Advisory Opinion 261

Parties: Fox Hollow of Providence Inc. / Providence City

Issued: October 5, 2022

TOPIC CATEGORIES:

Compliance With Land Use Regulations

Development Bonds

Interpretation of Ordinances

Requirements Imposed On Development

Subdivision Plat Approval

Development agreements may not be mandated for all conventional subdivisions as the only option for developing property in the municipality. A plat approval was improperly conditioned on execution of a development agreement subjecting the applicant to improvement standards that differed from state law and removed the applicant's choice for bonding in lieu of improvement completion. The applicant is entitled to final plat approval without a development agreement because its project complies with conventional development standards, but it must install improvements necessary to meet fire and building codes according to state law prior to obtaining building permits, while bonding for other improvements required by the City. The City may not require completion of improvements according to its own adopted standards in a way that conflicts with state building and fire codes.

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ADVISORY OPINION

Advisory Opinion Requested By:	Amy C. Walker
Local Government Entity:	Providence City
Applicant for Land Use Approval:	Fox Hollow of Providence Inc.
Type of Property:	Residential
Date of this Advisory Opinion:	October 5, 2022
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUES

May a city require subdivision applicants to execute a development agreement that commits the developer to completing infrastructure improvements according to local standards prior to receiving a building permit?

SUMMARY OF ADVISORY OPINION

State law allows a subdivision applicant to choose to provide a form of improvement completion assurance as an alternative to completing all required infrastructure prior to development activity. This choice does not supersede the terms of a valid development agreement, though a development agreement may not be the only option for developing property in the municipality. Additionally, an applicant choosing to provide assurance for required improvements must nevertheless complete at least those improvements necessary to meet state building and fire codes in order to obtain a building permit. Cities may not enact their own improvement standards that conflict with state law.

Under Providence City Code, a development agreement is required for final plat approval for any conventional subdivision, making it the only option to develop property in violation of state law. In response to Fox Hollow's request for final plat approval of its townhome subdivision, the City proposed a draft development agreement that would obligate Fox

Hollow to complete infrastructure improvements according to city code standards before receiving building permits.

Fox Hollow is nonetheless entitled to final plat approval without a development agreement because its project complies with conventional development standards. It must, nevertheless, install improvements necessary to meet fire and building codes according to state law, while bonding for other improvements required by the City. The City may not require completion of improvements according to its own adopted standards in a way that conflicts with state building and fire codes.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for Advisory Opinion submitted by attorney Amy C. Walker, on behalf of Fox Hollow of Providence Ince., received on June 9, 2022.
2. Response Letter from Chad Woolley, Providence City Attorney, dated July 18, 2022.
3. Reply Letter from Amy Walker, dated July 27, 2022.

BACKGROUND

Fox Hollow of Providence, Inc. ("Fox Hollow") is the owner of real property that was annexed into Providence City on January 20, 2021, and zoned Multi-Family Medium (MFM), which allows for multi-family residential type uses.

Later that year, Fox Hollow applied for, and received concept and preliminary plan approval of, a residential townhome development known as Fox Hollow Townhomes. The approved plans proposed a two-phased development consisting of attached multi-family dwellings totaling 60 separate single-family lots, together with HOA-managed common area open space.

Fox Hollow then applied for approval of Phase 1 of the Fox Hollow Townhomes, which proposed 33 lots at a density of 11.83 (The MFM zone allows a maximum of 12 units/acre). The City's subdivision ordinance requires a development agreement for final plat approval, and on December 15, 2021, the City Council approved a draft Development and Public Improvement Installation Agreement ("Draft DA") for Phase 1.

The terms of the Draft DA provided that prior to the issuance of any building permits, "minimum improvements" must be completed according to the City's subdivision ordinance, which defines minimum improvements to include "all grading of roads . . . all curb, gutter, and all utility trenches that lay inside the roadway; all stormwater, water

sewer, and other improvements that may be deemed necessary; and egress and ingress to provide acceptable and safe travel to and from each lot in the approved subdivision."[1]

Despite approval of the Draft DA by the City Council, it remained unsigned by Fox Hollow, who asserted that it did not have a meaningful opportunity to review or negotiate the terms of the Draft DA before its approval. While City Code requires that a development agreement be executed and an improvement bond posted before a final plat is approved, due to an administrative error by the City, Phase 1's final plat was both signed and recorded before either had occurred.

Fox Hollow thereafter offered to bond in order to secure building permits for Phase 1, but the City did not accept, instead insisting on, prior to any building permits, execution of the Draft DA and completion of the minimum improvements defined in City Code—which the City concedes to amount to almost everything short of "landscaping or a paved surface." Due to supply chain shortages, Fox Hollow was unable to complete all of the City's requested improvements, though it believed it had already completed improvements necessary to meet building and fire code requirements. Fox Hollow sent the City a letter demanding the issuance of building permits, arguing that requiring completion of the City's defined minimum improvements before permits conflicted with state law, and alleging that the installed improvements met building and fire code requirements as necessary, and that it was willing to bond for the remaining improvements.

At Fox Hollow's request, the City Council met shortly thereafter to consider whether to amend the Draft DA in a way that would allow building permits based on what improvements had already been installed and with a bond for the remaining minimum improvements as defined by City Code. The Council expressed concerns about deviating from City Ordinances that required completion of minimum improvements, and ultimately tabled the matter to allow the matter to be considered by the Property Rights Ombudsman.

On June 9, 2022, Fox Hollow requested an advisory opinion to determine whether Providence City has complied with the mandatory provisions of applicable land use regulations, and imposed proper requirements on development. The parties have since been able to resolve the issues as it related to buildings permits for Phase 1 of the development. However, Fox Hollow continues to seek an opinion on these issues as it relates to obtaining approval and permits for Phase 2.

ANALYSIS

This opinion centers around whether Providence City ("City") ordinances comply with state law—specifically, whether the City's adopted development standards comply with Utah's Land Use Development and Management Act ("LUDMA") regarding infrastructure improvements required for new development and the ability of a subdivision applicant to

[1] PROVIDENCE CITY CODE (PCC) § 11-5-2(A).

obtain certain approvals by providing an improvement completion assurance[2] in lieu of installed improvements.

I. Resolving Conflicts Between State and Local Standards, and Statutory Ambiguity

LUDMA provides that a municipality's land use ordinance is illegal if it is expressly preempted by, or enacted contrary to, state law. UTAH CODE § 10-9a-801(3)(a). Generally, Utah Courts have held that local governments "may legislate by ordinance in areas previously dealt with by state legislation, provided the ordinance in no way conflicts with existing state law." *Redwood Gym v. Salt Lake County*, 624 P.2d 1138, 1144 (Utah 1981). Local ordinances conflict with state law when "the local law [stands] as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature." *Price Development Co. v. Orem City*, 2000 UT 26, ¶ 12.

The City argues that the LUDMA code sections dealing with infrastructure improvement completion and assurances are "a bit of a mess," alleging various inconsistencies within its provisions, both in regards to conflicting definitions or uses of terms, as well as whether to bond for improvements is the applicant's choice to make, or the City's to allow.

However, the City's contentions that LUDMA's provisions are inconsistent do not further its position that it may subject Fox Hollow to certain local development standards that are more restrictive or amount to additional barriers to the ability to develop its property. If anything, even accepting the City's arguments as true, the fact that internal inconsistencies in LUDMA may result in two or more plausible meanings of the same provisions is the very definition of ambiguity. *See Epperson v. Utah State Ret. Bd.*, 949 P.2d 779, 783 n.6 (Utah Ct. App. 1997) (*citing Alf v. State Farm Fire & Cas. Co.*, 850 P.2d 1272, 1274 (Utah 1993) (ambiguous means capable of two or more plausible meanings). Ambiguity is significant when it comes to interpreting the meaning and applicability of land use regulations. This is because Utah Courts have repeatedly and consistently held that as zoning laws 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 Cty. Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995).

To the City's credit, state law on infrastructure improvement completion and assurances looks entirely different than it did ten years ago, with incremental changes to its provisions over the last several years. Nevertheless, we conclude that LUDMA's regulatory scheme regarding infrastructure improvement completion and assurance is not ambiguous. Even if it were, the inevitable result would be to apply the provisions in a way that favors Fox Hollow's ability to obtain approvals to develop its property. Because of this, to make the opinion more concise, rather than address all of the City's contentions in detail, we feel it

[2] Defined to mean "a surety bond, letter of credit, financial institution bond, cash, assignment of rights, lien, or other equivalent security required by a municipality to guaranty the proper completion of landscaping or an infrastructure improvement required as a condition precedent to: (a) recording a subdivision plat; or (b) development of a commercial, industrial, mixed use, or multifamily project." UTAH CODE § 10-9a-103(23).

might suffice to simply provide a brief overview of how LUDMA's regulatory scheme on improvement completion and assurances has evolved to better explain the legislative intent inherent in the plain language of current statutes.

A. Cities Must Accommodate an Applicant's Choice to Provide Completion Assurance.

Fox Hollow argues that state law gives the choice to the applicant of whether to complete required infrastructure or provide improvement completion assurance, and that the City may not remove that choice by enacting ordinances that require one over the other. The City believes that state law's reference to the applicant's choice to bond for improvements only applies when that choice is made available by local ordinance.

The state has historically given broad discretion to local governments to enact their own land use ordinances and development standards not inconsistent with state law. Up until 2018, state law implied that the default expectation was that a subdivision applicant was obligated to complete required landscaping or infrastructure improvements *prior* to any plat recordation or development activity, unless "the land use authority ha[d] *authorized* the applicant to post an improvement completion assurance . . . consistent with local ordinance." *See* UTAH CODE § 10-9a-604.5 (2013) (emphasis added).[3] Under that regulatory scheme, the decision to allow for improvement assurance in lieu of completed infrastructure improvements rested entirely with the City pursuant to its discretion to choose to enact local standards for completion assurance.

However, in 2018,[4] the legislative winds began to shift when Section 604.5 was amended to say:

> Before an applicant conducts any development activity or records a plat, the applicant shall:
>
> (i) complete any required landscaping or infrastructure improvements; ***or***
>
> (ii) post an improvement completion assurance for any required landscaping or infrastructure improvements.

UTAH CODE § 10-9a-604.5(2) (2018) (emphasis added). This section continued that "if an applicant elects to post an improvement completion assurance," the municipality "shall . . . allow the applicant to post an assurance that meets the conditions of this title, and any

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[3] Section 10-9a-604.5 was added to LUDMA in 2008, *see* 2008 Ut. ALS 112, 2008 Utah Laws 112, 2008 Ut. Ch. 112, 2008 Ut. SB 196, which provided that a land use authority "*may* allow a land use applicant to proceed with subdivision plat recording or development activity before completing improvements required" so long as it required an improvement assurance that met certain requirements. UTAH CODE § 10-9a-604.5 (2008) (emphasis added). The section was repealed and reenacted in 2013, *see* 2013 Ut. ALS 309, 2013 Utah Laws 309, 2013 Ut. Ch. 309, 2013 Ut. SB 153, with much more cautionary language: "A land use authority *shall require* an applicant to complete a required landscaping or infrastructure improvement *prior to any plat recordation or development activity*," though this provision did not apply if, "upon the applicant's request, the land use authority has authorized the applicant to post an improvement completion assurance in a matter that is *consistent with local ordinance*." UTAH CODE § 10-9a-604.5 (2013) (emphasis added).

[4] 2018 Ut. HB 377, 2018 Utah Laws 339, 2018 Ut. Ch. 339, 2018 Ut. ALS 339.

local ordinance."[5] *Id.* This amendment effectively mandated that municipalities ensure that their local ordinances allow the option to provide assurance and gave the developer the discretion to choose between the two options. Any remaining doubts that municipalities still had any discretion to not make that choice available in their ordinances was removed the next year when more direct language was added to this section: "A municipality shall . . . establish a minimum of two acceptable forms of completion assurance." UTAH CODE § 10-9a-604.5(2)(c)(i) (2019).[6]

LUDMA, therefore, currently gives the subdivision applicant the choice of either completing all required infrastructure improvements or providing a completion assurance to record a plat or commence development activity. Local governments must accommodate that choice by making at least two acceptable forms of completion assurance available in its land use ordinances, and may not otherwise remove the applicant's meaningful choice to provide an assurance.

B. *Completion Assurance Option Does Not Apply to State Construction Code Requirements.*

While state law gives applicants the choice to provide completion assurance in lieu of completing *all* required infrastructure improvements before plat recording or development activity, some improvements must still be installed before a building permit is approved. Specifically, the improvement assurance provisions in Section 604.5 do not "supersede the terms of . . . *the state construction code*," UTAH CODE § 10-9a-604.5(5).

For example, the State Construction and Fire Code Act states, regarding fire safety *during construction*,[7] that vehicle access "shall be provided by either temporary or permanent roads," and that "[i]f an improvement completion assurance has been posted in accordance with Section 10-9a-604.5, a local jurisdiction may not require permanent roads, or asphalt or concrete on temporary roads, before final approval of the structure served by the road." UTAH CODE § 15A-5-205.6(1). Temporary roads are those "constructed with a minimum of site specific structural fill for permanent roads and road base, or other approved material complying with local standards." *Id.*

When an applicant elects to provide improvement completion assurance, "the municipality may not deny an applicant a building permit if the development meets the requirements for the issuance of a building permit under the building code and fire code." UTAH CODE § 10-9a-604.5(4). Rather, the municipality is directed to "issue or deny a building permit in accordance with Section 10-9a-802 based on the installation of landscaping or infrastructure improvements." *Id.* § 604.5(2)(c)(iv). Section 10-9a-802, in turn, likewise

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[5] The City relies on this language "meets the conditions of . . . any local ordinance" to support its contention that it may, by ordinance, select which improvements are eligible for improvement assurance. That is not supported by the plain language here, which refers only to the *assurance itself* that must comply with local ordinances, not the applicant's choice to provide assurance in the first place.

[6] 2019 Ut. HB 315, 2019 Utah Laws 384, 2019 Ut. Ch. 384, 2019 Ut. ALS 384.

[7] Section 15A-5-205.6 consists of amendments and additions to Chapter 33 of the International Fire Code ("IFC") in the state's adoption of the international code as the State Fire Code. *See* UTAH CODE § 15A-5-103. Chapter 33 of the IFC, specifically, is titled "Fire Safety During Construction and Demolition." IFC Chapter 33 (2018).

states that a municipality "may not deny an applicant a building permit because the applicant has not completed an infrastructure improvement[] that is not essential to meet the requirements for the issuance of a building permit under the building code and fire code," and for which an assurance has been provided. UTAH CODE § 10-9a-802(2)(d).

Because improvement assurance does not apply to the terms of the state construction code, *see id.* § 604.5(5), it is inherent in the above provisions that the completion of infrastructure improvements essential to meet building and fire codes is still required prior to issuance of a building permit, regardless of the applicant's choice to provide improvement assurance—which instead only applies to all other infrastructure improvements required by local ordinances.

C. *For purposes of building permit issuance, "building and fire codes" consist of adopted state code, not additional requirements otherwise found in local ordinance.*

Fox Hollow's main contention is that, contrary to the provisions cited above, Providence City is illegally withholding issuance of building permits by insisting on completion of certain infrastructure improvements according to local standards, which Fox Hollow alleges go beyond what is required for "building code and fire code" under state law.

City Code provides that "[t]he following minimum improvements shall be completed and in place before the City will issue a building permit for any lot within [a] proposed development:

1. All grading of roads (including pit run and road base) as shown on the approved construction drawings, and all curb, gutter, and all utility trenches that lay inside the roadway;
2. All storm water (excluding finish grades and landscaping), water, sewer, and other improvements that may be deemed necessary minimum improvement; and . . .
3. Egress and ingress to provide acceptable and safe travel to and from each lot in the approved subdivision. Construction zone signs provided and maintained by the City at the developer's expense must be installed as per the Public Works Director.

PCC § 10-14-1.C(1). As discussed, because state law has previously spoken on the subject of what improvements may be required before issuance of a building permit, the City's ordinance is only permissible if it "in no way conflicts with existing state law." *Redwood Gym*, 624 P.2d 1138, at 1144.

In its submissions, the City argues that Fox Hollow interprets "building and fire code" too narrowly, and that the *City's* building and fire code include not only its adoption of international building and fire code standards, but also PCC Title 11—the City's subdivision ordinances—which includes the City's defined minimum improvements. These improvements therefore *are* essential for building and fire code, the City argues.

The term "the *City's* Building and Fire Code" is somewhat of a misnomer. Municipalities are not given discretion to have their own building or fire code standards in any material sense. Rather, Utah's State Construction and Fire Codes Act consists of the "codes adopted with any modifications . . . that the state and each political subdivision of the state shall follow." UTAH CODE § 15A-1-204(1)(a).[8] This state statute provides the extent to which any local variation is allowed to the otherwise statewide adoption of international building and fire codes.[9] The City's argument that its building code includes its subdivision improvement standards is also not borne out by the City Code's plain language, which provides that the Building Code of Providence City consists of the adoption of statewide uniform construction codes according to state law. *See* PCC § 9-1-1.[10]

Simply put, state law has spoken to when exactly a municipality may deny a building permit, which is that it "may not deny an applicant a building permit if the development meets the requirements for the issuance of a building permit under the building code and fire code." UTAH CODE § 10-9a-604.5(4). These provisions, as they stand, are not ambiguous. As such, Utah's State Construction and Fire Codes Act, UTAH CODE Title 15A, is the sole source of requirements for infrastructure improvements needed to obtain a building permit. This does not include the City's minimum improvement requirements found in its subdivision regulations to the extent that they conflict with this state Act.

II. Development Agreements may be Required for Optional Development Types, but Not All Conventional Subdivisions

Fox Hollow does not want to sign the Draft DA approved by the City because the document contains a provision that would obligate Fox Hollow to complete certain infrastructure improvements prior to building permits that Fox Hollow believes it would otherwise not be required to do under state law by providing improvement completion assurance. Fox Hollow therefore believes that this provision of the Draft DA is unenforceable.

The City argues that it is not violating state law by requiring City Code's minimum improvements because the provisions in Section 604.5 giving the applicant an ability to choose to provide improvement assurance "do[es] not supersede the terms of a valid development agreement . . . ." UTAH CODE § 10-9a-604.5(5). City Code requires a developer to enter into a development agreement with the City before the developer may obtain project approval. Therefore, the City argues, as LUDMA allows the parties to negotiate their own agreement, the City does not violate LUDMA when it requires completion of minimum improvements according to its subdivision standards.

[8] *See also*, UTAH CODE § 15A-1-403 (the State Fire Code is "a code to which cities, counties, fire protection districts, and the state shall adhere in safeguarding life and property from the hazards of fire and explosion")
[9] For example, the State Fire Code does not fully adopt the appendices to the International Fire Code, but does otherwise allow each local jurisdiction to adopt said appendices by ordinance. UTAH CODE § 15A-1-403(7)(c).
[10] The PCC cites to an outdated state code reference, Utah Code Title 58, Chapter 56, which is the predecessor to the State Construction and Fire Code Act, Utah Code Title 15A.

A development agreement is a valid and useful land use tool, and municipalities are authorized by state law to enter into development agreements with private property owners as a form of land use control. *See* UTAH CODE § 10-9a-102(2) (development agreements included among authorized actions for the use and development of land).

LUDMA provides that a municipality may generally enter into a development agreement containing any term that the municipality considers necessary or appropriate to accomplish land use objectives, *See* UTAH CODE § 10-9a-532(1), but like all governmental activity, the use of development agreements must operate within statutory and constitutional limits. One limitation imposed by LUDMA is that a municipality may not require a development agreement as the only option for developing property within the municipality. *Id*. § 532(2)(c).

This prohibition on compulsory development agreements is a logical outflow of the very concept of an "agreement."[11] In other words, for something to be considered a valid development agreement, it must generally meet the common law requirements of a legal contract. Contract law is based upon the principle that parties should be able to bargain between them as they see fit, and thereby enjoy the benefit of their bargain. This concept of a bargained-for performance or return promise is known as consideration, and is an essential element of a valid contract. Indeed, "[w]here consideration is lacking, there can be no contract." *General Ins. Co. of Am. v. Carnicero Dynasty Corp.*, 545 P.2d 502, 504 (Utah 1976).

Consistent with fundamental contract law, as long as a development agreement is entered into voluntarily with consideration negotiated at arm's length, and is otherwise legal, it is valid and enforceable. However, when a local government makes a development agreement "mandatory" under its code in order to develop property, in that there is no development alternative in which a development agreement will not be required, the result is not a development agreement at all, but simply another form of compulsory land use regulation.[12]

A. Development agreements are validly required for PUDs as an optional development type.

City Code mentions development agreements being required under two circumstances. One is found in Section 10-14-2, applicable to Planned Unit Developments, and which requires a development agreement as part of the "procedure" for approval of a PUD.

Planned Unit Development is defined as follows:

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[11] After all, development agreement is appropriately defined to mean "a written *agreement* . . . between a municipality and one or more parties . . . ." UTAH CODE § 10-9a-103(12) (emphasis).

[12] And not likely a *valid* land use regulation, either, as the unfettered discretion of the land use authority to impose any regulatory or restrictive condition it imagines without regard to predictable, objective standards otherwise expected of enacted land use regulations would very likely be considered unconstitutional. *See Lehi City v. Rickabaugh*, 2021 UT App 36, ¶ 39, 487 P.3d 453, 464 (a statute or ordinance is unconstitutionally vague if either it does not provide the kind of notice that enables ordinary people to understand what conduct is prohibited, or it encourages arbitrary and discriminatory enforcement).

> A development of land consisting of separate residential lots of record where conventional setbacks, lot sizes or density may be varied with adjacent land in common, usually as open space, and where said common land is maintained by the City, private management or a homeowners' association.

PCC § 10-1-4. A development agreement required by Section 10-14-2.B contains a list of things that amount to additional restrictions on development as a PUD. However, as anticipated in the term's definition, there are also some benefits available to a PUD not otherwise available to conventional developments. For instance, the permitted densities allowed in a PUD can be up to "110% of density allowed in the use chart for the zone in which the PUD will be built." PCC § 10-14-2.C. Also, Section 10-14-2.D adds permitted uses for residential, commercial, and recreation facilities within a PUD that individually might not otherwise be permitted in a particular zoning district. City Code contains some other provisions that provide special benefits to PUDs.[13]

Because PUDs are provided in addition to other conventional development methods in each of the City's zoning districts, and because PUDs provide special benefits that may be bargained for by the applicant not otherwise available to them, the City Code's requirement for a development agreement in the PUD process does not violate state law because it is entered into voluntarily with consideration negotiated at arm's length, with available development alternatives.

B. City may not subject all conventional subdivisions to required development agreement.

The other provision in City Code requiring a development agreement is found in the section for "Final Plat" under the chapter on Subdivision Regulations, which reads as follows: "Development Agreement: The developer shall enter into and sign an agreement with the City, which shall indicate a timetable for completion of the final improvements as listed in the preliminary and final plat. This agreement will be submitted to the City Council for approval." PCC § 11-3-3.

Because this provision applies to all subdivisions, it suggests that as every conventional subdivision within the municipality must enter into a development agreement with the city to obtain approval, the subdivision applicant is essentially subject to whatever time table for improvement completion the City is willing to agree to; otherwise, final plat approval cannot be obtained. Pursuant to Section 10-9a-532(2)(c) of LUDMA, this provision is unenforceable, as it requires a development agreement as the only option for developing property within the municipality, and places the entire administrative approval process on one completely discretionary decision by the City.

As a side note, an agreement solely indicating a timetable for improvement completion appears to be unnecessary under local ordinance and state law. This is because, as mentioned, the applicant must either install necessary improvements or provide

[13] *See*, for example, PCC § 8-1-21 (exceptions made to PUDs for some water availability requirements under certain circumstances).

assurance for required improvements prior to final plat approval, and state law and local ordinance otherwise provide for the expiration of approved final plats should they not be carried out within a reasonable amount of time. *See* UTAH CODE § 10-9a-509(1)(e) (the continuing validity of a land use approval is conditioned upon the applicant proceeding to implement the approval with reasonable diligence); *see also,* PCC § 11-3-3.G(2) ("An approved final plat shall be void if it is not recorded within one (1) year of approval . . . by the City Council.").

C. Fox Hollow was reviewed as a conventional development and cannot be subjected to a mandatory development agreement.

The City's staff reports and minutes never make a direct reference to the particular use from the City's use chart that is applied to the project, but because the project does not appear to have been reviewed under special development standards, it is assumed that it was processed simply as a conventional subdivision, and not as a PUD, for multiple-family dwellings as a permitted use in the MFM zone, which allows for "Multi-family residential type uses." PCC § 10-4-1.

According to City Code's use chart, the MFM allows all forms of attached dwellings, including single-, two-, three-, four-, as well as multi-family (5 or more), dwellings. PCC § 10-6-1. Additionally, the use chart also lists two special development types in the MFM zone that employ multi-family dwellings, "Cluster development," and "Planned Unit Development." *Id.* What is puzzling, however, is that City Code's definitions for these two uses are verbatim, *See* PCC § 10-1-4, but in the MFM zone, PUDs are listed as a permitted use while cluster developments are listed as a conditional use. PCC § 10-6-1.

Ironically, Fox Hollow's project also meets this shared definition of Planned Unit Development or Cluster Housing,[14] and intuitively the project's proposed use could be characterized as either. But while the two types of development are identical in definition, they do each have their own special development standards. City Code contains a chapter on "Special Developments," which includes separate sections for either "Cluster And Inner Block Development," PCC § 10-14-1, or "Planned Unit Developments," PCC § 10-14-2. The most notable difference between the two standards are the special benefits available to PUDs, such as the density bonus, and the accompanying PUD requirement for a development agreement, whereas in cluster developments, density may *not* be increased, though no development agreement is required for the other variations to conventional standards inherent in the term's definition, which instead are likely considered by imposing reasonable conditions when under review for approval of the conditional use permit.

[14] Both terms, as provided in the definitions section, are defined as "*A development of land consisting of separate residential lots of record where conventional setbacks, lot sizes or density may be varied with adjacent land in common, usually as open space, and where said common land is maintained by the City, private management or a homeowners' association.*" PCC § 10-1-4. This definition is applicable to Fox Hollow's property as it proposes, in addition to the multi-family dwellings, adjacent common areas that will be maintained by an HOA.

Nothing in the City's record suggests that Fox Hollow's project was reviewed and approved as either a PUD or a Cluster Development,[15] mostly because Fox Hollow does not appear to be taking advantage of any density or other benefits available to a PUD (again noting that it proposed 33 lots at a density of 11.83 whereas the MFM zone allows a maximum of 12 units/acre), *See* PCC § 10-8-1, and has not otherwise been subject to conditional use proceedings necessary for Cluster Development.

Under state law, the City cannot require a development agreement for all conventional subdivisions as the only method for developing in the City, but may require a development agreement for a PUD where the applicant has bargained for special benefits available to PUDs. Fox Hollow's project proposed a multi-family residential development as a permitted use in the MFM zone, and did not take advantage of any special bargained-for benefits as a PUD. Therefore, it cannot be subject to a development agreement to obtain final plat approval as a conventional subdivision.

CONCLUSION

The Fox Hollow townhome project received preliminary approval as conventional subdivision that did not take advantage of any special PUD benefits, and it is entitled to final plat approval without the need for a development agreement. Fox Hollow may therefore choose to provide assurance for the city's required infrastructure improvements to obtain final plat approval, and the City may not withhold a building permit on the basis of its own subdivision improvement standards inasmuch as Fox Hollow at least completes improvements necessary to meet fire and building code requirements as found in state law.

Jordan S. Cullimore

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

[15] While one of the citations in Fox Hollow's submissions is to Section 10-14-2 (PUD standards) as the source of the development requirement it was being subject to, that appears to be an isolated instance, as the City has only ever cited Section 11-3-3, applicable to final plats for all subdivisions, as the source of the required development agreement.

NOTE:

This is an advisory opinion as defined in Section 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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees and civil penalty provisions, found in Section 13-43-206 of the Utah Code, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.