GARY R. HERBERT
Governor

GREG BELL
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Old Ranch Road Neighborhood Group
Local Government Entity:	Summit County
Applicant for the Land Use Approval:	Park City Ranches, LLC
Project:	Stone Ridge CORE Rezone and Subdivision at Silver Summit
Date of this Advisory Opinion:	August 17, 2010
Opinion Authored By:	Steven R. Schaefermeyer, Legal Intern, Office of the Property Rights Ombudsman

Issue

Does a proposed development project Sketch Plan Application conform to the Snyderville Basin Development Code and General Plan, and does the General Plan constrain the Summit County Council's ability to grant or deny a CORE rezone request?

Summary of Advisory Opinion

The Sketch Plan Application being reviewed by Summit County is in its procedural infancy. In its current state, it is premature to determine if the project proposed by Park City Ranches, LLC conforms to applicable sections of the Snyderville Basin Development Code and General Plan. A complete analysis is more appropriate and useful at a later stage of the review and approval process.

Under state law a general plan is advisory unless otherwise stated by ordinance. The Snyderville Basin Development Code requires the Summit County Council to only approve CORE rezone requests it finds are consistent with the General Plan. The County Council's determination of whether the rezone request is consistent with the General Plan, and its ultimate decision to grant or deny the rezone request will be affirmed if it is reasonably debatable that its decision promotes the purposes of the County Land Use, Development, and Management Act.

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.

The request for this Advisory Opinion was received on December 31, 2009 from Gary W. Nielsen on behalf of the Old Ranch Road Neighborhood Group. A letter with the request attached was sent via certified mail, return receipt requested, to Bob Jasper, County Manager, 60 North Main, P.O. Box 128, Coalville, Utah 84017. Mr. Jasper's name was listed on the State's Governmental Immunity Database as the contact person for the County. By a letter dated February, 2010, Jami R. Brackin, Deputy Summit County Attorney, submitted the City's response to the Advisory Opinion request. Mr. Nielsen submitted a response to the County's submission by a letter dated February 12, 2010. Ms. Brackin submitted a letter dated February 17, 2010 in response to Mr. Nielsen's letter. By a letter dated March 1, 2010, Mr. Nielsen submitted a response to Ms. Brackin's letter. On March 9, 2010 Ms. Brackin indicated by email that she did not intend to respond to Mr. Nielsen's last letter.

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 December 31, 2009 with the Office of the Property Rights Ombudsman by the Old Ranch Road Neighborhood Group.
2. Email from Gary W. Nielsen, including attachment, received January 4, 2010.
3. Email from Gary W. Nielsen, received January 14, 2010.
4. Response from Summit County, including attachments, submitted by Jami R. Brackin, received February 1, 2010.
5. Reply from Gary Nielsen, received February 16, 2010.
6. Letter from Jami R. Brackin, received February 23, 2010.
7. Reply from Gary Nielsen, received March 1, 2010.

Background

In May 2009, Summit County (the County) received a Sketch Plan Application (the Application) from Park City Ranches, LLC (Applicant). The Applicant proposes a development project (the Project) to be located on approximately 307 acres in Summit County.[1] The Project is a large residential subdivision that would include approximately 250 units, 65 of which would be workforce housing units, if a residential subdivision and a re-zone request are granted. The rezone request proposes rezoning the property to the Community Oriented Residential Enhancement Zone B (CORE),[2] which may only be approved for land where a related workforce housing proposal is simultaneously approved.[3] A density bonus is given in CORE zones as an incentive to build workforce housing units.

A Major Development Review (MDR) is required for any development that proposes more than ten residential lots in certain residential zones.[4] The MDR process integrates the subdivision and site planning procedure with the zoning procedure,[5] but a separate Rezone Application is required apart from the applications required for the MDR.[6] Thus, the County is considering two co-dependant requests, where the approval of one is void without the approval of the other. The first request is for approval of a housing subdivision that is decided administratively, and the second request is for a rezone that is decided legislatively.

Work sessions to discuss the Project were held with the Snyderville Basin Planning Commission (the Commission) on May 26, 2009; June 23, 2009; August 11, 2009; October 27, 2009; and November 10, 2009. In its response dated February 1, 2010, the County stated that it anticipated at least one additional work session before the Applicant submits additional required applications[7] seeking approval of the Project. Public input concerning the Project was received on December 8, 2009; January 12, 2010; and January 26, 2010. Some members of the Old Ranch Road Neighborhood Group (the Neighborhood Group) expressed concerns during the first public input session, before submitting a request for an Advisory Opinion to the Office of the Property Rights Ombudsman on December 31, 2009.

The Neighborhood Group claims there are many significant discrepancies with the Snyderville Basin General Plan (the General Plan) and the Snyderville Basin Development Code (the Code). The Neighborhood Group also claims there are many procedural and substantive problems with the Application including: the Application violates and is being processed in violation of various sections of the Code, the Project is inconsistent with the General Plan, and notice of work sessions to affected property owners was improper. The main contention the Neighborhood Group would like to be addressed in this Advisory Opinion is whether the Summit County

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[1] The Applicant has an option to purchase the subject property from the owner, Nadine Gilmore.
[2] SNYDERVILLE BASIN DEVELOPMENT CODE § 10-5-16B.2.
[3] SNYDERVILLE BASIN DEVELOPMENT CODE § 10-5-16D.5.
[4] SNYDERVILLE BASIN DEVELOPMENT CODE § 10-3-10A.
[5] SNYDERVILLE BASIN DEVELOPMENT CODE § 10-3-10.A.
[6] The County Development Director or County Council may combine the processing and hearing of the applications required for the MDR and the Rezone Application. SNYDERVILLE BASIN DEVELOPMENT CODE § 10-3-2C.
[7] The Preliminary Plan Application, Final Subdivision Plat Application, and Rezone Application must each be submitted prior to project approval.

Council (the Council) is required to follow the General Plan when it considers applications requesting rezone to a CORE zone.[8]

The County maintains that it is processing the Application in accordance with the Code, and that any claims the Code has been violated and the Project is inconsistent with the General Plan are premature and unfounded. The County notes that no decision has been made concerning the application, and that the Commission has made no findings whether the Application is consistent with the Code or General Plan. Lastly, the County states that the General Plan is an advisory document, not regulatory one.

Analysis

It is premature to determine if the Project conforms to applicable sections of the Code and General Plan. A complete analysis at this time would be inappropriate and untimely. If the Council chooses to grant the rezone request, it must find the request is consistent with the General Plan, and the courts will defer to the Council's determination that the rezone request is in fact consistent with the General Plan. The Council's decision to grant or deny the rezone request will also be given great deference when reviewed by the courts, and affirmed if it is reasonably debatable that its decision promotes the purposes of the County Land Use, Development, and Management Act (CLUDMA).

I. It is premature to determine whether or not the Project conforms to applicable sections of the County Code and General Plan

A Sketch Plan Application (the Sketch Plan) is the first of three applications required by the MDR process. While the Sketch Plan must contain enough information to show compliance with the Code and General Plan, the Code does not consider a Sketch Plan a completed application for purposes of vesting.[9] Thus, under state law,[10] an applicant's right to develop the project proposed during the Sketch Plan phase may be limited.

After an applicant has submitted a Sketch Plan and held a preapplication conference with County staff, but before submitting a Preliminary Plan Application (the Preliminary Plan), an applicant must participate in work sessions with the Commission. Work sessions are informal meetings where various relevant issues pertaining to a development proposal are discussed and explored. The purpose of these work sessions is to educate, discuss, and clarify community policies before a Preliminary Plan is submitted and any formal action or decision is made by the County relating to a proposal. Work sessions are open to the public, but the Code does not require the County to permit public input during work sessions or send notice to affected property owners.[11] Only after a Preliminary Plan has been submitted and reviewed is a public hearing required by the Code.[12]

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[8] Email from Gary Nielsen received by OPRO Thursday, January 14, 2010.
[9] SNYDERVILLE BASIN DEVELOPMENT CODE § 10-3-10C.1.
[10] UTAH CODE ANN. § 17-27a-508(1)(a).
[11] SNYDERVILLE BASIN DEVELOPMENT CODE § 10-3-10D.2.b.
[12] SNYDERVILLE BASIN DEVELOPMENT CODE § 10-3-10D.3. A public hearing before the Council is also required during the Rezone Application phase. SNYDERVILLE BASIN DEVELOPMENT CODE § 10-7-4C.

Only after a Preliminary Plan has been submitted and a public hearing held is the Commission able to make a recommendation to the Summit County Manager (the County Manager) for approval, approval with conditions, or denial of the Preliminary Plan. After the Commission makes a positive recommendation, the applicant is able to submit a Final Subdivision Plat Application (the Final Plat), and the County Manager administratively approves, approves with conditions, or denies the project. Where a project, including one found to comply with the Code and General Plan, simultaneously requests a rezone to a CORE zone in order to receive a density incentive, the County Manager may not unilaterally approve the project without the rezone also having received approval by the Council.[13]

It is premature to evaluate if the Application submitted by the Applicant conforms to the standards of the Code and General Plan. The Application before the County is a Sketch Plan which is purposefully an informal, non-binding, and informational stage of a longer three step MDR approval process. This informal stage of the MDR process allows the Applicant, when prepared, to submit a Preliminary Plan that more fully responds to important issues raised during required work sessions and optional public input sessions. More specifically, the Applicant is able to submit a formal Preliminary Plan that complies with the General Plan and Code.

As anticipated by the Code, the Project has changed since it was first submitted.[14] The Project is likely to continue to change before any required public hearings are held, any formal findings are entered, and the Commission is required to make a recommendation to the County Manager. Depending on the Commission's recommendation, the project may continue to evolve before the Final Plat is submitted and ultimately considered by the County Manager. Even if the Applicant got far enough in the process to submit a Final Plat, and the County Manager were to approve the Final Plat, approval is without effect unless the Council rezones the land to a CORE zone.

According to the Code, no right to develop under existing County land use regulations has vested in the Applicant, and three additional applications are required before final approval.[15] Additionally, no public hearings have been held or are currently required for the Application to proceed. No findings have been entered stating whether or not the Application conforms to the Code or General Plan, and no recommendation has been made to the County Manager. It is therefore imprudent and premature to analyze in an Advisory Opinion whether the Application conforms to applicable sections of the Code and General Plan.

II. The Summit County Council may only approve a CORE rezone request that is consistent with the General Plan, and the Council's decision to grant or deny a rezone request will be given great deference.

Every county in the state of Utah is required to prepare and adopt a general plan,[16] but a general plan is an advisory document unless otherwise stated by ordinance.[17] SNYDERVILLE BASIN

[13] SNYDERVILLE BASIN DEVELOPMENT CODE § 10-5-16D.
[14] The Applicant first proposed a total of 240 units, 81 of which would be workforce housing units. The total number of proposed units has increased to 250 units, and the proposed workforce housing units have decreased to 65. Response from Summit County received February 1, 2010, Exhibit "B."
[15] This Advisory Opinion does not examine whether any right vests in a developer upon submission of a sketch plan.
[16] UTAH CODE ANN. § 17-27a-401

DEVELOPMENT CODE § 10-5-16D.7 states that the Council may permit a CORE rezone if the "rezone and accompanying work force housing proposal are consistent with the goals, objectives, and policies of the General Plan." The Code defines "consistent" as:

> An amendment to the Snyderville Basin Development Code, or to a development permit, shall be deemed "consistent" with the General Plan only if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objective and policies, set forth in the General Plan and if it meets all other criteria enumerated in the General Plan and Development Code. The term "compatible with" means that the Code amendment or development permit is not in conflict with the General Plan. The term "furthers" means to take action in the direction of realizing the goals, objective and policies of the General Plan.

SNYDERVILLE BASIN DEVELOPMENT CODE § 10-11-1.72. As adopted, the Code limits the Council's discretion when considering a CORE rezone request. The Council is obligated to consider the General Plan and make findings that any CORE rezone it approves is "consistent" with the General Plan. When the provisions relating to CORE zones were adopted, the Council voluntarily limited the approval of CORE rezone requests to those consistent with the General Plan. The Council cannot arbitrarily choose to ignore provisions of the Code it has adopted that limits its own discretion.[18] Accordingly, the General Plan has the effect of law to the extent that a CORE rezone must be consistent with the General Plan – that is the rezone must be compatible with and not in conflict with the objectives and policies of General Plan.[19] In all other respects, the General Plan is advisory.

It is well-established in Utah law that a municipal legislative body is given wide latitude to make legislative land use decisions.[20] A rezone is a legislative land use decision,[21] and great deference is given to the Council when exercising its legislative discretion to grant or deny a rezone. Under Utah law, a court will presume that a land use decision is valid unless it is found to be arbitrary, capricious, or otherwise illegal. A land use decision will not be found to be arbitrary or capricious provided that it is "reasonably debatable" the decision promotes the purposes of CLUDMA.[22]

In *Harmon City, Inc. v. Draper City*, the City Council denied a request made by a grocery store chain to rezone property from a residential use to a commercial use. *Harmon City, Inc. v. Draper City*, 2000 UT App 31 (Utah Ct. App. 2000). The District Court presumed the City Council's decision to not change the zoning classification was valid even though the City's adopted General Plan called for a commercial use on the property. *Id.* at ¶2. The Appellate Court affirmed

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[17] UTAH CODE ANN. § 17-27a-405

[18] *Springfield Citizens for a Better Community v. City of Springfield*, 1999 UT 25, ¶30 (Utah 1999)

[19] This is not to say that the CORE rezone must be exactly compliant with the General Plan in every possible respect in order to be approved. Just that it must be consistent with the goals and objectives of the General Plan.

[20] Legislative decisions are distinguishable from administrative or quasi-judicial decisions frequently made by municipal governments which must be supported by substantial evidence on the record. *Bradley v. Payson City Corp.*, 2003 UT 16, ¶14 (Utah 2003)

[21] *Harmon City, Inc. v. Draper City*, 2000 UT App 31, ¶9 (Utah Ct. App. 2000)

[22] Utah Code Ann. § 17-27a-801(3)(b)

the lower court's use of the "reasonably debatable" standard to determine if the City Council's action was arbitrary or capricious. *Id.* at ¶25. This standard of review recognizes the presumption that a legislative body's zoning decision could promote the general welfare even if it is reasonably debatable that it actually will promote the general welfare. *Id.* at ¶14. The Harmon Court found no case where a zoning classification was overturned for being arbitrary or capricious, and emphasized that a zoning decision "reflects a legislative policy decision with which courts will not interfere except in the most extreme cases." *Id.* at ¶18. The policy expressed by the Harmon Court is firmly grounded in Utah jurisprudence.[23]

Accordingly, while the Council may only approve CORE rezone requests that are consistent with the General Plan, the determination that a rezone request is or is not consistent with the General Plan is part of the legislative rezone decision made by the Council. The County's determination whether a CORE rezone is compatible with the general plan will be upheld if it is reasonably debatable.

In *Bradley v. Payson City Corp.*, an applicant challenged Payson City's decision to deny its rezone request. *Bradley v. Payson City Corp.*, 2003 UT 16 (Utah 2003). The applicant claimed it was an unreasonable decision because of a discrepancy between the City's General Plan and Zone Map. The City ultimately relied on the General Plan to support its decision to deny the rezone request rather than the Zone Map which was more likely to support approving the applicant's rezone request. The Court noted that the discrepancy between the two documents was not conclusive evidence that the City's decision was arbitrary and capricious, but on the contrary was "precisely the kind of legislative decision that should be left to the city council and undisturbed by the judiciary." *Id.* at ¶26. The Court deferred to the City Council to determine which document it would rely upon to make its decision.

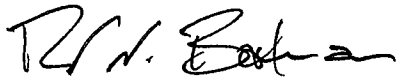
Accordingly, while the Council may only approve CORE rezone requests that are consistent with the General Plan, the courts will defer to the Council to make that determination. The Council is given the same deference when deciding whether to approve or deny any rezone request. The Council's finding that a CORE rezone request is compatible with the General Plan will be upheld it is reasonably debatable that the decision will promote the purposes of CLUDMA, and "is necessary to promote the public health, safety and welfare of the residents of the Snyderville Basin." SNYDERVILLE BASIN DEVELOPMENT CODE § 10-5-16D.7. A court will not substitute its judgment for that of the Council's when considering a legislative zoning decision made by the Council. *Bradley*, 2003 UT 16 at ¶24.

Conclusion

The County may continue to process the submitted Sketch Plan, and review all related applications that may come before for it for completeness and compliance with the Code and General Plan. The County Manager and the Commission should be given the opportunity to

[23] *Marshall v. Salt Lake City*, 105 Utah 111, 141 P.2d 704 (1943); *Dowse v. Salt Lake City Corp.*, 123 Utah 107, 255 P.2d 723 (1953); *Gayland v. Salt Lake County*, 11 Utah 2d 307, 358 P.2d 633 (1961); *Naylor v. Salt Lake City Corp.*, 17 Utah 2d 300, 410 P.2d 764 (1966); *Crestview-Holladay Homeowners Ass'n v. Engh Floral Co.*, 545 P.2d 1150 (Utah 1976); *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032 (Utah 1984); *Walker v. Brigham City*, 856 P.2d 347 (Utah 1993); *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct. App. 1998)

review and make formal findings as to the Project's compliance with applicable County standards. Additionally, if the Council chooses to approve a CORE rezone request, it must find the rezone request is consistent with the General Plan. This is part of the legislative zoning decision, and will be examined under the reasonably debatable standard. Conversely, even if a CORE rezone request found to be consistent with the General Plan is denied by the Council, the courts will affirm the Council's decision if it is reasonably debatable the decision will promote the purposes of the CLUDMA.



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

NOTE:

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

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

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

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

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:

Bob Jasper
Summit County Manager
60 North Main
Coalville, Utah 84017

On this 17th day of August, 2010, 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.

Cynthia W Nelson

Office of the Property Rights Ombudsman