Advisory Opinion #67

Parties: Christopher P. Gamvroulas, Ivory Development, LLC and City of West Point

Issued: May 4, 2009

TOPIC CATEGORIES:
J: Requirements Imposed Upon Development
R(v): Other Topics (Interpretation of Ordinances)

A development agreement's requirement that "each dwelling unit shall not be less than 1300 square feet" is not ambiguous, and refers to total area, not above-ground area. The Agreement provides that a more restrictive standard will control when there is a conflict between the Agreement and the terms of the City's ordinance. Since the City's zoning ordinance requires dwelling units to have at least 1200 s.f. above ground, that is the more restrictive requirement, and so it controls the size of the units.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Christopher P. Gamvroulas
Local Government Entity:	West Point City
Applicant for the Land Use Approval:	Ivory Development, LLC
Project:	Residential Subdivision
Date of this Advisory Opinion:	May 4, 2009
Opinion Authored By:	Brent N. Bateman, Lead Attorney, Office of the Property Rights Ombudsman

Issues

Is West Point City barred from denying Ivory's permit application to build townhomes, where the Development Agreement between the parties states that dwelling units shall be a minimum 1,300 square feet, and all dwelling units in the application are a minimum 1,300 total square feet but some are less than 1,300 square feet above grade? In other words, does the Development Agreement require dwelling units with a minimum 1,300 total square feet (including basements) or 1,300 square feet above grade?

Summary of Advisory Opinion

The language in the Development Agreement is not ambiguous. The Development Agreement calls for dwelling units of at least 1,300 square feet, and nothing in the Development Agreement supports that City's limitation that it must be 1,300 square feet above grade.

However, the Development Agreement also contains a provision requiring that, in the case of the conflict between the Development Agreement and the City standards, the more restrictive provision apply. City standards require a minimum dwelling unit of 1,200 square feet above grade, a more restrictive requirement than the Development Agreement's 1,300 total square feet. Therefore, the requirement of 1,200 square feet above grade applies, and the City must approve building permit applications that comply with that requirement.

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.

The request for this Advisory Opinion was received from Christopher P. Gamvroulas on February 18, 2009. A letter with the request attached was sent via certified mail, return receipt requested, to Gary R. Hill, West Point City Manager, 3200 W 300 N, West Point, Utah 84015. Mr. Hill's name was listed on the State's Governmental Immunity Database as the contact person for the City. On March 17, 2009, John Anderson, City Planner for West Point City, submitted a response to the Advisory Opinion request, which included a letter and several exhibits. In a telephone conversation dated April 2, 2009, Chris Gamvroulas briefly discussed the matter with the OPRO, reiterating some points previously made, and indicated that no further response on behalf of Ivory would be necessary.

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 dated February 18, 2009 with the Office of the Property Rights Ombudsman by Christopher P. Gamvroulas, on behalf of Ivory Development, LLC, with attachments.
2. West Point City's response to Ivory's request, dated March 17, 2009, with attachments.

Background

Ivory Development, LLC ("Ivory"), is the developer of the Yalecrest Towns Subdivision project ("Project") within West Point City. On November 7, 2007, Ivory's predecessor in interest, Ivory Land Corporation and Solgarden LLC, entered into a development agreement titled *Agreement for Development of Land Between West Point City and Ivory Land Corporation and Solgarden LLC (Approximately 200 South and 3000 West, East Side)* ("Development Agreement"). Section 4.4.1 of the Development Agreement contains the sentence: "Each dwelling unit shall not be less than 1,300 square feet."

On or about October 15, 2008, Ivory applied for a permit to build a townhome building in the Yalecrest Towns Subdivision. The application included plans for several townhome units. One of the units featured a total livable area of 1491 square feet. Of that total, 1051 square feet is above grade, with 440 square feet of basement space. Another townhome unit shows a total livable area of 2065 square feet, with 1060 square feet is above grade, with 1005 square feet of basement space.

West Point City denied Ivory's application for a building permit. West Point indicates that the denial arises because some of the dwelling units violate section 4.4.1 of the Development Agreement that each dwelling unit contain a minimum of 1,300 square feet. West Point argues that this requires dwelling units of at least 1,300 square feet *above grade*. In support, West Point cites section 15.15.130(B) of the West Point City Development Code, which states that "The minimum square footage shall mean the finished floor area above grade typically containing a kitchen, living room, bedrooms, and bathroom. Such space is not to include an attached garage, basement, covered patios or any type of detached structure." West Point contends that the minimum square footage requirement in its development code requires a calculation of only "above grade" square footage in a minimum square footage calculation, and basement square footage is not included. Therefore, argues the City, Ivory's application for dwelling units of 1051 and 1005 square feet above grade is inadequate to meet the requirement imposed in the Development Agreement.

Ivory contends that the total square footage of the dwelling units, including basements, exceeds the 1,300 square footage requirement, and that the above-grade requirement does not appear in the Development Agreement, and is therefore not applicable. Accordingly, Ivory contends, West Point City is required to approve its building permit application. Ivory has requested an Advisory Opinion from the Office of the Property Rights Ombudsman to examine whether West Point City is required to approve the request for a building permit.

Analysis

A. Determining Ambiguity in a Contract

At issue in this Opinion is the sentence in section 4.4.1 of the Development Agreement that states: "Each dwelling unit shall not be less than 1,300 square feet." Ivory argues that this sentence means "1,300 *total* square feet" of living space, including basement areas. West Point City argues that this sentence means "1,300 square feet *above grade*," excluding basement areas. In support of its assertion, the City cites to the definition of "minimum square footage" contained in 15.15.130(B) of the West Point City Development Code, which states that "The minimum square footage shall mean the finished floor area above grade . . ."

Determining which of these interpretations prevails necessitates application of the general principles of contract interpretation. A duly authorized development agreement is an enforceable

contract binding the developer and the local government,[1] and should be interpreted as a contract. *See* Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP.U.L.REV. 383, 394 (2004). No authority can be found to indicate that a development is subject to differing rules of interpretation than any other contract, or in particular that either party's interpretation of the agreement is entitled to special deference, as is the City's interpretation of its own ordinances,[2] simply because it is a development agreement. Conversely, courts have frequently applied normal principles of contract interpretation to development agreements.[3]

Under Utah's well-established rules of contract interpretation, the first step to determine the meaning and the intent of the contracting parties is to look at the language of the contract. *Green River Canal Co. v. Thayn*, 2003 UT 50, ¶17. Where "the language within the four corners of the contract is unambiguous, the parties' intentions are determined from the plain meaning of the contractual language." *Id*. Only if the language of the contract is ambiguous will courts consider extrinsic evidence of the parties' intent. *Cafe Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 6, ¶25. A contractual term is ambiguous "if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms, or other facial deficiencies." *WebBank v. Am. Gen. Annuity Serv. Corp*., 2002 UT 88, ¶20.

The Utah Supreme Court recently clarified how to determine whether a contract term is ambiguous. In *Daines v. Vincent*, 2008 UT 51, the court explained that "[w]hen determining whether a contract is ambiguous, any relevant evidence must be considered. . . . Second, after a judge considers relevant and credible evidence of contrary interpretations, the judge must ensure that "the interpretations contended for are reasonably supported by the language of the contract." *Id*. at ¶26 (citations omitted).

The *Daines* Court then goes on to clarify: "However, we did not intend that a judge allow surrounding circumstances *to create ambiguity* where the language of a contract would not otherwise permit. In other words, [extrinsic evidence] does not create a preference for that evidence over the language of the contract." *Id*. at ¶26 (citations omitted, emphasis added). Accordingly, in determining ambiguity, a review of extrinsic evidence is appropriate simply to see if a contract term can have more than one meaning. However, extrinsic evidence cannot create the ambiguity. Each meaning must be supported by the plain language of the contract in order to find an ambiguity.[4]

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[1] Within certain limitations. A local government cannot do by contract what it is not otherwise authorized to do. For example, a municipality cannot bargain away its authority to make zoning decisions. A municipality's authority to zone is a delegation of police power received from the state. *Marshall v. Salt Lake City*, 105 Utah 111, 121, 141 P.2d 704 (1943). The state cannot contract away its police power. *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877).

[2] *Carrier v. Salt Lake County,* 2004 UT 98, ¶18 ("We believe a better approach is that adopted by those jurisdictions that review a local agency's interpretation of ordinances for correctness, but also afford some level of non-binding deference to the interpretation advanced by the local agency.").

[3] *See, e.g., Fulton Greens, L.P. v. City of Alpharetta*, 272 Ga. App. 459 (2005).

[4] The Court in *Daines* illustrated by examining the term "boot." Extrinsic evidence would be necessary in order for a judge to know that the term "boot" could mean either rainy-day footwear or the trunk of a British car. However, the

B. The Development Agreement is Not Ambiguous

In applying these principles to the Development Agreement, no ambiguity is found. The contested term, *square feet*, could have more than one meaning – "total square feet" or "square feet above grade." However, the plain language of the contract cannot by itself support the additional limitation "above grade." In order to interpret "square feet" as "square feet above grade" extrinsic evidence is necessary, specifically the West Point City Development Code and/or City Council Meeting Minutes. The language in the agreement simply says "square feet" and nothing more. Any ambiguity is created only by the extrinsic evidence, exactly as the *Daines* Court forbade. The language of the agreement itself does not support the "above grade" limitation.

That extrinsic evidence, such as the West Point City Development Code, does indeed indicate that the City has a preference for, and perhaps intended in the Development Agreement, that the term "square feet" included only "above grade." However, *Daines* makes clear that that evidence outside of the four corners of the contract, cannot create the ambiguity. The ambiguity must be supported by the contract language itself. Here the contract language is only "square feet." Nothing in the contract supports an "above grade" interpretation. Therefore, the meaning of the term "square feet" in the Development Agreement can only be interpreted to mean "total square feet." The term is not ambiguous.

C. The Development Code is More Restrictive, and Therefore Prevails Over the Agreement

Unfortunately, the analysis does not end with a finding that "square feet" is unambiguous and means "total square feet." Another rule of contract interpretation requires that meaning and effect be given to *all* terms in the agreement, and all terms be interpreted in relation to other terms. *Green River Canal*, 2003 UT 50 at ¶17 ("We consider each contract provision . . . in relation to all of the others, with a view toward giving effect to all and ignoring none."). Accordingly, terms in the contract must be considered as a whole, and each term must be given effect.

As the City points out, section 4.7 of the Development Agreement provides:

> **Conflicts**. Except as otherwise provided, any conflict between the provisions of this Agreement and the City's standards for improvements, shall be resolved in favor of the stricter requirement.

In accordance with the rules above, full effect must be given to this section and its affect upon other contract provisions. By its plain language, this section of the Development Agreement indicates an intent by both parties that the City's standards for improvements would control when they imposed a stricter requirement than the requirement in the Development Agreement.

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fact that two meanings are possible does not create an ambiguity. In order for an ambiguity to be found, both meanings must be supported by the plain language within the four corners of the contract. Accordingly, unless the contract contains language that supports both a *shoe* and a *car* interpretation of *boot*, no ambiguity exists. As the court stated, "a finding of ambiguity will prove to be the exception and not the rule." *Id*. at ¶30 n.5.

As discussed above, the term "square feet" unambiguously means "square feet" without limitation. The development agreement, then, permits a dwelling unit no less than 1,300 square feet, basement and other areas included. The West Point City Development Code standard, found in Section 15.15.130, states:

> A. All single-family dwellings constructed or erected in the city shall contain the minimum, nonstacked square footage as outlined below.
>
> | Building Type | Finished Minimum Sq. Ft. |
> |---|---|
> | Rambler | 1,200 |
> | Slab on grade/crawl space | 1,200 |
> | Bi-level | 1,200 |
> | Tri-level | 1,200 |
> | Multi-level | 1,200 |
> | Two-story | 1,800 sq. ft. minimum,
10% variance between floors.
Buildings above 2,000 sq. ft.,
no minimum variance. |
>
> B. The minimum square footage shall mean the finished floor area above grade typically containing a kitchen, living room, bedrooms, and bathroom. Such space is not to include an attached garage, basement, covered patios or any type of detached structure.

Accordingly, City standards require that dwelling units have a minimum of 1,200 square feet above grade living space.

In this case, the City standard of the minimum 1,200 square feet above grade is more restrictive than the minimum 1,300 total square feet set forth in the Development Agreement. Since we must give meaning and effect to section 4.7 of the Development Agreement, and since that section indicates a clear intention for the parties to be bound by the more restrictive between the Development Agreement and the City standards, then the City standards control. Accordingly, the City should approve building applications showing dwelling units containing at least 1,200 square feet above grade.

Ivory argues that by entering into a development agreement, the City and Ivory have agreed that the Development Agreement should control the development, and that the City Development Code should be superseded or at least considered waived. If the language of the Development Agreement included a clear intention to waive or supersede the City Code, such might be given effect, but no clear intention is found here. To the contrary, section 4.7 of the Development Agreement, discussed above, indicates an intention by the parties to consider city standards outside of the Development Agreement, and give them effect when more restrictive, thus showing an intention to *not* disregard the City standards.

Moreover, in order for a development agreement to wholly supersede the city code, and become the "ordinance" for the development, the city ordinances themselves would need to contain language permitting such an action. "A municipality is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances." UTAH CODE ANN. § 10-9a-509(2). Where the city ordinances do not contain an authorization to disregard the city code in favor of a development agreement, then such an act cannot be done. In addition, in order for the development agreement to be given the effect of an ordinance superseding the existing ordinance, such an action would need to be undertaken legislatively by the City, rather than administratively, because it would require the enactment of new law. *See Bradley v. Payson City Corp.*, 2003 UT 16, ¶11. *See also Save Beaver County v. Beaver County*, 2009 UT 8 (discussing legislative enactment of a development agreement). There is no indication that the Development Agreement in this matter was legislatively adopted.

Section 16.05.110 of the West Point City Ordinances authorizes the West Point City Council to enter in to a developer's agreement: "The city council is hereby authorized to enter into a developer's agreement with individuals and/or entities." However, nothing in this ordinance indicates and intent or authorizes adopting a development agreement that supersedes or waives the city ordinances. To the contrary, section 16.05.110 of the West Point City Ordinance contains language to be included in the developer's agreement that indicates that the developer is to be bound by the requirements in the City code: "that [Developer] will fully and completely comply with the provisions and requirements therein contained [in the Subdivision Ordinance, the specifications and standard drawings]. Therefore, the City is not authorized to enter into a development agreement that wholly supersedes or waives the City Ordinances.

Conclusion

The principles of contract interpretation to the Development Agreement indicate that the term "square feet" is not ambiguous. It is not limited to "square feet above grade" and only the interpretation "total square feet" is supported by the language of the contract.

However, the parties have agreed to be bound by the most restrictive requirements between the Development Agreement and the City standards in the event of a conflict. A conflict exists between the development agreement's requirement of a minimum of 1,300 total square feet, and the City Ordinances requirement of 1,200 square feet above grade. The requirement found in the City ordinances is more restrictive and therefore applies.

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

NOTE:

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

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

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

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

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with UTAH CODE ANN. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Gary R. Hill, City Manager
West Point City
3200 West 300 North
West Point, UT 84015

On this _____ Day of May, 2009, 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