

Advisory Opinion #106

Parties: Citizens for Responsible Government, Debie Wangsgard and City of Draper

Issued: September 21, 2011

TOPIC CATEGORIES:

J: Requirements Imposed upon Development

R(v): Other Topics (Interpretation of Ordinances)

The conclusion that a Master Area Plan is not yet required is reasonable, and is supported by the language and intent of the ordinance. Allowing a road to be built within a required buffer zone is not a reasonable interpretation of the ordinance governing the design and purpose of the buffer zone. If the property is located within a FEMA flood zone, the City Code requires a Natural Resources Inventory to be completed for any subdivision.

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ADVISORY OPINION

Advisory Opinion Requested by: Citizens for Responsible Government,
% Debie Wangsgard

Local Government Entity: Draper City

Applicant for the Land Use Approval: Draper Holdings, LLC

Project: Subdivision

Date of this Advisory Opinion: September 21, 2011

Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property
Rights Ombudsman

Issues

Did the City correctly interpret its ordinances regarding development in a Transit Station District Zone?

Summary of Advisory Opinion

The City's conclusion that a Master Area Plan is not yet required is reasonable, and is supported by the language and intent of the ordinance.

Allowing a road to be built within a required buffer zone is not a reasonable interpretation of the ordinance governing the design and purpose of the buffer zone.

Finally, if the property is located within a FEMA flood zone, the City Code requires a Natural Resources Inventory to be completed for any subdivision.

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. The opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A request for an Advisory Opinion was received from Debie Wangsgard, on behalf of Citizens for Responsible Government, on August 22, 2011. A copy of that request was sent via certified mail to Tracy B. Norr, City Recorder of Draper City. A certified mail receipt, indicating that the City had received the letter, was delivered to the Office of the Property Rights Ombudsman on August 29, 2011.

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, from Citizens for Responsible Government, filed August 22, 2011 with the Office of the Property Rights Ombudsman.
2. Response from Draper City, submitted by Doug Ahlstrom, City Attorney, received September 6, 2011.
3. Reply from Citizens for Responsible Government, received via email on September 16, 2011.

Background

In the summer of 2011, Draper City considered a subdivision application involving property near a proposed station for a commuter rail line being built in the area. In anticipation of the new rail line, the City created a “Transit Station District Zone” (TSD Zone) to govern development near the proposed station. In 2008, the City entered a Development Agreement with the Utah Transit Authority, the Redevelopment Agency of Draper City, and Whitewater VII Holdings, LLC (which owned property near the proposed station).¹ The City entered the Development Agreement in part to encourage construction of the station in Draper, and the property owner

¹ Whitewater VII Holdings, LLC is identified in the Development Agreement as the owner/developer of the property. The Request for Advisory Opinion (and other documents submitted with the Request) identifies “Draper Holdings, LLC as the owner/developer. The analysis in this Opinion does not depend upon the ownership history. It is understood that Draper Holdings is the applicant for subdivision approval.

sought assurances that the property near the proposed station could be developed. The Development Agreement referenced the TSD Zone, and acknowledged that the property could rely on the TSD Zone regulations for development. The site was chosen for the new transit station, and so the property owner applied to divide the property, which was about 145 acres, into six parcels, evidently as a first step towards development of the parcels. According to the City, the application was for the subdivision only, not for any development of the lots.

Because the application proposed the creation of six parcels, it qualified as a “minor subdivision” under the City’s ordinances, even though the original property was quite large.² According to the City’s planning staff, the purpose of the subdivision was to establish (1) the primary rights-of-way for the development; (2) bulk properties for later planning and development; and (3) “backbone” infrastructure and utilities for future development.³

At a City Council meeting held on August 2, 2011, several neighboring property owners objected to the application, arguing that the City had not followed its ordinances. Among the many comments, the neighbors alleged the following ordinance violations:

1. The subdivision application did not include a “Master Area Plan” (MAP) required by § 9-14-060 of the Draper City Code.
2. The City allowed a public road in a buffer area, which is not permissible according to § 9-14-080.⁴

After the neighbors raised these objections, the City’s Planning Division responded in a memorandum to the Mayor and City Council, dated August 10, 2011. That memo painstakingly addressed each concern raised by the neighbors, including the two listed above. The memo states that “[t]he Development Review Committee and Zoning Administrator have determined that due to the nature of the subject request a MAP submission and approval is not required with this application but will be required prior to further applications.” Memorandum, Jim Bolser to Mayor and City Council, August 10, 2011, at 3.

In response to objections about the road being in the buffering area, the memo states that the buffer area will be addressed in the future, as part of the MAP process. It also notes that “the Planning Commission forwarded a positive recommendation to the City Council on August 4, 2011, that

² A “minor subdivision” has ten or fewer lots. *See* DRAPER CITY CODE, § 17-8-010.

³ *See* Draper City Development Review Committee Staff Report, July 19, 2011 (“Draper TOD – Minor Subdivision Request”).

⁴ The neighboring property owners also contend that the subdivision application is not complete, because several required items were not submitted. However, the neighbors did not explain what items were missing. They also contend that the City did not obtain approvals from Salt Lake County, UDOT, and the Army Corps of Engineers. This Opinion, however, will focus only on the three matters identified in the Request for Advisory Opinion, and will not address the additional objections. The neighbors also raised other objections about the cost, feasibility, and appropriateness of a development near the station. Those matters were not raised in the Request, and, for the most part are not appropriate topics for an Advisory Opinion.

included the extension of Galena Park Boulevard being permitted to be within the buffer area so long as the overall dimension of the buffer is satisfied.” *Id.* Memorandum at 3. In response to a challenge that the City Code does not allow a road within a buffer, the Memo states

The Development Review Committee and Zoning Administrator have issued their determination regarding the buffering requirement of 9-14-080(B). Whatever the intent of this section was, the requirements of that section will be enforced based on that determination and the determination of the City Council.

Id., Memorandum at 12.

The neighborhood group, Citizens for Responsible Government (CRG) appealed the Zoning Administrator’s determinations to the City’s Board of Adjustment.⁵ This Opinion was requested to evaluate the requirements in the City Code concerning the Master Area Plan, the buffer zone requirements, and whether a natural resources inventory was required as part of the subdivision application.⁶

Analysis

The three issues raised by CRG involve whether or not the City’s ordinances were properly interpreted. Based upon the plain language in the City Code, this Opinion concludes that a Master Area Plan was not required, because the application was for a subdivision and not development. However, the language of the City Code does not support a conclusion that a buffer zone may include a large road. Finally, the City Code requires a natural resources inventory if a subdivision application affects property in a FEMA zone.

A. *Standards of Statutory Interpretation*

Statutory interpretation begins with the language of the ordinance. *See Biddle v. Washington Terrace City*, 1999 UT 110, ¶ 14, 993 P.2d 875, 879. The “primary goal . . . is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.” *Foutz v. City of South Jordan*, 2004 UT 75 ¶ 11, 100 P.3d 1171, 1174. “In addition statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and . . . interpretations are to be avoided which render some part of a provision nonsensical or absurd.” *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996) (internal quotes omitted). “No clause[,] sentence or word shall be construed as superfluous, void, or insignificant if the construction can be found which will give force to and preserve all the words of the statute.” *State v. Anderson*, 2007 UT App 304, ¶ 11, 169 P.3d 778. It must also 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.

⁵ As of the writing of this Opinion, that appeal is pending before the Board.

⁶ The issue about the natural resources inventory was not raised at the City Council meeting, or in the August 10 Memorandum, however, it was included as part of the Request for Advisory Opinion.

In *Carrier*, the Utah Supreme Court further explained 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 1216.⁷

B. Section 9-14-060 Requires a Master Area Plan in Connection With a Development Proposal, but not Necessarily a Subdivision.

The City Code requires that a Master Area Plan be prepared in conjunction with a development proposal, but not for a subdivision application. Section 9-14-060 requires a MAP “in connection with the development of any property within the [Transit Station District].” The question then becomes whether the application submitted by Draper Holdings was for “development” or was for a subdivision only. The City’s staff have taken the position that “development” does not mean “subdivision only.” This interpretation is supported by the language of the ordinance.

To begin with, the word “development” implies a change, especially growth, increase, improvement, advancement, building, or construction. *The Oxford Dictionary and Thesaurus*, American Ed. (1996), at 388. Furthermore, the Draper City Municipal Code’s definition of “development” includes the following:

- (1) Any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations.
- (2) Any construction, reconstruction, or expansion of a building, structure, or use.
- (3) Any change in the use of a building or structure.
- ...
- (5) Any change in the use of land that creates additional demand and need for capital facilities.
- ...
- (7) The act, process or result of developing.

DRAPER CITY MUNICIPAL CODE, § 9-3-040 (definition of “Development or Development Activity”). This implies something more than merely redefining the property boundaries or dividing a parcel into smaller lots.⁸

As stated above, the interpretation of an ordinance starts with the plain language, but the objective is to give meaning to that language in light of the intent of the ordinance. The City Code states that the intent of a MAP is to help an applicant obtain approval for large projects

⁷ In the *Carrier* decision, the court applied that rule to an ordinance interpreted by a “lay” planning commission, rather than by a professional staff. Using the reasoning of the *Carrier* decision, the approach should be the same, however, and the interpretation advanced by the City’s zoning staff should be given the same non-binding deference. See *Carrier*, 2004 UT 98, ¶¶ 25-28, 104 P.3d at 1215-16.

⁸ The definition of subdivision from the Utah Code states that the term includes “division or development” of land.

within the TSD zone. *See* DRAPER CITY MUNICIPAL CODE, § 9-14-060(A). The MAP guides future development, and must include transportation, public spaces, proposed land uses, and specific design and development standards. *Id.* A MAP is reviewed and must be approved by the City’s Architectural Control Committee before any building permit or conditional use may be approved. *Id.* § 9-14-060(B).⁹

Along with land use and architectural guidelines, a MAP should identify the proposed sequence of development, and an economic analysis of commercial properties that will be built. Altogether, the purpose of the MAP requirement is to guide the design of an entire project, including land uses and buildings. With this purpose in mind, the City’s interpretation is reasonable and supported by the language and intent of the ordinance. Because the City is entitled to a degree of “non-binding deference,” the interpretation should be accepted.¹⁰

C. It is Not Reasonable to Conclude That a Buffer Zone May Include a Large Public Road.

Given the purpose of a “buffer zone,” as described in the City Code, it is not reasonable to include a road as an acceptable use within that area. A buffer zone is required in the Transit Station District Zone along the boundaries with residential areas. The average width of the zone must be at least 200 feet, and it cannot be less than 100 feet wide. A buffer zone “is meant to assist in transitioning from the smaller scale of the existing residential development to the taller, denser development of the TSD.” DRAPER CITY MUNICIPAL CODE, § 9-14-080(B). Within 50 feet of a buffer zone, building heights are limited, further showing that the purpose is to separate the denser commercial uses from the residential area.

A buffer zone consists of recreational or “public use space,” and is meant to be “extensively landscaped.” The term “public use space” is defined as “land set aside, dedicated, designated, or reserved for public or private use for recreational or amenity activities, including but not limited to parks, plazas, and patios.” *Id.*, § 9-14-020(N). Thus, the language of the ordinance anticipates that buffer zones consist of extensively landscaped recreational or public use areas, meant to separate residential neighborhoods from commercial development.

It is hard to see how a 106-foot road fits that definition or purpose. A commercial development will likely attract heavy traffic, which will be carried on roadways. A road is therefore part of the development that the buffer zone is meant to “buffer.” The purpose of the buffer zone is to separate the two areas, reduce noise, and to enhance visual and recreational amenities.¹¹ A road that consumes over one-half of the buffer area does not adequately fulfill those objectives.¹² The

⁹ The Architectural Control Committee is established in § 9-14-070.

¹⁰ It should also be remembered that the City is not waiving the MAP requirement, but is simply not applying it to the subdivision application. The City acknowledges that a MAP will be necessary for approval of future development in the area.

¹¹ It would seem likely that the buffer zone could provide amenities for both the residential area and the new commercial development.

¹² It is noted that the definitions of “public use space” and “amenity area” allow paving for recreation areas. These areas would be part of the “extensively landscaped” buffer zone, and the paved areas would be for recreational

deference afforded to the City does not allow an interpretation that is so far removed from the ordinance's purpose and language. A local government's deference is not a means to ignore the plain language and intent of an ordinance.

D. A Natural Resource Inventory is Required for Subdivisions in Certain Areas.

If the property falls within one of the categories listed in the City Code, a Natural Resources Inventory is required. Section 9-24-020 of the City Code expressly requires a Natural Resources Inventory (NRI) report for subdivisions and commercial development in certain areas. If the property is located in one of those areas, an NRI report is thus required. This is not a matter of interpretation, because the ordinance expressly requires such reports for subdivisions:

An NRI report shall be part of the application requirements for all subdivision and commercial site plan development applications on property where any of the following are true for any portion of the subject property . . .

- (i) located to the east of Highland Drive north of 13200 South;
- (ii) located to the east and south of the UTA light rail corridor south of 13200 South;
- (iii) located within a FEMA designated A-series flood zone, according to the currently adopted mapping; or
- (iv) located within the Sensitive River Overlay as shown on the General Plan Land Use Map.

DRAPER CITY MUNICIPAL CODE, § 9-24-020(b)(1).

According to Citizens for Responsible Government, at least part of the property is located within a FEMA flood zone. If that is true, then an NRI report must be submitted as part of the subdivision application. The ordinance is very explicit, and the City must comply with the mandatory provisions of its ordinances. UTAH CODE ANN. § 10-9a-509(2). If the property is located in one of those areas, an NRI report is required for a subdivision application.

Conclusion

Statutory interpretation aims to give effect and meaning to all terms of a law, based on the language used and the intent of the ordinance. Statutory interpretations by local governments are allowed a level of "non-binding deference," because of their specialized knowledge and background.

purposes, such as plazas or patios. Simply because the ordinance allows some paving does not mean that a road may be built through an area meant for recreational uses.

The City's conclusion that a Master Area Plan is not needed to consider the subdivision application is reasonable, and is supported by the language and intent of the ordinance. A MAP is intended to guide development, and addresses such things as land uses, parking, building design, and economic evaluations, which are not part of a proposed division of land. The City will require a MAP as the project progresses, but there is no need for one now.

Allowing a road as part of a "buffer zone" is not reasonable and is not supported by the language and intent of the ordinance. The buffer zone is intended to separate residential and commercial uses, and provide recreational and visual amenities. The ordinance requires a buffer zone to be extensively landscaped, and include recreational and public use areas. This cannot be accomplished with a road. A road is actually part of the commercial development the zone is meant to buffer.

Finally, a Natural Resources Inventory is required for all subdivisions in certain areas. If all or part of the property falls within one of those areas, the NRI is required. The neighborhood group requesting this Opinion alleges that the property is within a FEMA flood zone. If that is true, the ordinance expressly requires the NRI report for any subdivision.

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. § 63G-7-401 (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:

Tracy B. Norr, City Recorder
Draper City
1020 E. Pioneer Road
Draper, Utah 84020

On this _____ Day of September, 2011, 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