of the proposed development as a "permitted use" in the zone in which it is proposed.