Advisory Opinion #3

Parties: Brad Richards and Morgan County

Issued: July 10, 2006

TOPIC CATEGORIES:
K: Compliance with Mandatory Land Use Ordinances

If a county ordinance requires compliance with the county's general plan, any part of the approval that does not comply with the general plan is invalid. A final decision of a land use authority or appeal authority is valid if the decision is supported by substantial evidence in the record and is not illegal.

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Advisory Opinion

Advisory Opinion Requested by:	Brad Richards and others
Local Government Entity:	Morgan County
Applicant for the Land Use Approval:	Gardner Cottonwood Creek LLC
Project:	Cottonwoods PUD Overlay District
Date of this Advisory Opinion:	7-10-06

Issue: Does the application of the Cottonwoods at Mountain Green PUD Overlay District Development comply with the requirements of the Morgan County Land Use Ordinances?

Review:

The request for an advisory opinion in this matter was received by the Office of the Property Rights Ombudsman on Friday, May 5, 2006. A letter with the request and all the attachments included was sent by certified mail, return receipt requested, to Morgan County on May 9, 2006. The letter was addressed to Craig Fisher, Commissioner 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. A copy of the letter was also sent to Stacy Lafitte, the Morgan County Recorder. A copy of the request and all attachments was also sent to Rulon Gardner, the registered agent of Gardner Cottonwood Creek, LC, as shown on the records of the Division of Corporations and Commercial Code at the Utah Department of Commerce, at the address shown on those records. These letters were sent certified mail, with return receipt requested, and all were received by the County and by the company on May 10, 2006.

On May 18, 2006 I spoke with Sherrie Christensen, the County Planner, and on May 11, 2006, with Jann Farris, the County Attorney, each of whom advised me that the County Council had approved my proceeding to prepare the opinion from the Office of the Property Rights Ombudsman. I also spoke with Cathy James on May 11, 2006 and Brad Richards at about the same date, who also consented to my preparing the opinion. On May 11 I also spoke with LaMont Richardson, representing Gardner Cottonwood Creek LLC, who agreed to have me proceed. My decision to proceed with the preparation of

the opinion was made on May 18, 2006 and the parties were notified of that decision via a letter dated May 22, 2006

Prior to the preparation of this opinion, I visited via telephone several times with Cathy James, the attorney who jointly prepared the request for an advisory opinion with the person making the request, Brad Richards. I also met with Jann Farris, Morgan County Attorney and with Sherrie Christensen, Morgan County Planner, in Morgan on June 2, 2006, where they made available to me a number of documents related to the project which is the subject of this opinion. In order to properly analyze the facts and issues, I made a second trip to Morgan to again review the files on June 13, 2006 and again on June 27, 2006. I also had conversations prior to writing this opinion with Rulon Gardner, principle of Gardner Cottonwood Creek LLC and LaMont Richardson and Robert McConnell of Parr Waddoups, the attornies for the LLC. Numerous emails were exchanged in the process of preparation, each of which was circulated to all those individuals mentioned and copies of which are in the file at the Office of the Property Rights Ombudsman.

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

1. Morgan County Ordinances:
   a. Title 16, Chapter 6, Section 230 – Powers and Duties of the Board of Appeals
   b. Title 16, Chapter 6, Section 240 – Appeals.
   c. Title 16, Chapter 8 – Code Amendment, Document, Submission, Review Procedures and Process Steps
   d. Title 16, Chapter 35 – Planned Unit Development (PUD) Overlay Zone.
2. Morgan County General Plan, including a section entitled Mountain Green Area Plan.
3. Morgan County Council – Staff Report, April 18, 2006 – Request: Approval of Development Plan, Development Agreement & Preliminary Plat, Phase II, Cottonwood Hills (draft overlay ordinance).
4. Proposed ordinance – Chapter 49 – PUD OVERLAY DISRICTS (PUD), COTTON WOODS PUD OVERLAY DISTRICT. Undated version provided on June 13, 2006 by the Morgan County Planner, Sherrie Christensen
5. Proposed agreement – Development Agreement for the Cottonwoods at Mountain Green, Morgan County, Utah. Version dated 6/12/06.
6. pdf document showing a map of the Mountain Green area of Morgan County with the approximate locations of the residences of each of the individuals who joined in filing an appeal of the Morgan County Council's decision approving a preliminary plan for the Cottonwoods development to the Morgan County Board of Appeals. Map provided by Sherrie Christensen, the Morgan County Planner with an attached note indicating that the County Engineer had prepared the map.

7. Brief of Appellants, Before the Morgan County Board of Appeals, Appellants Brad Richards and others, dated May 3, 2006 and attached to the Request for an Advisory Opinion in this matter. The brief includes 21 attachments. A copy of the entire document was provided to the other parties with the original request for an advisory opinion, mailed to the parties as noted above on May 9, 2006.
8. County Staff Response to Brad Richards Appeal. Undated thirteen page summary provided by Sherrie Christensen, Morgan County Planner to me on June 20, 2006. Electronic copies were provided to the parties noted above on that same date via email.
9. Letter dated May 9, 2006 to the Morgan County Board of Appeals from Parr Waddoups Brown Gee & Loveless, Attorneys for Gardner Cottonwood Creek LC. This letter is also a response to the Brief of Appellants.
10. Letter dated May 24, 2006 to the Morgan County Board of Appeals from Robert McConnell, Parr Waddoups Brown Gee & Loveless, Attorneys for Gardner Cottonwood Creek LC. This letter challenges the jurisdiction of the Morgan County Board of Appeals to hear the appeal.

Assumed facts:

1. The proposed Cottonwoods PUD Development (referred to in the documents, minutes and correspondence by several names, but herein referred to as the PUD) involves approximately 1036 acres of land in Morgan County.
2. Before proceeding with development in the format proposed by the developer, Gardner Cottonwood Creek LC, Morgan County must approve a concept plan, an overlay ordinance, and a development agreement.
3. The Morgan County Council granted preliminary approval for the Cottonwoods concept plan on April 18, 2006.
4. Brad Richards and others filed an appeal to the Morgan County Board of Appeals on May 3, 2006, claiming that the preliminary approval by the Council did not comply with mandatory provisions of the Morgan County ordinances and asking the Board of Appeals to reverse the Council's decision.

Analysis:

In previous commentaries distributed to the parties involved in the preparation of this advisory opinion, I have provided the background analysis completed by which I came to the conclusion that some of the persons who filed the appeal of this matter to the Morgan County Board of Appeals had standing to do so. I also prepared and circulated commentaries concluding that the Board of Appeals can properly hear the kind of issues that are raised in the appeal if that appeal is timely brought. Those commentaries are not a part of this advisory opinion.

Brad Richards, who requested this opinion, asks only whether or not the Council erred in granting preliminary approval for the PUD on April 18, 2006.

Is the Current Issue Legislative or Administrative?

There is some confusion in my mind as well as others in the land use arena in exactly what is an administrative decision and what constitutes a legislative decision in the land use context. This issue is pivotal, for there are different standards that a court or the Board of Appeals should use in determining if the decision by a local land use authority will be upheld.

When a legislative body makes legislative decisions it has very broad discretion. Its decisions will rarely be overturned on appeal, and the appeal is not to a Board of Appeals but to the District Court. The Board of Appeals only hears appeals from decisions applying or interpreting the ordinance, not from decisions creating the ordinances in the first place or amending them. *Bradley v. Payson City Corp*., 2003 UT 16, at para. 13.

A legislative decision by the Council will be upheld by the courts if it is "reasonably debatable that the decision could promote the general welfare."

> This court has long recognized that municipal land use decisions should be upheld unless those decisions are arbitrary and capricious or otherwise illegal. Gayland v. Salt Lake County, 11 Utah 2d 307, 358 P.2d 633, 636 (Utah 1961) ; Marshall v. Salt Lake City, 105 Utah 111, 141 P.2d 704, 709 (Utah 1943) . Indeed, municipal land use decisions as a whole are generally entitled to a "great deal of deference." Springville Citizens for a Better Cmty. v. City of Springville, 1999 UT 25, P23, 979 P.2d 332 . However, in specific cases the determination of whether a particular land use decision is arbitrary and capricious has traditionally depended on whether the decision involves the exercise of legislative, administrative, or quasi-judicial powers. When a municipality makes a land use decision as a function of its legislative powers, we have held that such a decision is not arbitrary and capricious so long as the grounds for the decision are "reasonably debatable." Marshall, 141 P.2d at 709 (reviewing municipal zoning decision as legislative function and employing reasonably debatable standard); Smith Inv. Co. v. Sandy City, 958 P.2d 245, 252 (Utah Ct. App. 1998) (same). When a land use decision is made as an exercise of administrative or quasi-judicial powers, however, we have held that such decisions are not arbitrary and capricious if they are supported by "substantial evidence." Xanthos v. Bd. of Adjustment of Salt Lake City, 685 P.2d 1032, 1034-35 (Utah 1984) (reviewing board of adjustment decision as an administrative act and employing substantial evidence standard).

Bradley v. Payson City Corp., 2003 UT 16, P10. The Supreme Court has also stated that "because a 'zoning classification reflects a legislative policy decision,' we will not interfere with that decision 'except in the most extreme cases.'" *Harmon City v. Draper*,

2000 UT App 31 at P18. This broad discretion by legislative bodies would not apply to administrative acts.

Sometimes the lines between administrative acts and legislative acts become thin. Even the courts have expressed frustration over being forced to make the call as to what is legislative and what is administrative:

> Although the legislative-administrative distinction is difficult to apply in almost any context, it is especially so in connection with zoning enactments, which involve an unending variety of factual circumstances and relate to peculiarly local matters.

See J.R. Kemper, Annotation, Adoption of Zoning Ordinance or Amendment Thereto as Subject of Referendum, 72 A.L.R.3d 1030 § 2, at 1035 (1976), quoted in *Mouty v. Sandy City*, 2005 UT 41 at footnote 9.

The courts have had no problem, however, making a distinction between the procedural requirements of the ordinance adoption process and the pure policy aspects of legislation. In striking down legislative decisions because the process of adopting an ordinance did not comply with mandatory provisions of the local laws or state statute, there is no mention of legislative deference. These rules are akin to administrative in nature, and if a legislative body does not comply with the mandatory rules for deliberation, the resulting ordinance will be struck down on procedural bases alone. *Citizens Awareness Now v. Makaris*, 873 P.2d 1117.

The Morgan County ordinances include very strict language about the necessity of compliance with the General Plan in the review and approval of PUD Overlay Zone Amendments. For example: "All PUD applications must strictly comply with the Morgan County General Plan" Morgan Land Use Ordinance, 16-35-07. "The governing body may grant conditional approval of a PUD overlay zone amendment if it finds and cites to specific provisions demonstrating that the application is in accord and consistent with the General Plan and with the policies and provisions of the PUD." Morgan Land Use Ordinance, 16-35-07(6).

Inasmuch as these requirements appear to be similar to procedural limits on the process of approving ordinance changes, they must be complied with in order for an ordinance to be valid once adopted. They also involve decisions made in the "application or interpretation of the ordinance" so those decisions can be properly appealed to the Board of Appeals, even though legislative decisions cannot. If the Council wishes to avoid these strict requirements, all it need do is to pass an ordinance eliminating or amending them. Absent such legislative action to remove these administrative impediments to the process, those requirements are valid and would control the adoption of a PUD overlay zone, even though the ultimate result of that adoption would indeed be a legislative act.

This is consistent with Utah case law. In *Springville Citizens v. City of Springville*, the court reviewed a local decision involving a PUD issue that "adopted an ordinance" and "amended the zoning map" but still considered the process administrative. The court overturned the PUD approval in that case because the city did not comply with the mandatory provisions of its own ordinances, even in the process of making a legislative decision.

> In the case at bar, the undisputed facts demonstrate that the City's decision was not arbitrary or capricious but was the result of careful consideration and was supported by substantial evidence. Of significant import, consideration of the P.U.D. spanned nearly a year and a half and involved more than a dozen separate meetings wherein public input was heard, objections voiced, and modifications to the P.U.D. imposed. Although certain materials were not timely submitted, the majority of the required documentation was before the planning commission and the city council when the P.U.D. ultimately was approved. That documentation, as well as the other evidence before the commission and the council, supported approval of the P.U.D. Moreover, throughout the approval process and in an effort to meet the P.U.D. requirements, the city council required Peay to satisfy numerous conditions concerning the proposed development, all of which Peay eventually fulfilled. In short, the undisputed evidence reveals without question that substantial evidence supported the City's decision and that a reasonable person could have reached the same decision as the City. We conclude, therefore, that the City's decision to approve the P.U.D. was not arbitrary or capricious.
>
> This conclusion does not end our inquiry, however. 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 P.U.D. 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.)
>
> Title 11 of the Springville ordinances, entitled "Development Code," details the procedures and requirements for P.U.D. approval, including those that plaintiffs contend the City violated. Those procedures and requirements, as indicated in the ordinances quoted above, frequently are prefaced by the words "shall" and "must." Thus, according to the City's own rule of interpretation, compliance with the P.U.D. procedures and requirements containing these words was mandatory.
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> In its ruling granting summary judgment in favor of the City, the district court appeared to recognize the mandatory nature of the city ordinances but concluded nonetheless that substantial compliance with those ordinances was sufficient. In

> fact, one of the express legal principles upon which the district court premised its ruling was that "the city's actions approving the PUD must be upheld if those actions are in substantial compliance with the city's ordinances."
>
> The district court's use of the substantial compliance doctrine in the face of ordinances that are expressly mandatory was erroneous. 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.
>
> 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 {979 P.2d 338} 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 P.U.D. was illegal.

Springville Citizens v. Springville, 1999 UT 25, P25-30. Thus, if the County's actions are clearly not in compliance with mandatory provisions of the ordinances, they will be overturned in the courts. Where the violation is clear, the result would be clear, but there is not always a bright line between compliance and noncompliance. In the Springville case, there were clear mile markers along the way to approval. In the current matter, however, what we have to consider is a mandatory provision requiring compliance with the general plan. This is clearly an administrative act, as the Supreme Court held in a subsequent case brought in response to some broad language in the Springville Citizens case. In *Bradley v. Payson City*, 2003 UT 16, the Court held that the issues in the Springville case were clearly administrative, even though they involved the adoption of a PUD and changing the zoning map. This is so because it was not the policy issue that was challenged in *Springville Citizens*, but whether or not the city had complied with the mandatory provisions of its own ordinances.

It is easy to determine that compliance with the general plan is therefore essential if the County's action to approve the PUD is to be upheld. The hard issue is to determine whether that compliance has occurred.

Standard of Review

This leads us to the guidelines the courts have set up to interpret the ordinances and the general plan. In *Springville Citizens*, the issues were clear. The ordinance required specific acts and those acts were not performed in the process of reviewing a PUD. In this case, however, the lines are not so clearly drawn. The County ordinance here demands compliance with a document that is open to much more interpretation, in that it embodies some specific requirements and some statements of general policy and intent. We are therefore left to make some judgment calls on what compliance is and is not.

In interpreting and applying the ordinances the standard is:

> 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).

Springville Citizens v. Springville, 1999 UT 25, P23.

> Our "primary goal in interpreting statutes 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 S. Jordan, 2004 UT 75, P 11, 100 P.3d 1171 (internal quotation omitted). Cited in *Mouty v. Sandy City*, 2005 UT 41.

> The courts shall:
> (i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and
> (ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.
> (b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if the decision, ordinance, or regulation is reasonably debatable and not illegal.

> (c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.
> (d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

Utah Code Ann. 17-27a-801(3)(a). In determining whether the "decision, ordinance or regulation" violates existing law, the courts have given the following guidelines:

> To resolve conflicts in interpretation of statutes or ordinances, we look to well-settled rules of statutory construction. First, "in cases of apparent conflict between provisions of the same statute, it is the Court's duty to harmonize and reconcile statutory provisions, since the Court cannot presume that the legislature intended to create a conflict." Madsen v. Brown, 701 P.2d 1086, 1089-90 (Utah 1985).
>
> Further, "a provision treating a matter specifically prevails over an incidental reference made thereto in a provision treating another issue, not because one provision has more force than another, but because the legislative mind is presumed to have stated its intent when it focused on that particular issue." Id. at 1090.

Bennion v. Sundance Development, 897 P.2d 1232 (Utah 1995). These citations clearly indicate that the courts will give deference to local government entities where that is appropriate.

There is another context, however, where local discretion is limited in Utah jurisprudence:

> "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. See id.

Brown v. Sandy City Board of Adj., 957 P.2d 207. Based on these guidelines, a third party has an uphill battle to challenge local decisions where the city or county has made a land use decision. The courts will "seek to uphold" local discretion. Where there is real

ambiguity, issues in conflict will be resolved "in favor of the property owner." It would seem that the third parties "bring up the rear" in Utah's land use jurisprudence.

This is not to say that neighbors and others challenging local decisions always lose. Some prominent cases, including the *Springville Citizens* case, indicate otherwise. But for our present purposes, we will discuss the challenges to the County's review of the PUD with these guidelines in mind:

1. The County's approval must conform to the provisions of the General Plan.
2. If any part of the approval clearly does not comply with the General Plan, the approval is therefore invalid.
3. If the provisions of the General Plan or the PUD proposal are not clear and the issue of compliance is one of interpretation, then the County will be given the benefit of the doubt under the precedents above so long as the interpretation used by the County is logical and reasonable.
4. Where ambiguities exist, the County also has a duty to resolve ambiguities in favor of the property owner.

Issues raised in the appeal:

Issue 1. The size limits on a neighborhood

Appellant:

The subdivision breaches the very essence of General Plan principles based on a system of residential development *inside* Town, Village, and Neighborhood centers, and rural density *outside* these centers. The County Council erred in granting approval to this PUD application as it does not conform to the 3000 ft. Neighborhood center as required by the General Plan.

Applicant:

The General Plan is only referred to by reference and is overridden by the more specific provision of the Overlay Ordinance. The Development Documents involve a grant of density that is the real issue the appellants are challenging. The Overlay Ordinance clearly makes the 3000 foot radius inapplicable and other provisions of ordinances supercede it.

Staff:

The Wilkinson Farm neighborhood is to be located by the physical constraints analysis of MPDR. MGAP Policy 5.14 states that development shall "generally" be accomplished according to the Neighborhood pattern to be designated on a Future Land Use Map. The General Plan does not mandate a RR20 density in neighborhoods. The applicant has vested rights to the current zoning densities.

Analysis:

The General Plan Controls – see Amendment – Policy 2.1.3: "the general plan provisions, including goals, policies and objectives, contained in chapters 1 through 9 herein, shall prevail and control to the extent that such provisions may be inconsistent with provisions contained in the six area plans."

The goal in interpreting ordinances is to avoid inconsistencies. While the area plan provides for some flexibility in the configuration on the Future Land Use Map, it does not state on its face that this means that the more limiting definitions in the General Plan are to be superceded.

The provisions in Policy 3.1.2 identifying the Wilkinson Farm as to be "located by constraints analysis/MPDR" does not specifically override the more specific provisions of the neighborhood definition in Policy 3.1.5.5. The limit of an approximate distance of 3000 feet from the designated center is not inconsistent with other provisions of the General Plan and need not be disregarded to achieve the flexibility other policies and goals advance.

What is at issue, however, is whether the General Plan prohibits what the County has so far approved in preliminary reviews. Because of the deference paid to local officials by the court, I would conclude that the violation of the General Plan must be clear in order for a court to overturn local decisions and impose its judgment on local land use decisions. As stated above, sometimes the lines between administrative decisions and legislative decisions become blurred. I cited the *Harmon* case, where the court said that it would interfere with issues of policy "only in the most extreme circumstances." My personal prediction would be that this particular issue is so muddled with claims about good policy and legislative intent that a court would simply refuse to draw bright lines that would result in a finding that the local legislative body violated its own policy documents unless that conclusion is clearly and obviously mandated by the MCGP.

I have been advised by the County staff that there are several occasions where neighborhoods exist and have been approved that are contiguous, and that the 3000 foot radius requirement results in not scattered, autonomous neighborhoods, but identifiable centers every 3000 feet within the development pattern. If neighborhoods can border each other, then I would conclude it is not a stretch of the intent of the General Plan to

have neighborhoods border rural cluster development. If the MCGP can be reasonably read to allow the development as the Council has approved it, then a court will not overturn that interpretation of the General Plan under the statutory provision cited above directing the court to "presume that a decision, ordinance, or regulation made under the authority of this chapter is valid."

Conclusion:

The LUMC requires compliance with a written document (the MCGP), not the sentiments that may have been behind it which are not clearly stated as mandates in its terms and provisions. As stated above, in interpreting the language of local ordinances, the "primary goal in interpreting statutes 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." Where there is no plain language requiring specific mandates on development, the discretion of the legislative body to apply the General Plan to a given application will be upheld.

The total length of the proposed Wilkinson Farm development does not clearly violate the General Plan. The General Plan does not specifically prohibit the location of clusters that border neighborhoods, and a court would not read the plan so precisely as to overturn the legislative judgment of the Planning Commission and County Council, who wrote the General Plan, in interpreting its provisions and mandates.

Issue 2. Density and boundary requirements

Appellant:

A center (such as a neighborhood center) must have a "well-defined development edge" as per MCGP Policy 3.1.8. and be surrounded by rural densities.

Applicant:

The Neighborhood is established by the Overlay Ordinance, and looking at the Cottonwoods as a whole, it has a well-defined development edge.

Staff:

The "well defined development edge" issue is inapplicable to neighborhoods. MCGP Policy 3.1.8 refers to town centers and village centers, not neighborhoods. Policy 5.16 of the MGAP refers to commercial centers. There is no requirement that the area around a neighborhood be maintained in rural densities.

Analysis:

Prior decisions made in the designation of zoning districts and the intent of legislative decisions made before the current decision would not govern the legality of future legislative acts without specific linkage in the relevant ordinances. A court would not go beyond the LUMC and the MCGP to consider legislative history unless there was some clear ambiguity to be resolved. In this density and boundary requirements issue, there is not.

The definition of "center" as used in the MCGP at Policy 3.1.8 probably refers to villages and towns, not neighborhoods. See, for example, policy 3.1.8.14 indicating that "centers" have public space such as a church, school, or park. This is ambiguous and will be resolved "in favor of the property owner."

The pattern of approvals cited by the appellant indicates a series of consistent decision over the size of neighborhoods, but not, as the narrative indicates, the application of development edge requirements on neighborhoods.

Conclusion:

The proposed PUD is a neighborhood, not a town or village center, and the requirements for a "well-defined development edge" do not apply.

Issue 3: Agricultural Land Requirements

Appellant:

The proposed PUD does not preserve the existing agricultural uses.

Applicant:

The overlay ordinance supercedes the MCGP. To read the MCGP to require preservation of existing agriculture would be illogical as it would stop all development. It is more logical to assume that development should not infringe upon neighboring agricultural uses.

Staff:

The policies in the MCGP were designed to protect neighboring agricultural uses, not the land being developed. The MCGP encourages the preservation of agriculture outside of towns and village centers, not within the neighborhoods inside those centers.

Analysis:

The MCGP clearly embraces a limited, guided transition of some areas of the county from rural and agricultural uses to more concentrated development. The Wilkinson Farm area is designated for development as a neighborhood, even though the term "farm" is used to describe its historical use.

Conclusion:

The proposed PUD does not violate the policies in the MCGP that seek to preserve agriculture.

Issue 4: Slopes.

Appellant:

The proposed PUD involves development and construction on slopes that exceed 25%, which is prohibited by the MCGP.

Applicant:

The LUMC at 16-04-770(a) prohibits building envelopes on natural or manmade slopes over twenty-five percent grade without site-specific review by a geologist and/or geotechnical engineer. This allows disturbance of such slopes and supercedes the MCGP. There are no building envelopes on a slope greater than 25% and no geotechnical concerns have been found. The County Council's action to grant preliminary approval conclusively resolved the issue of "over-lot grading."

Staff:

The 25% slope limitation applies to the construction of homes on slopes greater than 25% and no homes are to be built on such slopes. The geotechnical studies have shown that there is no slope instability hazard potential. Further study will be required with each building permit application. There is no prohibition in the LUMC, the MCGP or the MGAP against lots with more than 25% slope. It is too early to tell if there will be any lots that do not have a building pad of 15% slope or less. The Council and Planning Commission toured the site and determined that the provisions related to "over-grading" did not apply as they defined the term.

Analysis:

The provision of Policy 1.1.5 of the MCGP is very clear. Any "development or construction" on any natural slope that equals or exceeds 25% is prohibited. The second part of this policy could be read to apply to development and construction on slopes that

are less than 25% to make the sentence internally consistent. The Policy addresses two solutions to hillside issues: 1) no development on 25% slopes and 2) engineering measures on other slopes to reduce the risks of instability.

This provision may or may not be reasonable, but it is clearly stated in the text of the document and therefore would be given its full legal force.

In the *Springville Citizens* case, the court overturned a PUD approval because the city had not complied with mandatory provisions of the local ordinances. The opinion does not applaud the restrictive measures that tripped up the applicant and the city reviewers, but simply stated that if the city chose to impose mandatory rules that were impractical it should amend them, not ignore them.

Conclusion:

If the PUD as proposed involves any roads or construction on natural slopes equal to or greater than 25%, it violates the General Plan. It is not possible to determine conclusively at this point if any such development is mandated by the development as preliminarily approved, but as more specific plans and engineering proceeds, any development or construction on natural slopes of 25% or greater would violate the provisions of the Planned Unit Development Overlay Zone Ordinance at 16-35-070.

Issue 5: Open Space

Appellant:

The open space provisions of the MCGP are essential to calculating bonus densities and to the goals of the plan. They should minimize sprawl and preserve prime areas as open space. The proposed PUD does not do this, but uses undesirable and unbuildable land as open space while still obtaining bonus densities for not developing those properties.

Applicant:

The Overlay Ordinance supercedes the MCGP and only requires 40% open space although the MCGP requires 60%. The Development Documents do not violate the Overlay Ordinance. The open space includes large and contiguous pieces of land and a trail system. The assertion that these lands are left over or scattered is without merit.

Staff:

The open space proposed is neither unconnected or undesireable. These lands have continuing use in farming and wildlife habitat. The minimum “useable” open space is easily met. Densities were not calculated as alleged.

Analysis:

The MCGP policies cited by the appellant use the word "should" rather than "must" or "shall". This leaves the interpretation and application of these provisions to the judgment of the land use authority.

Conclusion:

There is substantial evidence in the record which is sufficient to support the decision that the open space is appropriately configured.

Issue 6: Wildlife Habitat

Appellant:

The Wilkinson Farm is critical habitat. Provisions of the MCGP requiring preservation, mitigation, and close cooperation with wildlife officials have not been followed. The impact of the project on wildlife has not been appropriately minimized. Again, bonus densities were granted contrary to the limits in the ordinances and MCGP.

Applicant:

The impact on wildlife is minimal and in compliance with the Overlay Ordinance and the provisions of the general plan. The property is not critical habitat for the Sage Grouse. The wildlife corridors identified in the project proposal meet the critical needs.

Staff:

The applicant has worked closely with DWR and staff also made contacts to verify sufficiency. If no sensitive lands were affected by development, there would be no development. The proposal makes adequate provision for wildlife.

Analysis:

The provisions of the MCGP related to wildlife are more general in scope and impose less specific mandates than the requirements imposed on other aspects of development.

Conclusion:

Local discretion will be supported on this issue. There is substantial evidence in the record which is sufficient to support the decision that the open space is appropriately configured.

II. PUD VIOLATIONS

Issue 1. Useable Open Space Requirements

Appellant:

The open space in the proposed PUD is not sufficiently useable. Most of the more level property is covered with development. Those areas set aside were already constrained by other limits on use. There is no provision that useable open space be landscaped and maintained. The minimum requirement that 10% of open space be useable has not been complied with.

Appellant:

The proposed PUD complies with the ordinances as more than 10 percent of the open space is improved. All open space is landscaped and maintained.

Staff:

The proposed PUD meets the requirements. The standard is not that the land must be landscaped, but that it must be able to be landscaped. There is disagreement on what constitutes "useable" vs. "improved" open space.

Analysis:

The provisions of the ordinances related to open space are general in scope and impose less specific mandates than the requirements imposed on other aspects of development.

Conclusion:

Local discretion will be supported on this issue. There is substantial evidence in the record which is sufficient to support the decision that the open space is appropriately configured.

Issue 2 – Bonus Density Improperly Granted.

Appellant:

Staff justification for bonus density awarded with regard to "extra useable open space was inadequate. Inappropriate density bonus for slope set-asides and public reservoir use.

Applicant:

No response

Staff:

The density bonus was vested at concept plan approval.

Analysis:

As stated above, no vesting has occurred with regard to any aspect of the project other than that the ordinances that were in place and applicable to the review of an application cannot be changed without the consent of the applicant after a complete application is submitted and applicable fees are paid. See Utah Code Ann. 17-27a-508.

The density bonus aspects of chapter 35 of the Land Use Management Code at Section 16-35-040 appear to be very discretionary. The "Extra useable open space for public use" provision is defined in footnote 7 to apply to "open space allowed for public use" while I have not reviewed the staff comments referred to, it would seem that the reference to a reservoir where public use is allowed would be sufficient to support the exercise of discretion by the planning commission in granting this density bonus.

Conclusion:

The density bonus allowed for extra useable open space for public use would be upheld. Local discretion will be supported on this issue. There is substantial evidence in the record which is sufficient to support the decision that the density bonus is allowed in response to making an amenity included in useable open space available to the public.

Issue 3 – Improper Density Calculation

Appellant:

The bonus densities violate the maximum densities allowed in rural areas under the General Plan, which the PUD ordinance insists be followed exactly.

Applicant:

No comment.

Staff:

The General Plan does not prohibit bonus density outside the neighborhood boundary and bonus densities have been given in the normal course of approval for PUD developments in rural areas. There were no duplicative bonus densities given.

Analysis

The bonus densities are allowed under specific provisions of the land use ordinances in the same chapter where the provision exists that requires strict conformity to the General Plan. These specific provisions allowing density bonuses would be considered by a court to better reflect the legislative intent instead of any more general statements in the General Plan. In order to make the General Plan, the bonus densities provisions and the strict conformance provisions reconcile, it would be logical to conclude that the legislative intent of all these provisions was to allow bonus densities, and that those bonuses do not violate the General Plan.

Conclusion:

The bonus densities do not violate the General Plan.

Issue 4 – Improper Granting of Variances

Appellant:

The project allows reduced setbacks and flag lots without the necessary findings that are required of variances by state statute. Variances are reserved for the Board of Appeals to grant and cannot be granted by the PUD approval process.
Applicant:

The Overlay Amendment supercedes any conflicting language in other, older ordinances. By enacting an ordinance specific to the property, the County is not granting a variance.

Staff:

Section 16-35-060 allows the Council to vary setbacks, yard, coverage and height regulations. The adoption of an ordinance is not a function of the Board of Appeals. The Council can adopt a specific ordinance for a specific PUD zone and include appropriate setback, height, frontage, and other requirements as deemed suitable in the new zone.

Analysis:

Section 16-35-060 of the Land Use Management Code does indeed allow the Council, upon the recommendation of the Planning Commission, to "vary" the normal setbacks, yard, coverage, and height regulations of the underlying zone. When the legislative body sets new standards, it is not granting a "variance" as used in the state statute and the Appeals section of the Land Use Management Code. To quote the language specifically, the statute reads "variances from the terms of the land use ordinances" in Utah Code Ann.

17-27a-701(1)(a). In the current case, the "variances" are not from the ordinance, they are in the ordinance. The statutory discussion of variances does not apply.

Conclusion:

The proposed PUD ordinance does not contain illegal variances.

Issue 5. PUD overlay zone amendment must be applied within Town or Village Boundaries.

Appellant:

PUD overlay zones cannot be used outside a Town or Village identified by the General Plan. Since part of the PUD lies outside the defined boundaries of the Town of Mountain Green, the PUD cannot be approved.

Applicant:

No response.

Staff:

The General Plan defined the boundaries of the Town of Mountain Green. The PUD was always within those town boundaries. Other recommendations and aspects of the Area Plan did not change the definition of the boundaries of the entire Town.

Analysis:

The General Plan lists "Wilkinson Farm" as a neighborhood in the Town of Mountain Green. The associated maps generally identify the area considered in the Mountain Green Area Plan, which includes all the PUD area. It would appear that the proposed PUD is within the area of the Town of Mountain Green and is eligible for development under the PUD ordinance. The determination of the staff, the planning commission, and the council that the PUD is within a "town" is within the discretion afforded local government in interpreting its ordinances.

Conclusion:

The proposed PUD does not violate Section 16-35-060 of the Land Use Ordinances. The PUD is within the Town of Mountain Green.

III. Mountain Green Area Plan Violations.

Appellant:

The Mountain Green Area Plan applies to the development. The development is not in compliance because it is outside the town boundaries, exceeds the recommended densities, and violates the development guidelines related to the airport area.

Applicant:

The application was submitted prior to the pending approval of the Area Plan, and the applicant has proceeded with the application with reasonable diligence, so the Plan does not apply.

Staff:

The Area Plan approval was not pending at the time the application was submitted, so it does not apply. Densities in the Area Plan are not exceeded by the PUD as proposed. Reasonable efforts were made, consistent with the Land Use Ordinances, to accommodate the details of the PUD as they relate to the airport area.

Analysis:

This issue is impossible to resolve without extensive research that is beyond the scope of this advisory opinion. Among the questions that would have to be addressed are:

1. What is a complete PUD application?
2. When was a complete PUD application submitted and all applicable fees paid?
3. Could the Area Plan be considered a "pending ordinance" when it is not in ordinance form?
4. When did the Area Plan become a "pending ordinance"? Was it adopted within six months of that date?
5. Although the PUD Chapter of the Land Use Ordinance mandates strict compliance with the General Plan, does that extend to include "supplements" to the General Plan such as the Area Plans?
6. What about inconsistencies between the General Plan and the Area Plans? Which control?

Conclusion:

The County and the Applicant maintain that the PUD is not required to comply strictly with the provisions of the Area Plan. Absent the right answers to the above questions, the default decision would be that it does not apply. That is by far the most likely result of

any investigation done on the issues raised, and the conclusion of this advisory opinion as well. The Mountain Green Area Plan does not apply to the application at issue here.

Conclusion of the Advisory Opinion:

The position of the appellants is correct with regard to their claim that the proposed PUD must comply with mandatory provisions of the General Plan. While there are more details to be determined, particularly with regard to natural slopes of 25% or more, I conclude that a court would find that the County would not exceed its discretion if it were to approve the current proposal with a provision that future approvals for specific site configuration and building permits must also comply with the MCGP and relevant ordinances.

The complexities and nuances of the MCGP and the competing philosophies being advanced by all involved are very much issues of policy, not law. The normal intention of the courts to defer to local decision makers in such matters and the case law requirements that ambiguities be resolved in favor of the use of property combine to make it very difficult to challenge land use decisions such as these.

As I am bound by the same guidelines that a court would be, I must arrive at that same conclusion. As I understand the facts and law at this time, I have concluded that if this matter were to be decided by legal process, a court would likely find that the application as proposed and approved preliminarily does not violate relevant law with regard to the issues raised.

I also believe that the pending appeal before the Board of Appeals is not timely brought and the Board has no authority to hear it at this time. The appellants can challenge the approval of the PUD after it the Council makes a final decision. At that time the appellants can appeal to the Board of Appeals and/or to the District Court. I have also concluded that there has been no lapsing of appeals rights because this interim appeal is premature, and all issues will be available for review once the final decision of the County Council is made.

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.