Advisory Opinion #1

Parties: Ivory Development and Taylorsville City

Issued: July 5, 2006

TOPIC CATEGORIES:

D: Exactions on Development
K: Compliance with Mandatory Land Use Ordinances

A municipality is bound by the terms and standards of its applicable land use ordinances and must comply with the mandatory provisions of its ordinances. When the ordinance uses the word "shall," it indicates a mandatory provision.

The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov

Advisory Opinion

Advisory Opinion Requested by:	Christopher P. Gamvroulas, President Ivory Development
Local Government Entity:	Taylorsville City
Applicant:	Ivory Development
Project:	The Towns at Ivory Highlands
Date of this Advisory Opinion:	July 5, 2006
Author:	Craig M. Call, Attorney Office of the Property Rights Ombudsman

Can Taylorsville City impose a condition in approving an application for a conditional use permit for The Towns at Ivory Highlands, that requires that the street proposed for the development be a public street? How should the status of the street affect the calculation of the maximum number of residential units that can be built on the property?

Review:

The request for an advisory opinion in this matter was received by the Office of the Property Rights Ombudsman on Friday, May 26, 2006. The decision by the author to proceed with the preparation of the opinion was made with the consent of officials of the City of Taylorsville and Ivory Development on June 6, 2006.

Prior to the preparation of this opinion, the author met twice with Chris Gamvroulas of Ivory Development and Kevin Egan Anderson, Attorney for Ivory. The author also met in a separate meeting with Mark McGrath and Nick Norris of the Taylorsville City planning staff. There have been extensive phone calls and email correspondence between and among the parties and the author in the process of reviewing the facts, issues and law.

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

1. Excerpts from the transcript of a Taylorsville Planning Commission hearing held April 22, 2006.

2. Information provided by the City of Taylorsville about Planned Unit Developments. Five page undated document apparently used to explain how to apply for a PUD.
3. Staff Reports prepared by the Taylorsville Department of Community Development and dated December 22, 1005 and February 6, April 4, and April 6, 2006.
4. Letter to Chris Gamvroulas from Nick Norris, dated February 15, 2006 notifying him of preliminary approval of a land use application, file 46C05.
5. Letter to Chris Gamvroulas from Nick Norris, dated April 12, 2006 notifying him of preliminary approval of a land use application, file 46C05.
6. Letter to Craig Call from Mark McGrath, dated June 14, 2006, with attachments:
    a. Area map showing phases 1-10 of Ivory Highlands Subdivision
    b. Taylorsville Land Use Ordinances – Chapter 13.04 – Definitions
    c. Chapter 13.28 – C-2 Commercial Zone
    d. Chapter 13.42 – Planned Unit Development
    e. Chapter 13.50 – Conditional Uses
    f. Staff Report – dated April 19, 2004
    g. Minutes – Taylorsville Planning Commission – April 27, 2004
    h. Staff Report – dated December 22, 2005
    i. Minutes – Taylorsville Planning Commission – January 10, 2006
    j. Staff Report – dated February 6, 2006
    k. Minutes – Taylorsville Planning Commission – February 14, 2006
    l. Staff Report – dated March 21, 2005
    m. Staff Report – dated April 6, 2006
    n. Minutes – Taylorsville Planning Commission – April 11, 2006
    o. Timeline – Ivory Highlands
7. Minutes – Taylorsville Planning Commission – March 28, 2006.
8. Density calculations of Ivory Highlands PUD – all phases, prepared by Ivory Development

Assumed facts:

1. Ivory Development proposed the development of a parcel of property at about 3200 West on 6200 South, zoned as C-2 under the Taylorsville land use ordinances. That zone is regulated under Chapter 13.28 of the ordinances.
2. The proposed use is a townhouse development consisting of 38 residences.
3. According to the ordinances, at Chapter 13.28.040, a "planned unit development" is allowed in the applicable C-2 zone as a conditional use.
4. According to the ordinances, any residential use shall be a permitted use in a planned unit development which allows residential uses at 13.42.060.
5. The project, including a conditional use for a planned unit development, received preliminary approval from the Taylorsville Planning Commission on February 14, 2006.

6. In granting amendments to that preliminary approval for the project on April 11, 2006, the Taylorsville Planning Commission imposed a condition that the road in the project be dedicated as a public road.
7. The commission also imposed a condition that the number of residential units allowed in the project be recalculated after deducting the land area occupied by the required public street.
8. The Taylorsville community development staff has concluded that the proposed 38 unit development complies with the relevant density requirements of the applicable Taylorsville land use ordinances.
9. Ivory Development has appealed the approval of the conditional use permit to the Taylorsville City Council.

Analysis:

Issue: Can Taylorsville City impose a condition in approving an application for a conditional use permit for The Towns at Ivory Highlands, that requires that the street proposed for the development be a public street? How should the status of the street affect the calculation of the maximum number of residential units that can be built on the property?

Utah code provides that "A municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances." U.C.A. 10-9a-509(2). This requirement is also well-settled in Utah Case Law. See *Springville Citizens v. City of Springville*, 1999 UT 25:

> P23 A municipality's land use decisions are entitled to a great deal of deference. See Xanthos v. Board of Adjustment, 685 P.2d 1032, 1034 (Utah 1984); Triangle Oil, Inc. v. North Salt Lake Corp., 609 P.2d 1338, 1339-40 (Utah 1980); Cottonwood Heights Citizens Ass'n v. Board of Comm'rs, 593 P.2d 138, 140 (Utah 1979); Naylor v. Salt Lake City Corp., 17 Utah 2d 300, 410 P.2d 764 (Utah 1966). Therefore, "the courts generally will not so interfere with the actions of a city council unless its action is outside of its authority or is so wholly discordant to reason and justice that its action must be deemed capricious and arbitrary and thus in violation of the complainant's rights." Triangle Oil, 609 P.2d at 1340. Indeed, the statute that forms the basis of this appeal requires the courts to "presume that land use decisions and regulations are valid." Utah Code Ann. § 10-9-1001(3)(a) . However, this discretion is not completely unfettered, and the presumption is not absolute. If a municipality's land use decision is arbitrary, capricious, or illegal, it will not be upheld. See id. § 10-9-1001(3)(b).
>
> * * * * *
>
> P26 . . . . Under Utah Code Ann. § 10-9-1001(3)(b) , we must also determine whether the City's decision was illegal. Plaintiffs argue convincingly that the

> City's decision to approve the PUD was illegal because the City violated its own ordinances during the approval process. Plaintiffs highlight that compliance with the city ordinances at issue was, under the City's own legislatively enacted standard, mandatory. Plaintiffs point to Springville City ordinance 11-10-101, which states, "For purposes of this Title, certain words and terms are defined as follows: . . . (4) Words 'shall' and 'must' are always mandatory." (Emphasis added.)
>
> * * * * *
>
> P29 . . . While substantial compliance with matters in which a municipality has discretion may indeed suffice, it does not when the municipality itself has legislatively removed any such discretion. The fundamental consideration in interpreting legislation, whether at the state or local level, is legislative intent. See Board of Educ. v. Salt Lake County, 659 P.2d 1030, 1030 (Utah 1983). Application of the substantial compliance doctrine where the ordinances at issue are explicitly mandatory contravenes the unmistakable intent of those ordinances.
>
> P30 Municipal zoning authorities are bound by the terms and standards of applicable zoning ordinances and are not at liberty to make land use decisions in derogation thereof. See Thurston v. Cache County, 626 P.2d 440, 444-45 (Utah 1981). The irony of the City's position on appeal is readily apparent: the City contends that it need only "substantially comply" with ordinances it has legislatively deemed to be mandatory. Stated simply, the City cannot "change the rules halfway through the game." Brendle v. City of Draper, 937 P.2d 1044, 1048 (Utah Ct. App. 1997). The City was not entitled to disregard its mandatory ordinances. Because the City did not properly comply with the ordinances governing P.U.D. approval, we conclude that under Utah Code Ann. § 10-9-1001(3)(b) , the City's decision approving the PUD was illegal.

In determining whether or not to uphold the decisions of a land use authority, the appeals body that hears the matter need not give any deference, however, to the authority's interpretation of the ordinances:

> It is clear that § 10-9-704 requires the Board to review the staff's interpretation for correctness, giving it no deference. Although "the person or entity making the appeal has the burden of proving that an error has been made," Utah Code Ann. § 10-9-704(3) (1996), the person need show only an "error in an[] order, requirement, decision, or determination made by an official in the administration or interpretation of the zoning ordinance." Id. § 10-9-704(1)(a)(i). There is no requirement that the Board give any deference to the administrator or executive official making the determination.

Brown v. Sandy City Bd. Of Adj., 957 P.2d 207 (UT App 1998).

In amending the previously granted preliminary approval to the Towns at Ivory Highlands, the Taylorsville Planning Commission imposed the following condition 14:

> That the road be a public street and applicant is encouraged to submit an exception request to the roadway standards ordinance to modify the right of way width to accommodate the minimum necessary to make it a public right of way, which more than likely would be 30" to back of curb to back of curb, possibly 32' to allow a foot from back of curb to back of curb for the future right of way line.

Minutes, Taylorsville Planning Commission, April 11, 2006, page 7-8 and 11-12.

The Taylorsville Land Use Ordinances (hereafter TLUO), at 13-28-040 (Dwelling group) (c) provides, in part, for a specific condition of dwelling group uses in the C-2 Zone: "Access shall be provided by a private street or right of way from a public street . . ." (Emphasis added)

In the PUD Section of the ordinances, at 13.42.080, it states that "density of dwelling units per acre shall be the same as allowed in the zone in which the planned unit development is located." Where the word "shall" is used, the land use authority must comply with the ordinance and cannot reduce the density through the more flexible device of the CUP section of the ordinance.

By approving the PUD, the land use authority would be required to comply with the mandatory provisions of the PUD ordinance, since the term "planned unit development" is defined in the TLUO as "a complete development plan for an area pursuant to this title". See section 13.04.400.

By using the term "Planned Unit Development" as a conditional use in the C2 zone, the ordinances would be read to require that a PUD allowed as a CUP must comply with the mandatory provisions of the TLUO relating to PUD's -- specifically the PUD Chapter at 13.42. Thus, for example, the underlying C2 zone allows a density of 9 units per acre at 13.28.060(A) and that density governs a PUD in that zone because of the mandatory language related to PUD's found at 13.42.080.

That being stated, however, the PUD chapter also states: "The purpose of the planned unit development is to allow diversification in the relationship of various uses and structures to their sites and to permit more flexibility in the use of such sites." TLUC at 12.42.020.

A "Planned Unit Development" is also defined in the ordinance as "an integrated design for development of residential, commercial, or industrial uses, or combination of such uses, in which one or more of the regulations, other than use regulations, of the district in which the development is situated, is waived or varied to allow flexibility and initiative in

site and building design and location in accordance with an approved plan and imposed general requirements as imposed in this chapter. . .”

The waivers allowed in the PUD chapter do not permit the land use authority to ignore the mandatory requirements of the ordinances, and in fact specifically requires that the proposal “fully meets the intent and purpose and requirements of the zoning ordinance.” TLUC at 13.42.010.

Since condition #14 is deemed illegal, condition #15 in the Planning Commission’s approval of the proposed PUD is irrelevant. That condition reads:

> Due to the road now being public, the density should be calculated less the right of way area once the right of way has been determined.

Conclusion:

In reviewing the decisions of a land use authority in interpreting the land use ordinances, no deference need be given to the authority. The board hearing the matter need only decide whether or not the decision of the authority was correct. The purpose of an advisory opinion is to review the issues raised as an appeals body or court would review them and determine the appropriate resolution of the issue as it might be determined by such an entity.

In this case, the PUD ordinance allows flexibility in the approval of a development, including the allowance of “any residential use” in a PUD. TLUC at 13.42.060. A dwelling group could therefore be approved in the C2 Zone and was approved by the appropriate land use authority. As stated clearly in the staff report, this approval included a waiver of the requirement of single ownership of a dwelling group, and was an appropriate waiver that was consistent with the goals of the ordinance and did not violate a mandatory provision of the ordinances. The definition of “dwelling group” does not include mandatory language related to common ownership in TLCO at 13-04-170. All involved sought approval of this waiver and it was appropriately granted.

Other requirements in the land use ordinances are mandatory by use of the word “shall”. By approving a dwelling group, the land use authority was also bound by the provisions of the ordinance relating to dwelling groups in the C2 zone. The condition imposed by the land use authority as item 14 contradicts a mandatory provision of the Taylorsville ordinances stating that streets in a dwelling group be private. Item 14 is an illegal condition. The street in the proposed PUD must therefore be a private street.

According to the record, the area of private streets is included in the density calculations when considering the number of dwelling units that can be built in a PUD in Taylorsville. See “Addendum to Staff Report for File 46C05” item 14. (While not noted, this is

apparently an addendum to the staff report dated March 21, 2006, identified on the cover of the document in error as March 21, 2005).

The density of the underlying zone at 9 units per acre is the appropriate density to be applied to the total project area of 4.3 acres, yielding a maximum of 38 residential units on the site, as calculated in the staff report dated March 21, 2006 as item A under "Applicable Zoning Ordinances."

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.

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.