Advisory Opinion 266

Parties: Christensen Farms Lots LLC / Wasatch County

Issued: March 24, 2023

TOPIC CATEGORIES:

Compliance with Land Use Regulations

Subdivision Plat Approval

The county code's requiring a development agreement for all "Large Scale" subdivisions did not violate state law's prohibition on development agreements as the "only" option for development land within a county, because the applicant either has the alternative to develop as a "Small Scale" subdivision without an agreement, or else may choose a development agreement "alternative" by recording a "development approval memo." The county code's allowance of an alternative to a development agreement through a recorded development approval memo does not amount to a wrongful lien because it is a choice selected and signed by the applicant.

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ADVISORY OPINION

Advisory Opinion Requested By:	Christensen Farms Lots, LLC
Local Government Entity:	Wasatch County
Applicant for Land Use Approval:	Christensen Farms Lots, LLC
Type of Property:	Undeveloped residential
Date of this Advisory Opinion:	March 24, 2023
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUES

Does Wasatch County Code violate state law's prohibition on requiring development agreements as the only option for development where the code requires a development agreement "or equivalent" recorded approval memo for any conventional subdivision greater than five lots?

SUMMARY OF ADVISORY OPINION

State law prohibits a county from requiring a development agreement as the only option for developing land within a county. A comprehensive zoning scheme may only require development agreements for approval of certain development types chosen by the applicant where there otherwise remains a "choice" for conventional development without one. The county code's requirement for a development agreement for all "Large Scale" developments is not illegal where the applicant either has the alternative to develop as a "Small Scale" development without an agreement, or else may choose a development agreement "alternative" by recording a "development approval memo."

Moreover, the county code's allowance of an alternative to a development agreement through a recorded development approval memo does not amount to a wrongful lien because it is likewise a choice selected and signed by the applicant.

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 Analise Wilson, attorney, on behalf of Christensen Farms Lots, LLC, received on October 7, 2022.
2. Letter from Jon Woodard, Deputy Wasatch County Attorney, received on October 25, 2022.
3. Response letter from Analise Wilson, received October 28, 2022.
4. Response letter from County, received November 3, 2022.

BACKGROUND

Ivory Development, LLC ("Ivory") and CLW Development, LLC purchased sixty acres of real property in unincorporated Wasatch County ("County") with plans to codevelop the Property as Christensen Farms Lots, LLC.

Over the course of a year, Ivory engaged with the County in development discussions for a concept plan that anticipated a development agreement to obtain a density above the limits provided in County Code in exchange for the donation of a regional park. The result of that process was ultimately a plan approved by the County Council that was not in line with Ivory's goals.

Starting over, Ivory submitted a new development application seeking administrative approval under the existing land use provisions by subdividing the property into 62 one-acre lots. County Code provides for certain defined development types, and conventional subdivisions are classified as either "Small Scale Development" (no more than five lots or equivalent residential units) or "Large Scale Development" (more than five lots or units).[1] The County returned some red-line comments, including a requirement that as a "large scale" subdivision, County Code required the applicant to enter into a development agreement with the County. Ivory raised some opposition to the requirement, and as a result, the County amended its code to provide for an "equivalent alternative to development agreements," which instead provides that an applicant may request, in lieu of a development agreement, a "development approval memo" which is recorded against the property at the time of final plat, and includes things such as vesting date, DRC reports and conditions of approval, minutes of public meetings, Will-Serve letters, architectural renderings, landscape plans, total units/ERU's granted, etc.

Ivory believes that this alternative is more onerous than the negotiated development agreement, arguing that it is wholly unnecessary to have all development approvals and supporting documents recorded against real property and amounts to a permanent encumbrance on private property and a wrongful lien. Ivory has requested an Advisory Opinion to determine whether the County may require the recording of the "Development Approval Memo" as a condition of developing property in the zone.

ANALYSIS

Utah's Land Use Development and Management Act ("LUDMA"), as applicable to counties, is the enabling state statute that authorizes counties to enact local land use regulations, and provides that in order to accomplish the purposes of the Act, a county "may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that the county considers necessary or appropriate for the use and development of land within … the county." UTAH CODE § 17-27a-102.

[1] WASATCH COUNTY CODE 2002 ("WCC") § 16.27.04.

Local land use regulations enacted pursuant to the Act are presumed valid unless "expressly preempted by, or was enacted contrary to, state or federal law." UTAH CODE § 17-27a-801(3)(a).

There are two principal ways in which a local land use law can be contrary to state law that are relevant to this opinion. First, to the extent that a local land use regulation conflicts with express provisions of LUDMA on a particular subject, state law controls. Second, a local land use regulation may not authorize the county to take any action that would be "expressly preempted" or contrary to some other state statute outside of LUDMA.

Therefore, the questions to be answered for this advisory opinion are:

(1) Whether Wasatch County's Development Agreement and Development Approval Memo regulations violate LUDMA's prohibitions that a Development Agreement be the only option to develop property; and
(2) Whether the Development Approval Memo is preempted by, or contrary to, Utah's Wrongful Lien Act?

I. County Code Provides Limited, but Sufficient, Options for Developing Land Without a Development Agreement

Development Agreements are a valid land use tool under LUDMA. Development Agreements may either be used pursuant to a legislative process to craft certain deviations from enacted standards in exchange for certain public benefits on an ad-hoc basis, or else as an administrative tool to implement an existing land use regulation as an administrative act. UTAH CODE § 17-27a-528(2)(a)-(b). What LUDMA does not allow a county to do, however, is to "require a development agreement as the only option for developing land within the county." *Id.* § 17-27a-528(2)(c). In this instance, we are only dealing with "administrative" development agreements—those employed in the approval of a land use application pursuant to enacted development standards.

When interpreting a statute, the primary goal is to ascertain the legislature's intent, the best evidence of which is the plain language of the statute itself. *Ragsdale v. Fishler*, 2020 UT 56, ¶ 29. The plain language of a statute is to be read as a whole and its provisions interpreted in harmony with other statutes in the same chapter. *Selman v. Box Elder County*, 2011 UT 18, ¶ 29 (citations omitted).

LUDMA defines "Development Agreement" to mean "a written agreement . . . between a county and one or more parties that regulates or controls the use or development of a specific area of land." The term "agreement" denotes a valid legal contract, which 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).

Recognizing that an agreement must entered into voluntarily and mutually agreed to, it is antithetical that a development agreement can be compulsory, as that would amount to a contract that lacks legal consideration. However, LUDMA's prohibition on development agreements as the "only option" for development is plainly stated. That is, assuming a landowner has at least some choice to develop land pursuant to enacted and plainly stated development standards without the need to negotiate terms with the county through a development agreement, a county's imposition

of a development agreement requirement on other particular types of development "options"—selected by the applicant within the larger zoning scheme—is permissible.

In this instance, County Code requires a development agreement for all "Large Scale Developments," though "Small Scale Developments" may be approved without a development agreement. *See,* WASATCH COUNTY CODE 2002 ("WCC") § 16.27.23. Because Ivory's development subdivides the property into 62 lots, the proposal is considered a "Large Scale" development. Ivory contends that the County Code's requiring development agreements for all Large Scale Developments expressly violates LUDMA as it is the "only option" for developing. The County argues, however, that because the code "allows" for "Small Scale" subdivisions to be approved without a development agreement, the county regulations are compliant with LUDMA's prohibition on requiring development agreements as the "only" option for developing within the county.[2]

Ivory notes that its proposed development is 62 total 1-acre lots, and that it would need to break up the development into 11 small scale subdivisions, requiring 11 separate applications, to engineer 11 different plan sets, and to appear at no less than 22 public meetings. This, Ivory concludes, is not a *reasonable* "option for developing land within the county" within the meaning of Section 528(2)(c).

While Ivory's concerns are well taken—being the Hobson's choice as it may be for this developer—the County Code's allowance for Small Scale Developments without a development agreement is nevertheless an "option" for developing land wherein a development agreement is not required, and we cannot conclude that this is in violation of Section 528(2)(c) of LUDMA, despite any alleged shortcomings as a policy matter. Truly, even if the County had simply enacted a land use regulation limiting the subdivision process entirely to five lots or less for a single application and plat approval, we similarly do not believe this would be a *per se* invalid land use regulation—though not likely good policy nor conducive to effective community planning.

The standard for whether a local land use regulation is valid is not a "reasonableness" standard as Ivory is suggesting; rather, it is merely whether it is "reasonably debatable" that the land use regulation is consistent with LUDMA. UTAH CODE § 17-27a-801(3); *see also*, *Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 14 (review of legislative zoning decisions is limited to whether the ordinance "could promote the general welfare; or even if it is reasonably debatable that it is in the interest of the general welfare") (cleaned up). Our Office has noted, on many occasions, that the reasonably debatable standard is a very low standard, or, in the words of the Utah Supreme Court, "highly deferential." *Bradley*, at ¶ 16. We simply cannot conclude, therefore, that the County's requirement for a development agreement on development types other than conventional Small Scale Developments eliminates Ivory's development options. Ivory simply cannot achieve the size

[2] The County would do well to proceed with caution, however, as the Code expressly states that for "small scale developments or site plan approvals, development agreements are only required if the land use authority determines there are unique circumstances that can be well addressed or memorialized through a development agreement." WCC § 16.27.23 (2022). If it is truly the County's position that Small Scale Developments are the blessed "option" pursuant to LUDMA's Section 528(c) that would not require a development agreement to develop land within the county, the County must understand that it may not then impose a development agreement, regardless of any "unique circumstances" as the code implies. Rather, this code's reference to development agreements for Small Scale Developments under unique circumstances must only refer to voluntary agreements that are entered into mutually between the county and applicant. Because otherwise, such an applicant apparently has no development choice, and a development agreement requirement under these circumstances is therefore compulsory.

of development it proposes without either being subject to a development agreement or phasing its development over several approvals.

Additionally, after Ivory raised opposition to the County's requirement for a development agreement as a "Large Scale" subdivision, the County in response amended its code to add the provision on "Equivalent Alternative to Development Agreement," referred to as a "Development Approval Memo," *See* WASATCH COUNTY ORDINANCE NO. 22-02 (February 16, 2022), which it then offered as an option to Ivory. This Equivalent option is available in instances of base density where a development agreement "would otherwise be required," but provides that "the applicant may request, and the land use authority may allow" [the] alternative." WCC § 16.27.23.A (2022). While the County's position is that its regulations were compliant with LUDMA before, the County offers up this newly enacted development agreement alternative as further support that its regulations do not require a development agreement "as the only option for developing land" within the county. *See,* UTAH CODE § 17-27a-528(2)(c).

It is our opinion that allowing for "Small Scale Development" (again, meaning only five lots or less) without requiring a development agreement is facially enough to avoid a violation of LUDMA by giving land use applicants at least one option to develop without a development agreement (regardless of the prudence of effectively limiting conventional development entitlements to no more than 5-lot subdivisions at a time). Beyond this minimum, however, the code's additional allowance of the alternative recorded development approval memo for "Large Scale" subdivisions otherwise subject to a development agreement further provides a developer yet another "option" to develop in the County, regardless of development size, without being compelled into a negotiation of unknowable terms with the County, and similarly satisfies this very basest of standards found in Section 528(2)(c).

II. County Code's Optional Development Memo is not a Wrongful Lien

Ivory argues that the County's option for a recorded development approval memo as an "alternative" to development agreement requirements amounts to an unlawful lien that would violate Utah's Wrongful Lien Act ("WLA"), UTAH CODE § 38-9-201 *et seq*. As discussed, LUMDA provides that a local land use regulation is presumed a valid enactment of its delegated authority unless it is "expressly preempted by, or was enacted contrary to, state or federal law." UTAH CODE § 17-27a-801(3)(a). Utah's WLA defines a "wrongful lien" to include "any document that purports to create a lien, notice of interest, or encumbrance on an owner's interest in certain real property" if it is not expressly authorized by statute, authorized by a court, or "signed by or authorized pursuant to a document signed by the owner of the real property." UTAH CODE § 38-9-102(12).

To this definition, Ivory asserts simply that the recorded memo is an "encumbrance" that "is not authorized by state or federal law, and in fact, conflicts with the intent of [Section] 528(2)(c)," and "is not authorized by court order and will not be signed by the owner of the real property."

The County views this option of recording a development approval memo as helping to address issues with development approvals that can still be questioned decades later, and that having key parts of those approvals recorded gives record notice to ensure the rights and obligations of the approval are understood and binding on the affected persons, and understood by interested persons, now and in the future. The County observes that in most local governments, the only records available over fifty years old are typically recorded documents. Ivory, on the other hand, argues that the recorded approval memo will "permanently encumber" its property, and that whereas project approvals of this size commonly undergo modifications and refinement, it is not workable to continually amend a "memo" recorded on title, and is impossible that the totality of

the approvals will be accurately reflected from day one of recording, such that the recorded version of the approval will only create ambiguity for future stakeholders. These concerns are understandable and well-founded in light of the practical realities of the development process.

While Ivory states that it does not dispute that there may be some value in using the development memo tool, it nevertheless criticizes it as a "mere record keeping tool" that encumbers its property without its consent. Granted, there are surely other ways that county planning and development officials can reliably preserve internal records of the details of development approvals without overwhelming the county recorder's office by delegating their own record-keeping needs, or otherwise passing that obligation onto private title. But in response to Ivory's wrongful lien claim, however, the County defends the development approval memo as being "authorized pursuant to a document signed by the owner of the real property." See, UTAH CODE § 38-9-102(12)(c).

The County notes that in order to utilize a development approval memo in place of a development agreement for those applications where a development agreement would otherwise be required, it must be requested by the applicant. *See,* WCC § 16.27.23 ("where . . . a development agreement would otherwise be required, the applicant may request, and the land use authority may allow for an alternative means of recording the development approval against the property"). Additionally, the County notes that for all development applications, the County requires either the owner to sign the application, or if the application is being signed or made by an agent, the County requires the agent to show that they are authorized by the owner. WCC § 16.27.05(A)(4).

Even assuming that a recorded development memo would be an "encumbrance" within the purview of the WLA, *see generally, WDIS v. Hi-Country Estates Homeowners Ass'n*, 2022 UT 33, ¶ 25 (questioning whether the WLA, with its focus on *liens*, applies to restrictive covenants as "encumbrances"), the provision of County Code allowing it very clearly requires that it be requested by the applicant. We cannot conclude that such an option, requested by the applicant as part of a signed development application, would ever amount to a wrongful lien as defined in the WLA.

While we understand the developer's argument that they feel they are being forced to choose between a compulsory development agreement and authorizing a permanent encumbrance on the property, as discussed, the availability of another conventional development method for Small Scale Development under County Code underscores that these options of either a development agreement or an equivalent recorded development memo does, in fact, present a legally sufficient choice.

The restrictiveness of these choices, undoubtedly, may deter certain larger development projects like Ivory's or others—whether intentional or not—but the fact remains that the County has delegated authority and discretion to express certain policy preferences in its land use ordinances. Those policies do have consequences and result in both incentives and disincentives, but as long as enacted land use regulations are at least "reasonably debatable" to promote the general welfare, they do not violate state law, which appears to be the case here.

CONCLUSION

Wasatch County ordinances do not violate state law in requiring a development agreement, or an alternative recorded development approval memo, on all Large Scale Developments, insofar as the landowner may otherwise choose to seek approval of a Small Scale Development without a

compulsory development agreement. For Large Scale Developments, the Code's provision allowing an applicant to forego the required development agreement by requesting a recorded development approval memo as an alternative does not amount to a wrongful lien under Utah statute because it is an option authorized by the applicant when the applicant chooses that development option under the County Code. While restrictive in effect, these provisions and development options are not illegal forms of land use controls as they are at least reasonably debatable to promote the general welfare, and therefore comply with state-delegated authority.

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Office of the Property Rights Ombudsman

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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.

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