Salt Lake City Land Use Appeals hearing officer
Appeal of Administrative Decision
PLNAPP2018-00278
775 E 400 South – Billboard Credit Issue – Reagan Outdoor Advertising
October 5, 2018

This is an appeal from a decision made by Joel Paterson, Zoning Administrator, dated April 6, 2018, applying the land use ordinance of Salt Lake City in a manner that denied a request to build a billboard at 775 E 400 South in the City. The denial was based on the conclusion by the administrator that the applicant and appellant here, Reagan Outdoor Advertising (Reagan), was not proposing a replacement billboard in a zone that was equal to or less restrictive than the zone in which the demolished billboard was located, as is required by the relevant ordinance.

RECORD

The record includes the Staff Report, a document of 82 pages, dated September 6, 2018. The Staff Report packet includes information from Reagan, including exhibits; the decision from which this appeal is taken; and a response by the office of the Salt Lake City Attorney to the appeal. The record also includes the audio recording made of the Appeal hearing held June 14, 2018, and other exhibits provided at the hearing, including:

- An amended version of the City's Brief, dated September 6, 2018.
- A printed matrix showing sign, height, setback, and review process requirements in three different city zoning districts.
- A copy of a Third District Court Memorandum, dated January 27, 2015, in the matter of Outdoor Front Media LLC v. Salt Lake City Corp., Case No. 150900004.
- Photographs of the historic building plaque and of part of an historic building located at the intersection of 10th East and 4th South.
- An excerpt from a decision made by the Salt Lake City hearing officer from a previous case, not identified on the document.
- A letter to the hearing officer dated September 13, 2018 from Scenic Utah.

The record also includes an email exchange among the parties, assumed here to terminate with the provision of this decision to those receiving the emails. The record provided is incorporated into this decision and provides substantial evidence to support it.

Appearing at the hearing on behalf of Reagan were Josh Peterman and Leslie Van Frank. Appearing for the City were Samantha Stark and Katherine Lewis from the office of the Salt Lake City Attorney. Nick Norris, Salt Lake City Planning Director, provided some information when requested to do so. Appearing on behalf of the public was Ralph Becker.

STANDARD OF REVIEW

Under the relevant City Ordinances, the standard of review for this type of appeal shall be de novo. The appeals hearing officer shall review the matter appealed anew, based upon applicable procedures and standards for approval, and shall give no deference to the decision below. SLC Code §21A.16.030(E)(1). The Appellant bears the burden to show the decision of the City to be in error.

FACTS

This case arises from an application by Reagan to construct a billboard at 775 East 400 South in the City, on property within a "special gateway" area for billboards. Within that area, according to Salt Lake City Code §21A-46-160(O): "if a nonconforming billboard is demolished within a special gateway, the billboard owner may construct a new billboard along the same special gateway if the billboard owner has deposited billboard credits in the City's billboard bank for that specific special gateway in a zoning district equal to or less restrictive than that from which the nonconforming billboard was removed." The credits must be used within 36 months of the date of demolition of the billboard. *Id.* at Subsection (2). Reagan had indeed demolished a billboard located at 400 South and 200 East, also within the special gateway district sometime in 2015 and deposited 1272 billboard credits into the City's 400 South special gateway district billboard bank. The demolished sign was in the City's D-1 zoning district. Reagan seeks to use those credits to build a billboard at 775 East 400 South, located within the City's TSA-UN-T zoning district. The application to construct the replacement billboard was filed within the 36 month period provided by the ordinance.

ISSUES

A replacement billboard can only be built, according to the code cited above, if the new billboard was in a zone that is "equal to or less restrictive" than the district within which the demolished billboard was located. The decision from which this appeal arises states that the application to build a billboard at 775 East 400 South was denied because the TSA-UN-T district is more restrictive than the D-1 zoning district.

Reagan raises five bases for this appeal:

1. The TSA-UN-T district is equal to or less restrictive than the D-1 district, not more restrictive than the D-1 district. The proposed billboard should therefore be allowed.
2. Under Utah Code Ann. §72-7-506(2)(b), the City had a duty to provide notice to Reagan when the City enacted the ordinance which adopted the TSA-UN-T designation for the property involved. Therefore the ordinance is void.

3. If indeed, as the zoning administrator has decided, the TSA-UN-T district is more restrictive than the D-1 district, then all other available properties in the Fourth South special gateway area are also more restrictive districts. Since Reagan's billboard bank credits can only be used in the Fourth South gateway district, to deem these districts more restrictive than D-1 renders the billboard bank "superfluous" and the provisions of the billboard ordinance inoperative – a "nonsensical and absurd" result in violation of the rules governing the interpretation of local ordinances.
4. If the City's decision renders all potential locations for a replacement billboard unavailable, then the City's decision is a taking of private property without the payment of just compensation, contrary to constitutional and statutory law.
5. To require that the billboard credits must be used within 36 months or be forfeited violates a statute found at Utah Code Ann. §10-9a-511(2)(b) which prohibits either terminating nonconforming billboards or amortizing their existence over time.

The City responds to Reagan's issues and raises a jurisdictional issue: That the hearing officer has no authority to hear and decide issues that are not "interpretation or application of Salt Lake City Code." The only issues raised by Reagan that are within the jurisdiction of the hearing officer, according to the City's argument, are issues 1 and 3 above.

JURISDICTION

The issue raised by the City will be discussed first. According to the argument, the hearing officer (who is acting on the matter "de novo") cannot consider any factor in the decision except to interpret and apply the Salt Lake City Code and only the Salt Lake City Code. State statutes and case law related to the application and interpretation of the Code are not to be considered. The City's argument is rejected, for the following reasons.

The State Municipal Land Use Development, Management, and Administration Act (MLUDMA) states that "a municipality may not impose a requirement or standard that conflicts with a provision of this chapter, other state law, or federal law." Utah Code Ann. §10-9a-104(2). Assuming that the City does not claim that land use authorities, including the zoning administrator, are to ignore this state land use regulation law, then it follows that the City would agree that when the zoning administrator makes a decision, he must consider MLUDMA, other state law, and federal law. In its argument here, however, the City suggests that the de novo review by the hearing officer of the same issues considered by the zoning administrator could not consider those same factors. The City does not explain why the hearing officer's scope of review would be different than the zoning administrator's.

It is also noted that in the city ordinance, a person appealing a local land use decision must comply with this requirement: "The appeal shall specify the decision appealed, the alleged error

made in connection with the decision being appealed, and the reasons the appellant claims the decision to be in error, *including every theory of relief that can be presented in district court*." Salt Lake City Code §21A.16.030(A) (*emphasis added*). The City's position is that while the appellant must state all his or her claims in an appeal to the hearing officer, the hearing officer has no jurisdiction to hear any claims not arising from the four corners of the ordinance alone. This position contradicts the Utah Supreme Court, which in *Patterson v. American Fork City*, 2003 UT 7 ¶¶ 14-21 dismissed the entire "laundry list" of claims brought by Patterson, including his equal protection and due process claims, because he did not exhaust local remedies before bringing those claims to the district court. Specifically mentioned are his constitutional claims (¶14) and his equitable claims (¶15) as being subject to the exhaustion requirement, stating in its opinion that the process of exhaustion may have eliminated those claims and should have been pursued, in part, for that purpose.

Under the Salt Lake City Code, the hearing officer hears two categories of appeals (1) appeals of administrative decisions by the zoning administrator and others, which are to be heard "de novo", and (2) appeals from decisions by the planning commission and landmarks commission, which are reviews of the record of the decision from the commission. Salt Lake City Code §§21A.16.010 and 030(e). No new evidence is gathered in a record review. As to the authority of the hearing officer to consider statutes, it is specifically stated in the Code that where there is a record review before the hearing officer the "the appeals hearing officer shall uphold the decision unless it is not supported by substantial evidence in the record or it violates a *law, statute, or ordinance* in effect when the decision was made." Salt Lake City Code §21A.16.030(E) (*emphasis added*). The City does not explain in its argument here why the relevant ordinance would mandate the consideration of other law and statutes in a record review but prohibit their consideration in a de novo review such as the instant case.

The City cites the case of *Bennion v. Sundance Development,* 897 P.2d 1232, 1236, n.5 (Utah 1995) to support its position, stating that the decision "finding County (appeals) board was limited to review of interpretation of County code." *Bennion* does indeed discuss the board's review of the application and interpretation of county code but does not state that the review cannot consider anything outside the county code nor proscribe the consideration of state law when that appropriate review of the code is conducted. The only limit on the County review of an administrative decision found in *Bennion* footnote 5 is that the review cannot include "zoning amendments", an issue which was not at issue in *Bennion* nor an issue here. No one claims here that the hearing officer can review legislative decisions such as the one referred to in the *Bennion* footnote. No one disputes here that the decision from which this appeal is taken was an application and/interpretation of the city code. *Bennion* does not hold that the review on appeal is to be done in a vacuum, independent of any consideration beyond the words found in the ordinance, as the City argues.

As required by MLUDMA, anyone applying or interpreting local land use codes must consider the ordinances, state statutes, and federal law in that application and interpretation. (Utah Code Ann. §10-9a-104(2)). Indeed, a local administrative decision will be overturned if it is "arbitrary, capricious, or illegal". According to MLUDMA:

> A court shall: (i) presume that a final decision of a land use authority or an appeal authority is valid; and (ii) uphold the decision unless the decision is: (A) arbitrary and capricious; or (B) illegal. (c) (i) A decision is arbitrary and capricious unless the decision is supported by substantial evidence in the record. (ii) A decision is illegal if the decision is: (A) based on an incorrect interpretation of a land use regulation; or (B) *contrary to law*."

Utah Code Ann. §10-9a-801(3)(b) (*emphasis added*). Since the hearing officer is the City's appeal authority, as required by MLUDMA at §10-9a-701 *et seq*., then it would follow that when the hearing officer functions in that MLUDMA required capacity, the hearing officer should follow the requirements of MLUDMA, including §10-9a-104(2), and not make a decision which is arbitrary, capricious or illegal because it violates state or federal law. That is the precise standard that a court will use to review the decision of the hearing officer, so it is one that he or she should consider in making his or her decision.

The City's argument on this issue is rejected. This discussion will therefore consider all of Reagan's five issues.

APPELLANT'S ISSUES:

1. The TSA-UN-T zone is indeed more restrictive than the D-1 zone. The state land use code states that a land use authority shall apply the plain language of land use regulations. Utah Code Ann. §10-9a-306 (1). The City, in support of the land use decision appealed here, has provided a discussion of the relative requirements of the D-1 zone (where the Appellant has removed a billboard and received credits in the billboard bank on behalf of that removed billboard) and the TSA-UN-T zone (where the proposed site for a new billboard is located). The TSA-UN-T zone allows for less intensity than the D-1 zone; it mandates lower building heights, larger set-backs, and a less intensive mix of uses. The TSA-UN-T zone also imposes significantly more restrictions on the size of signs that are allowed in the zone, as compared to the D-1 zone. It is reasonable to conclude that the TSA-UN-T zone is more restrictive, in a plain language interpretation, than the D-1 zone, the City's highest density zone. To burrow deeply into more obscure comparisons of the ordinances and read into language not clearly intended to be considered when determining whether one zone is more restrictive than another is not to follow the plain language as required by statute.

2. The issue of providing notice as required by the state billboard statute is not determinative here. In order to establish that the required notice nullifies the zone applied to the location of the proposed new billboard, Reagan must establish that the ordinance chancing the zone was a "change or proposed change to the outdoor or off-premise advertising provisions of its zoning provisions, codes, or ordinances." Utah Code Ann. §72-7-506(2)(b). It would also have to be established that the consequence of not providing notice, if required, would be to render the ordinance null and void.

   It is understood that both the then-current and then-proposed zoning regulations prohibited billboards in both the TSA-UN-T zone and the D-1 Zone. Reagan has not established that the City's interpretation of the zone changes eliminated the use of billboard credits in all of the new zones assigned to the Fourth South gateway district, but only in the TSA-UN-T zone. The zone change did have a tertiary or perhaps secondary impact on the use of some billboard credits under the City's ordinance, but Reagan has not shown that this change would be considered to be a "change or proposed change to the outdoor or off-premise advertising provisions" of the code, terms not defined in the state statute cited.

   The notice referred to, if required by the City, was required some years ago, when the ordinance in question was adopted. This was after the billboard credit system was created by the City but before the credits at issue here were obtained by Reagan. The zone has not changed during the time between the date that Reagan obtained the credits in dispute here and the date Reagan attempted to use those credits.

   This issue, in all its complexities, is simply not adequately briefed or discussed in the short submittals and will therefore not be considered here. Reagan has also failed to demonstrate that the failure of any required notice resulted in any change of the law that may have affected Reagan. In a case involving an alleged failure to provide the required statutory notice, the Utah Supreme Court stated that "the challenging party (must) show that there is a reasonable likelihood that the legal defect in the city's process changed the outcome of the proceeding." *Potter v. South Salt Lake*, 2018 UT 21, ¶33. Reagan has made no such showing. This claim is denied.

3. As to whether the decision here renders all the available property in the 400 South Gateway District unavailable for a new billboard, no conclusions can be drawn at this time. The City, in its brief, stated that the other TSA zones are "equal to or less" restrictive than the D-1 zone, from which the billboard credits arose, which would make those areas open to a new billboard structure. At the hearing, the City modified that statement, saying that the City takes no position on whether the other TSA zones would be eligible for a billboard relocation from the D-1 zone. Since there has been no formal

decision by the City that the other available zones are "equally or less restrictive" than the D-1 zone, that issue is not properly raised here. One cannot appeal a decision that has not been made, and while the function of the hearing officer is to hear the appealed matter "anew", it is not to hear new applications. This claim is denied.

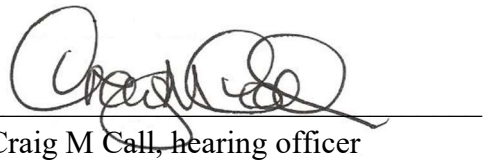
4. In order to establish a taking or justify a claim for just compensation, a person must meet significant factual requirements that are not met here. For example, one must provide substantial evidence that the governmental action involved resulted in the "taking or damaging" of private property for a public purpose. This question turns in part on the third issue above, where Reagan claims that no other zone would allow use of the credits, so the credits are worthless. But it has not been established that the other TSA zones prohibit the use of billboard credits. The City has not been provided with the opportunity to determine if a proposed billboard in another TSA zone would be allowed because no application to build a billboard in these other areas was filed. This claim is denied.

5. In order to establish illegal amortization of a billboard, some citation to authority is needed. The sole argument for this claim in the written materials is three sentences without any statutory or case law precedent which establishes that a City's granting billboard credits when a billboard is removed, which credits must be used within three years, amounts to an illegal amortization. Such a program imposes a duty on the billboard credits holder, if it chooses to not immediately relocate a billboard and thus accept the credits, to utilize them within three years. There has been no showing that it was impossible to do that. This claim is denied.

DECISION

The decision here is to deny the appeal.

Dated this 5th day of October, 2018.



Craig M Call, hearing officer