

Advisory Opinion #164

Parties: Pleasant View City, Horizon Development & Management, LLC

Issued: October 26, 2015

TOPIC CATEGORIES:

Conditional Uses
Entitlement to Application Approval
Compliance with Mandatory Land Use Ordinances
Interpretation of Ordinances

Courts follow established rules of statutory construction when determining the correct interpretation of a municipality's land use ordinance. The plain language of the ordinance in question indicates that the proposed use is a conditionally permitted use that should be approved as long as it will not produce detrimental impacts that cannot be mitigated through reasonable conditions. A "Purpose and Intent" section of an ordinance typically is not a mandatory, substantive part of the ordinance. A City should follow the mandatory provisions of an ordinance when applying it to development applications.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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

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



GARY R. HERBERT
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State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI
Executive Director

BRENT N. BATEMAN
Lead Attorney, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested By: City of Pleasant View
Local Government Entity: City of Pleasant View
Applicant for Land Use Approval: Horizon Development and Management, LLC
Type of Property: Multi-family Residential Development
Date of this Advisory Opinion: October 26, 2015
Opinion Authored By: Jordan S. Cullimore
Office of the Property Rights Ombudsman

ISSUES

1. Did the City correctly interpret its ordinance to require the applicant to incorporate a mix of uses into the applicant's development proposal?
2. Is the City bound to expand the Master Development Guidelines of a prior, adjacent project to the applicant's present proposal?

SUMMARY OF ADVISORY OPINION

Courts follow established rules of statutory construction when determining the correct interpretation of a municipality's land use ordinance. Pleasant View City did not correctly interpret its TOD ordinance when it determined that Mr. Peterson's project must incorporate non-residential uses to comply with the zone's requirements. The plain language of the ordinance indicates that Mr. Peterson's proposed use is a conditionally permitted use that should be approved as long as it will not produce detrimental impacts that cannot be mitigated through reasonable conditions. The "Purpose and Intent" section of the ordinance does not require mixed use development, but instead provides for and encourages it.

Additionally, the City should follow the mandatory provisions of its ordinance and adopt a common set of Master Development Guidelines that governs all properties, including Mr. Peterson's current project, in the existing TOD Zone.

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 § 13-43-205. An advisory 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.

A Request for an Advisory Opinion was received from Valerie Claussen, Assistant City Administrator for Pleasant View City, on July 23, 2015. A copy of that request was sent via certified mail to Horizon Development and Land Management, LLC (“Horizon”), Attn: Kirt Peterson, President, at 1466 North Hwy 89, Ste 220, Farmington, Utah. According to the return receipt, Horizon received the Request on July 27, 2015.

EVIDENCE

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

1. Request for an Advisory Opinion, with attachments, submitted by Valerie Claussen, Assistant City Administrator for Pleasant View City, on July 23, 2015.
2. Response from Bruce R. Baird, on behalf of Pleasant View Holdings IV, LLC, received August 17, 2015.
3. Reply submitted by Ms. Claussen, received September 3, 2015.

BACKGROUND

Kirt Peterson of Horizon Development and Land Management, LLC, proposes to construct 132 multi-family residences on a 9.97 acre parcel located in the Transportation Oriented Development (TOD) Zone at approximately 3000 North Highway 89 in Pleasant View City. The site is surrounded by light industrial, commercial, office, and other multi-family residential uses and is located near a UTA FrontRunner station.

The stated purposes of the TOD Zone are, among others, to provide standards for development of areas close to Pleasant View’s major transportation hubs, and “[p]rovide for development of compatible mixed uses in close proximity to one another to provide a blend of retail, service, office, dining and residential uses.” PLEASANT VIEW CITY CODE §18.39.010(1)-(2).

Prior development in the existing TOD Zone has consisted of two phases of a single, multi-family housing development. Mr. Peterson’s proposal will occupy the remaining available, undeveloped portion of the existing TOD Zone.

The City determined that Mr. Peterson’s proposal is not consistent with the requirements of the TOD Zone because the “Purpose and Intent” section of the City Code contemplates mixed use development and Mr. Peterson’s proposal includes only residential uses. If his development were approved as proposed, the entire TOD Zone would consist only of multi-family residential housing, which would not fulfill the intent of the zone. Mr. Peterson responded to the City’s concern by asserting that his proposal complies with the requirements of the TOD Zone because “multi-family high density residential” is a conditionally permitted use in the zone.

Subsequently, the Planning Commission denied Mr. Peterson’s application on June 4, 2015. The Commission determined that the “purpose and intent” of the TOD Zone was not met since Mr. Peterson’s proposal consisted of a single use (multi-family residential) and did not incorporate other compatible non-residential uses. Mr. Peterson appealed this decision, and Pleasant View City requested that the Ombudsman provide an opinion about whether the City properly interpreted its ordinance in denying Mr. Peterson’s request for approval.

ANALYSIS

I. Pleasant View City’s TOD Zone Does Not Require an Applicant to Include a Mix of Uses in a Project Proposal.

Pleasant View City did not correctly interpret its TOD ordinance when it determined that Mr. Peterson’s project should incorporate non-residential uses. The plain language of the ordinance indicates that Mr. Peterson’s proposed use is a conditionally permitted use that should be approved as long as it will not produce detrimental impacts that cannot be mitigated through reasonable conditions. The “Purpose and Intent” section of the ordinance does not require mixed use development; it provides for and encourages it. The ordinance does not require a project to incorporate non-residential uses with a multi-family residential use.

A. Rules of Statutory Interpretation.

To determine whether a municipality correctly interpreted and applied its ordinance to a development application, a court will follow established rules of statutory construction. *Foutz v. City of South Jordan*, 2004 UT 75, ¶ 8, 100 P.3d 1171. Because local governments possess a certain degree of specialized knowledge about their ordinances, Utah courts afford “some level of non-binding deference to the interpretation advanced by the local agency.” *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 28, 104 P.3d 1208. However, the courts retain the ultimate authority to determine whether a local government’s interpretation of an ordinance is correct. *Id.*

Ordinance interpretation begins with an analysis of the plain language of the ordinance. *Carrier* 2004 UT 98 ¶ 30, 104 P.3d 1208. The primary goal of interpretation 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*, 2004 UT 75, ¶ 11, 100 P.3d 1171 (emphasis added). In doing so, it is presumed that the legislative body used each word advisedly. *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804. “When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.” *Id.* It is also important to recognize that zoning ordinances should be strictly construed in favor of allowing a property owner’s desired use since

such ordinances are in derogation of an owner’s use of land. *See Carrier* 2004 UT 98 ¶ 31, 104 P.3d 1208.

B. Interpretation and Application of Pleasant View City’s TOD Ordinance.

The plain language of Section 18.39.030 of the Pleasant View City Code allows development projects consisting exclusively of single-use, multi-family housing. The section lists which uses are permitted, conditionally permitted, and prohibited in the TOD Zone. The list of conditionally permitted uses, in pertinent part, is as follows:

B. Conditional Uses:

...

7. Mixed-use development incorporating any uses listed herein as conditional uses.
8. Multi-Family high density residential, including residential facilities for the elderly and handicapped, condominiums, and generally all classes of affordable or higher end types of housing, whether for rental or sale.

...

PLEASANT VIEW CITY CODE § 18.39.030(B). The list of conditionally permitted uses includes multi-family high density residential, the use Mr. Peterson proposes on the subject parcel.

Separately, the list of conditional uses includes “[m]ixed use development incorporating any uses listed herein as conditional uses.” *Id.* We presume that each term in an ordinance was included advisedly. *See Selman*, 2011 UT 18, ¶18, 251 P.3d 804. Since both “multi-family residential” and “mixed-use development” were listed separately as conditionally permitted use categories, both use categories are separate and independent of one another.

Moreover, a section of the TOD ordinance specifically lists prohibited uses in the zone. PLEASANT VIEW CITY CODE § 18.39.030(C). This list does not prohibit any of the standalone permitted or conditionally permitted use categories. This bolsters the conclusion that the plain language of Pleasant View City’s TOD ordinance entitles Mr. Peterson to approval of a development proposal that consists exclusively of multi-family residential housing, subject to any development standards and reasonable conditions imposed by the land use authority to mitigate potentially detrimental impacts of the use. *See UTAH CODE ANN.* § 10-9a-507(2)(a).

C. Legal Effect of the “Purpose and Intent” Section of the TOD Ordinance.

Pleasant View City asserts that it can require Mr. Peterson to include a mix of uses in its project proposal because of the “Purpose and Intent” section of the TOD ordinance. One of the stated purposes of the TOD Zone is to “[p]rovide for development of compatible mixed uses in close proximity to one another to provide a blend of retail service, office, dining and residential uses....” PLEASANT VIEW CITY CODE § 18.39.010(A)(2).

In *Price Development Co. v. Orem City*, 2000 UT 26, ¶ 23, 995 P.2d 1237, the court discussed the role of a policy section in a statute. The court “referred to a statement of legislative purpose

as a ‘preamble’ to the operative provisions of a statute.” *Id.* As such, “a preamble is nothing more than a statement of policy which confers no substantive rights.” *Id.* The court further explained that these provisions “provide guidance to the reader as to how the act should be enforced and interpreted, but they are not a substantive part of the statute.” *Id.* Accordingly, these provisions “may be used to clarify ambiguities, but they do not create rights that are not found within the statute, nor do they limit those actually given by the legislation.” *Id.* Since the substantive text of the TOD ordinance unambiguously allows multi-family housing as a standalone use, we need not look to the statement of purpose and intent for clarification.

Further, in the event that the “Purpose and Intent” section of the ordinance were considered binding on an applicant for development approval, the plain language of the section states that the purpose of the zone is to “[p]rovide for development of compatible mixed uses....” PLEASANT VIEW CITY CODE § 18.39.030(A)(2) (emphasis added). The dictionary defines “provide for something” as “[making] it possible for something to happen in the future,” *Macmillan Dictionary*, www.macmillandictionary.com/us/dictionary/american/provide-for, or encourage it, as opposed to requiring a certain outcome. Thus, the “Purpose and Intent” section by its plain language does not *require* mixed-use development.

D. Appropriate Use of Conditions in the Conditional Use Permit Context.

Pleasant View City, in its June 4, 2015 Planning Commission staff report on Mr. Peterson’s proposal, proposes an approach of imposing, as a condition of approval pursuant to the required conditional use permit, a requirement that the project include a certain percentage of non-residential uses. While it is appropriate to impose reasonable conditions on a conditionally permitted use, UTAH CODE ANN. § 10-9a-507, a condition of this nature would be improper in this context.

Utah Code states that a conditional use “shall be approved if reasonable conditions are proposed, or can be imposed, to mitigate the reasonably anticipated detrimental effects of the proposed use in accordance with applicable standards.” *Id.* § 10-9a-507(2)(a). Further, an application for approval of a conditional use permit may only be denied if the reasonably anticipated detrimental effects of a proposed use “cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards.” *Id.* § 10-9a-507(2)(b).

Pleasant View City Code Chapter 18.54 articulates the applicable standards that a conditional use must meet to receive approval. The applicable standards identify concerns related to the general well-being of the community, human and environmental health and safety, traffic, parking, building design and location, landscaping, signs, etc., as well as concerns about compatibility with surrounding uses and conformance to “goals, policies, governing principles, and the land uses found in the General Plan of the city.” PLEASANT VIEW CITY CODE § 18.54.050(A)-(D).

If the Planning Commission were to identify unique characteristics related to multi-family, high-density housing that could be reasonably anticipated, by substantial evidence, to have a detrimental effect on any of the above concerns, the imposition of reasonable conditions to mitigate such impacts would be appropriate. However, it is improper to designate the conditionally approved use (multi-family, high-density residential) as an intrinsically detrimental

impact, the solution to which is non-residential uses, when the ordinance governing the zone already identifies the standalone use as an appropriate and compatible use in the zone. For this reason, it would be improper to impose, as a condition of site plan approval, a requirement that the project include a certain percentage of non-residential uses.

E. Consideration of Prior Projects within the TOD Zone.

In the record submitted by Pleasant View City, multiple references exist to statements made by city representatives that the existing TOD Zone, of which this project is a part, was established with the intent of creating a mixed use area. Such statements were made in the context of granting approvals for other multi-family residential project phases in the zone.

The project that is the subject of this Advisory Opinion will occupy the remaining area currently available for development within the TOD Zone. All of the prior development in the zone has consisted of multi-family residential housing. This is partially why the City has instructed Mr. Peterson to include nonresidential uses in his current proposal—to ensure that some portion of the existing zone contains non-residential development.

Pleasant View City's TOD ordinance does not support the conclusion that the City has the authority to consider the present proposal in context of prior development within the zone, and require this project to bear the burden of carrying out the legislative preference of mixed use development. *See Price Development Co.*, 2000 UT 26, ¶ 24, 995 P.2d 1237. The plain language of the ordinance, *see Carrier* 2004 UT 98 ¶ 30, 104 P.3d 1208, does not make the approval of subsequent projects contingent on the approval of prior projects.

Moreover, the fact that the City has granted approval for prior single-use, multi-family residential projects in the TOD Zone strengthens the conclusion that such projects comply with the requirements of the zone. Accordingly, the City's requirement to include non-residential uses in the development does not comply with the plain language of Pleasant View City ordinances.

II. Pleasant View City Should Create a Common Set of Master Development Guidelines for the Entire TOD District.

Pleasant View City also requests that the Ombudsman's Office provide an opinion regarding whether the City is obligated to expand the Master Development Guidelines approved for the prior project in the TOD Zone to the current project Mr. Peterson is proposing. The Code states that a common set of Master Development Guidelines (MDGs) governing architectural design, open space, buildings, and structures "shall be adopted as supplemental regulations applicable to *all properties* in a specific TOD Zone." PLEASANT VIEW CITY CODE § 18.39.060(A)(1) (emphasis added). The Code indicates that the purpose of the MDGs, and an accompanying Common Area Management Plan for landscaping, open space, and common areas, is to establish design standards that "create a cohesive appearance that is pedestrian friendly (walkable) and...encourages travel by transit, bicycling, van pooling, and car pooling." PLEASANT VIEW CITY CODE § 18.39.060(A)(2).

Pleasant View City has acknowledged that it should have adopted comprehensive MDGs for all the properties in the existing TOD Zone when it was established, but did not. Instead, the practice has been to adopt Master Development Guidelines in piecemeal fashion as development has occurred.

Utah Code states that a city is bound by the terms and standards of its land use ordinances and must comply with the ordinances' mandatory provisions. UTAH CODE ANN. § 10-9a-509(2). Consequently, and according to Code requirements, the City should adopt a common set of Master Development Guidelines, *see* PLEASANT VIEW CITY CODE § 18.39.060(A)(1), that governs all properties, including Mr. Peterson's current project, in the existing TOD Zone.

That said, the Code does grant the City discretion to review, and amend the document "as necessary." PLEASANT VIEW CITY CODE § 18.39.060(A)(1). Accordingly, if the City determines that the existing MDG document applicable to the existing TOD Zone needs to be modified in consideration of the new project to ensure a cohesive appearance that is pedestrian and transit friendly, the City has the discretion to do so as long as it considers and preserves the vested rights possessed by Mr. Peterson as a result of submitting a complete land use application to the City.

CONCLUSION

Courts follow established rules of statutory construction when determining the correct interpretation of a municipality's land use ordinance. Pleasant View City did not properly interpret its TOD ordinance when it determined that Mr. Peterson's project must incorporate non-residential uses to comply with the zone's requirements. The plain language of the ordinance indicates that Mr. Peterson's proposed use is a conditionally permitted use that should be approved as long as it will not produce detrimental impacts that cannot be mitigated through reasonable conditions. The "Purpose and Intent" section of the ordinance does not require mixed-use development, but instead provides for and encourages it.

Additionally, the City should follow the mandatory provisions of its ordinance and adopt a common set of Master Development Guidelines that governs all properties, including Mr. Peterson's current project, in the existing TOD Zone.

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.

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 provisions, found in Utah Code § 13-43-206, 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.

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:

Horizon Development and Land Management, LLC
Attn: Kirt Peterson, President
1466 N. Hwy 89, Ste. 220
Farmington, Utah 84025

On this _____ Day of _____, 2015, 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