

Advisory Opinion #192

Parties: Cedar Hills Farm Land, LLC; Cedar Hills City

Issued: December 28, 2017

TOPIC CATEGORIES:
Conditional Use Applications
Entitlement to Application Approval

By law, conditions imposed upon a conditional use permit must accord with applicable standards adopted by ordinance. Accordingly, the City may only impose conditions on the applicant's development proposal to the extent that the conditions mitigate the use's reasonably anticipated detrimental effects in accordance with the City Code's applicable standards. To the extent the City's conditions do not mitigate detrimental effects or accord with applicable ordinance standards, they are invalid.

DISCLAIMER

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ADVISORY OPINION

Advisory Opinion Requested By: Bruce R. Baird, Attorney for Cedar Hills Farm Land, LLC, *et al.*

Local Government Entity: City of Cedar Hills

Type of Property: Congregate Care Facility

Date of this Advisory Opinion: December 28, 2017

Opinion Authored By: Jordan S. Cullimore
Office of the Property Rights Ombudsman

ISSUE

Are the conditions imposed by Cedar Hills City on the applicant's proposed conditional use permit lawful?

SUMMARY OF ADVISORY OPINION

By law, conditions imposed upon a conditional use permit must accord with applicable standards adopted by ordinance. Accordingly, Cedar Hills may only impose conditions on the applicant's development proposal to the extent that the conditions mitigate the use's reasonably anticipated detrimental effects in accordance with the City Code's applicable standards. To the extent the City's conditions do not mitigate detrimental effects or accord with applicable ordinance standards, they are invalid.

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 Bruce R. Baird on December 16, 2015. A copy of that request was sent via certified mail to Colleen Mulvey, City Recorder, City of Cedar Hills, at 10246 North Canyon Road, Cedar Hills, Utah. The City received the request on December 21, 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 Bruce R. Baird, Attorney for Cedar Hills Farm Land, LLC, *et al.*, on December 16, 2015.
2. Supplemental Submission Materials submitted by Bruce A. Baird, Attorney for Cedar Hills Farm Land, LLC, *et al.*, on October 13, 2016.
3. Reply from Loyal C. Hulme, Attorney for the City of Cedar Hills, received March 6, 2017.
4. Response from Bruce R. Baird, Attorney for Cedar Hills Farm Land, LLC, *et al.*, received March 14, 2017.

BACKGROUND

Sometime prior to April 2013, Cedar Hills Farm Land, LLC ("CHFL") and the Lyle J. Smart Limited Family Partnership (the "Owner") began discussions with Cedar Hills City (the "City") staff and elected officials regarding a proposal to develop the Owner's property (the "Property"). The Property is located in the City's Shopping Center (SC-1) Zone and is further regulated by two subzones: the Neighborhood Retail subzone and Mixed Use Office/Retail subzone. The parties agree that the proposed facility that is the subject of this Opinion is wholly located in, and therefore regulated by, the Mixed Use Office/Retail subzone within the SC-1 Zone.

After initial discussions with the City, CHFL began the formal application and review process on April 25, 2013 when it submitted an initial development plan to the City. The plan was presented to the City's Planning Commission on that same day. The plan proposed development and construction of a 5-story senior living facility on the Owner's property and also envisioned an overall plan that included a retail component consisting of a movie theater, shops, and sit down restaurants on adjacent, City-owned property.

Multiple meetings were subsequently held with staff, elected and appointed officials. The project was modified and adjusted along the way in response to regulatory requirements, as well as requests by elected and appointed officials and the public. By the March 19, 2014 City Council meeting the proposed facility was being referred to as a "congregate care facility" instead of simply a "senior living facility."

As the development review process moved forward and public input was given, confusion apparently developed regarding the nature of the facility and how it would operate once constructed. CHFL considered modifying the proposal to fit neatly within the conditionally permitted use category of “Assisted living, convalescence home” to dispel such confusion. However, according to CHFL, residents and City officials encouraged CHFL to move forward with the congregate care model as a more desirable option.

Before moving forward with a congregate care facility, however, CHFL sought assurances that a congregate care use would be approved under the City’s existing land use regulations. On December 2, 2014 the City Council and Planning Commission held a joint work session with City staff and legal counsel. In that meeting, the City discussed whether CHFL’s proposed congregate care facility was “substantially the same” as the Design Guidelines’ conditionally permitted “Assisted living, convalescence home” use category since “congregate care” was not specifically listed.¹

Following the joint work session the City Council held its regularly scheduled Council meeting and formally considered the question on the agenda. After discussing the item in the public meeting, the Council voted 3-2 to categorize CHFL’s proposed congregate care use as “similar in nature” to an assisted living facility. The Council further concluded that the proposed use “shall be treated as an assisted living facility or convalescence care center in interpreting” the City’s Design Guidelines.²

Subsequent meetings were held involving CHFL, City staff, and the elected and appointed officials in which the plans were iteratively reviewed and revised. CHFL attempted to comply with the City Code, the Design Guidelines, as well as various requests by elected and appointed officials and residents of the City. On August 18, 2015, the Planning Commission considered the product of this process and concluded that the proposal complied with all applicable requirements. As an advisory body to the City’s Land Use Authority, which in this case was the City Council, the Planning Commission recommended approval of the proposed project.

The City Council considered the Planning Commission’s recommendation on September 22, 2015. In response to several comments from City residents who were opposed to the project for various reasons, the Council voted 4-1 to continue the item to a later date.

The later date arrived on November 17, 2015 when the City Council again met to consider CHFL’s proposal. After additional review and consideration, the City Council approved CHFL’s proposed site plan subject to fourteen conditions.

CHFL subsequently appealed the decision imposing the conditions to the City’s appeal authority, the Board of Adjustment, arguing that the imposed conditions are “absurd, illegal, punitive, facially insupportable” and that as such, the approval effectively operates as a denial of the

¹ The Design Guidelines state that “[i]f a proposed use is not listed in the [permitted and conditional uses table] but it can be shown to be substantially the same as an existing item in the chart, then it can be treated as the item in the chart.” Design Guidelines, p. 7.

² The motion, in its entirety was as follows: “To approve a finding of fact that a congregate care facility is similar in nature to an assisted living facility and shall be treated as an assisted living facility or convalescence care center in interpreting the Guidelines for the Design and Review of Planned Commercial Development Projects.”

conditional use permit. More specifically, CHFL argues that the conditions imposed by the City Council lack connection to any reasonably anticipated detrimental effects and are not necessary to mitigate detrimental effects in accordance with any applicable standards in the City's ordinances or Design Guidelines. CHFL and the City agreed to seek an Advisory Opinion from the Ombudsman's office before proceeding with the appeal process.

In its position brief to the Ombudsman's Office, the City voluntarily withdrew conditions 1, 2, 3, and 13. The remaining applicable conditions are as follows³:

4. The Rosegate Development should be limited to no more than 165 residential units. Currently, the densest residential zone in the city (the PR 3.4 Zone) allows for only 6 units per structure. The Rosegate building is an anomaly in the city with a proposed 291 units in the structure. Any more than 165 units on the subject property would be irresponsible planning practices. This condition will ensure that the property has an intensity that is less than the use in the neighborhood retail sub-district, a requirement listed in the design guidelines. In addition, this condition must take into account the reality that there is little public transportation in our area, so residents will need to drive regularly, causing additional intensity far beyond an assisted living building and even more than a typical senior housing development that might be more conveniently located to nearby shops and services. The Rosegate development should be compatible with the surrounding properties and the City's intent to create a viable, mixed use commercial center for the reasons described in concern 2 and concern 3.
5. The Rosegate development must include on-site services for the convenience of its residents, so they can age in place. These services should be provided as direct services, provided directly by management of the housing facility. These services should include a restaurant that provides three meals a day seven days a week; home health care services from qualified professionals, including help with medications, bathing, dressing, and other hospice needs; physical therapy; other routine health care services; fitness classes; regular social activities; and a shuttle to nearby destinations that are too far for walking. This will ensure the development qualifies for a conditional use that is "substantially similar to" assisted living, as discussed in concern 4.
6. The Rosegate development must include 1.4 parking stalls per residential unit. The developer's description of the proposed use is more closely akin to a senior apartment complex than an assisted living center. Accordingly, for the reasons discussed in concern 4 and concern 5 of my letter, the number of residential units must be reduced, in order to accommodate active senior living.
7. Outdoor overnight parking of vehicles shall be prohibited in areas adjacent to single family homes, with covered parking provided in these areas. This restriction is imposed in accordance with the City Council's power to take reasonable steps to preserve the integrity of the General Plan and the intent of the mixed-use sub-district in the commercial zone, and to minimize effects on residents as discussed in concern 5.
8. In accordance with the Design Guidelines, the landscaping and open areas shall create a park-like atmosphere with linked pedestrian corridors designed to promote pedestrian activity. For the reasons discussed in concern 6 of my letter, the landscaping needs to

³ The conditions were adopted from a letter written by one of the councilmembers who had several concerns with the proposal, hence the first-person narrative format.

promote integration with the surrounding property uses and not limit the open-space and pedestrian traffic areas to the interior courtyards of the facility. The landscaping should provide open walkable space between separated buildings. Currently, the landscaping is not accessible to the pedestrian uses from surrounding neighborhoods and is not linked in a way to create the pedestrian corridors and park-like environment required by the Design Guidelines.

9. The Rosegate development should be constructed in phases that include both commercial and residential development, consistent with the primary intent of the sub-district being a mixed-use development. The proposed phased construction is inappropriate because the primary purpose of the development is to place residential use in the heart of the City's commercial center, the commercial aspect of the development is ancillary to the overall development, the timing of the commercial portion of the development is uncertain, and for each of the other reasons discussed in concern 7. This mitigates the potential impact of the City being left with a building purely residential in nature in a commercial zone. Commercial uses must have adequate parking, separate from residential uses.
10. The Rosegate development should be reduced in scale, size and intensity in order to mitigate the impacts on the City's public safety services. No more than 165 units should be permitted in the development for the reasons discussed in concern 8, and in keeping with concerns listed in concern 3 and 4.
11. Each residential unit shall be occupied by at least one resident that is 55 years of age or older, and there shall be no residents younger than 25. This mitigates the concern for traffic impacts and crowding in schools. For the reasons discussed in concern 9, reasonable rental restrictions are required in order to prevent an erosion of the living accommodations and services available to the senior community.
12. To add that these conditions be in the CC&Rs and that lights in parking areas adjacent to single family homes should be low to the ground in bollards, rather than on light poles.
14. That all review and approval must be made by both the Planning Commission and this Council and prior to the review by Council the approved conditions must have legal review.

Finally, CHFL contends that its project must be approved without conditions because, as a threshold matter, the City's zoning ordinances and land use regulation scheme are fundamentally flawed and invalid.⁴

⁴ CHFL also asserts that because of incurable bias on the part of the City Council acting as the land use authority, the Council's decision imposing conditions must be set aside and the Planning Commission's decision should be followed. Whether or not the City Council displayed sufficient bias to disqualify it from making decisions on CHFL's conditional use permit application is an inquiry that exceeds the scope of this Office's authority and of this Advisory Opinion. Accordingly, we limit our review to the questions involving the validity, applicability, and effect of the City's regulatory scheme and the legality of the conditions imposed on CHFL's conditional use permit.

ANALYSIS

I. VALIDITY AND APPLICABILITY OF THE CITY'S REGULATORY SCHEME TO CHFL'S CONDITIONAL USE PERMIT APPLICATION

CHFL argues that the City's SC-1 Zone is fundamentally flawed, and therefore invalid and inapplicable to CHFL's development proposal because the zone lacks any permitted uses, and instead only allows conditionally permitted uses. To support its claim that such a zoning district is invalid, CHFL cites at length to a 2008 Wisconsin Supreme Court opinion, *Town of Rhine v. Bizzell*, 751 N.W.2d 780 (Wisc. 2008).

In *Bizzell*, the Wisconsin Supreme Court considered a zoning district that explicitly included “no permitted uses.” Any use of the land within the district was authorized only by conditional use permit. Applying substantive due process principles, the court in *Bizzell* concluded that a “no permitted uses zone” was, under the Wisconsin Constitution, unconstitutional on its face. The court reasoned that the regulatory scheme was “arbitrary and unreasonable in that it precludes any use as of right in the [zoning district] and such limitation bears no substantial relation to the public health, safety, morals or general welfare.” *Bizzell*, 751 N.W.2d at 793.

Bizzell differs from the present case. Even assuming that Utah courts would adopt the same reasoning and conclusions in *Bizzell* under a similar set of circumstances, that case involved a zoning district that allowed *no* permitted uses of right. Here, the City's SC-1 zone allows *very few* permitted uses.⁵ Since zoning districts, such as single family residential districts, routinely allow few permitted uses in addition to some conditional uses, and since the parties have presented no relevant authority that a zoning district allowing very few permitted uses is fundamentally flawed or invalid, *Bizzell* does not apply.⁶ Accordingly, the City's SC-1 zone has a presumption of validity in accordance with established Utah law.⁷

CHFL further argues that its development proposal is not subject to the City's Design Guidelines because the Design Guidelines were enacted by resolution instead of by ordinance. Moreover,

⁵ The text of the SC-1 zone allows the following as permitted uses of right: (1) Agriculture and the production of crops in the field; (2) Planned commercial development projects subject to the applicable ordinance; and (3) Public utility rights of way and related utility facilities. Arguably, the SC-1 zone meaningfully allows only one permitted use. All uses within a planned commercial development projects are conditionally permitted. Consequently, it is appropriate to conclude that planned commercial development projects are, effectively, conditionally permitted. Additionally, allowing public utility rights of way and related facilities is not a very meaningful allowance for private property owners since such uses are almost universally allowed impliedly as ancillary to material land use categories. Nonetheless, the SC-1 zone does allow agricultural uses as permitted of right.

⁶ The court in *Bizzell* even impliedly acknowledges that since the “no permitted uses” ordinance under consideration had since been modified to permit just two use categories of right—agricultural and recreational—the issue had been rendered moot. See *Bizzell*, 751 N.W.2d at 799. Moreover, the *Bizzell* court indicates that its holding does not create a categorical rule, and that even a “no permitted uses” zoning district may be valid if the circumstances lead to the conclusion that the regulatory scheme is rationally related to a legitimate government interest.

⁷ See *Gayland v. Salt Lake County*, 358 P.2d 633 (Utah 1961) (In zoning, as in any legislative action, the functioning authority has wide discretion. Its action is endowed with a presumption of validity....); *Thurston v. Cache County*, 626 P.2d 440 (Utah 1981) ([T]he zoning authority is afforded a broad latitude of discretion, and its decisions are afforded a strong presumption of validity.); *Bradley v. Payson City Corp.*, 2003 UT 16, ¶28 (A [legislative body's] ultimate decision, of course, reflects legislative preferences that are entitled to a presumption of validity.)

CHFL asserts that much of the language in the Design Guidelines is unenforceable because the provisions are overly vague and ambiguous.

The latter argument, that the Guidelines are unenforceable due to vagueness and ambiguity will be addressed in greater detail below. Regarding the former argument, that the Guidelines are unenforceable because they were enacted by resolution instead of ordinance, State law provides specific guidance. The City points out that UTAH CODE § 10-3-711(2)(a), discussing publication and posting requirements for municipal ordinances, provides that:

Any ordinance, code or book...relating to building or safety standards, municipal functions, administration, control, or regulations, may be adopted and shall take effect without further publication or posting, *if reference is made to the code or book* and at least one copy has been filed for use and examination by the public in the office of the recorder or clerk of the city or town prior to adoption of the ordinance by the governing body.

UTAH CODE § 10-3-711(2)(a) (emphasis added).

In the case of the City's Design Guidelines, the article in the City Code governing Planned Commercial Development projects references the Design Guidelines and requires that projects comply with the Guidelines.⁸ The fact that the Guidelines were passed by resolution instead of by ordinance is, in this case, irrelevant. CHFL has not presented any evidence that the above provision allowing adoption by reference is inapplicable in this case. We therefore conclude the Guidelines are valid and the City had authority to require compliance with the Guidelines, as well as with the SC-1 Zoning District. Cedar Hills' regulatory scheme is appropriate under applicable Utah law.

II. CITY'S REVIEW AND CONSIDERATION OF CHFL'S CONDITIONAL USE PERMIT

The bulk of CHFL's remaining arguments relate to the City's procedural and substantive regulations used to review and approve CHFL's conditional use permit with conditions. CHFL argues that the City imposed conditions that lack connection to any reasonably anticipated detrimental effects. CHFL also argues that the conditions are not necessary to mitigate detrimental effects in accordance with any applicable standards in the City's Ordinances or Design Guidelines. Accordingly, we will consider the individual conditions imposed by the City on CHFL's development proposal to determine whether the conditions are reasonable and designed to mitigate anticipated detrimental impacts in accordance with applicable standards.

⁸ Specifically, the Code states that “[b]uildings, structures and uses of land listed as conditional may be permitted within a planned commercial development project, subject to compliance with applicable requirements of this title and those contained within the document “Guidelines For The Design And Review Of Planned Commercial Development Projects”, and after approval has been given by the designated review agency.” CEDAR HILLS MUNICIPAL CODE § 10-6A-2(A).

A. Law Governing Conditional Uses

State law gives local governments authority to designate certain uses as conditional uses within their individual zoning districts. UTAH CODE § 10-9a-507(1). State Code defines a conditional use as “a land use that, because of its unique characteristics or potential impact on the municipality, surrounding neighbors, or adjacent land uses, may not be compatible in some areas or may be compatible only if certain conditions are required that mitigate or eliminate the detrimental impacts.” UTAH CODE § 10-9a-103(5).

Consequently, in addition to ensuring that the proposed conditional use complies with all general, relevant, non-discretionary requirements in the local code that any other *permitted* use must comply with in the same zoning district, a municipality may review and permit conditional uses in accordance with the following:

- (1) A land use ordinance may include conditional uses and provisions for conditional uses that require compliance with standards set forth in an applicable ordinance.
- (2)
 - (a) 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.
 - (b) If the reasonably anticipated detrimental effects of a proposed conditional use cannot be substantially mitigated by the proposal or the imposition of reasonable conditions to achieve compliance with applicable standards, the conditional use may be denied.

UTAH CODE § 10-9a-507. In accordance with state law, a municipality must adopt applicable standards for conditional uses. These standards guide and limit the municipality’s discretion in imposing specific conditions in addition to generally applicable code requirements.

When the municipality receives a conditional use permit application, the city may review the local code’s standards applicable to conditional uses to determine whether, in light of the standards, the proposed use will produce any “detrimental impacts” on the municipality generally, or on the surrounding uses and property owners specifically. Any determinations must be supported by substantial evidence in the record. If the decision makers are unable to identify any reasonably anticipated detrimental effects, additional conditions are unnecessary and cannot be imposed.

Once detrimental impacts are identified, the municipality possesses discretion to impose reasonable conditions specifically to mitigate the anticipated impacts and achieve compliance with applicable standards. The conditions must be related to the purposes and goals of the applicable standards, and must address the impacts in a reasonable manner. Finally, the conditions must also be supported by substantial evidence in the record.⁹ *Wadsworth v. West Jordan City*, 2000 UT App 49, ¶ 9.

⁹ Substantial evidence is “that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *First Nat’l Bank of Boston v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah

1. *Applicable Standards for Conditional Uses Generally*

CHFL asserts that the City violated the law because it imposed conditions on the proposed congregate care facility unrelated to applicable standards in the Cedar Hills City Code. CHFL argues that in some instances an applicable standard simply does not exist to justify a particular condition.

Most local ordinances contain standards addressing conditional use permits generally. These general standards often relate to health, safety, general welfare, design, open space, aesthetics, etc. Effective standards go further than this and identify specific considerations (traffic, access, noise, lighting, buffering, compatibility, etc.). Useful standards also articulate purposes or goals related to such considerations to guide the decision maker in identifying detrimental impacts.

The Utah Code does not define “applicable standard,” nor does it explain the degree of specificity a standard must reach to be legally sufficient in guiding the local decision maker. Clear, well-crafted standards effectively guide the local land use authority and produce relatively predictable and unsurprising results. However, the law does not presently require that every standard be flawlessly specific and objective. Although those make the best standards, the *legal* threshold a standard must satisfy to be valid is much lower.

The Utah Supreme Court addressed what constitutes an appropriate “applicable standard” in the context of a conditional use permit in *Thurston v. Cache County*, 626 P.2d 440 (Utah 1981). The standard under review in *Thurston* required the decision maker to ensure that “the proposed use will not be detrimental to the health, safety, or general welfare of persons residing in the vicinity, or injurious to the property in the vicinity.” *Thurston v. Cache County*, 626 P.2d 440, 444 (Utah 1981). The applicant for a conditional use permit in *Thurston* argued that this standard provided “insufficient guidelines...for the issuance or denial of conditional use permits,” *Id.* at 443, and that the standard left the city “completely without legislative limitations to issue or deny permits according to its own desires....” *Id.*

In response to this argument, the Court concluded that the County’s standard “adequately channel[ed] the discretionary activities of the Planning Commission...” *Id.* at 444. Moreover, the court explained:

While it is true that a zoning ordinance must set some ascertainable boundaries on the exercise of discretion by a zoning authority, such boundaries are not required to be unduly rigid or detailed. A generalized exposition of overall standards or policy goals suffices to direct the inquiry and deliberation of the zoning authority, and to permit appellate review of its decision.

1990). Moreover, and in this context, a court will uphold the City’s determination as supported by substantial evidence as long as the decision maker has carefully reviewed and considered the submitted application and evidence such as site plan drawings, elevations, material samples, architectural renderings, technical studies, etc., and made a reasonable, evidence-based determination in accordance with applicable ordinance provisions. *See Springville Citizens v. City of Springville*, 1999 UT 25, ¶¶ 25-30, 979 P.2d 332 (the city’s decision was based upon substantial evidence, and was not arbitrary or capricious, because it held required meetings, carefully considered the materials submitted, and reached a decision that a reasonable person could have reached).

Id. at 443-444. This reasoning applies to applicable standards intended to guide decision makers in identifying detrimental impacts and imposing reasonable conditions to mitigate the impacts.

2. *Applicable Standards in Cedar Hills' Land Use Regulations*

It appears that at the time CHFL submitted its land use application for the proposed congregate care facility, the Cedar Hills Municipal Code (the “City Code”) did not contain a section specifically articulating applicable standards for all conditional uses within the City. CHFL’s development proposal was reviewed as a “planned commercial development project” under Cedar Hills Municipal Code Chapter 10-6A. The record indicates that the Council categorized the proposed congregate care facility as “similar in nature” to the conditionally permitted “Assisted living, convalescence home” use category. The Council also concluded that the use would “be treated as an assisted living facility or convalescence center in interpreting” the City’s land use regulations.

CHFL and the City disagree about the effect of the City Council’s December 2, 2014 finding that CHFL’s project would be treated as an assisted living facility. CHFL argues that the determination officially categorized the proposed use as an assisted living facility and that it was entitled to be treated as such for purposes of development application review.

The City, however, argues that in designating CHFL’s development proposal as “similar in nature” to assisted living the City simply acknowledged that, in concept, the proposed care facility was similar to an assisted living facility in that they two uses functioned similarly and provided similar features and services. Some of the elected officials appear to believe that the City’s authority to categorize land uses and regulate their location within the jurisdiction also grants authority to tailor the use’s business plan to comport with the Council’s vision and perception of how the use should operate once established.

Moreover, some of the Councilmembers apparently concluded that they could reserve ultimate judgment on use categorization until final approval to ensure they could impose conditions on the care facility’s business model and day-to-day operations, if necessary. This is illustrated by some of the conditions ultimately imposed. For reasons discussed in detail below, this is an improper use of conditions in the conditional use context.

Notwithstanding the contrary opinion of some Councilmembers, the plain language of the City’s motion at the December 2, 2014 Council meeting indicates that the Council, as a whole, determined that for purposes of reviewing CHFL’s development proposal for compliance with applicable land use regulations, the proposed congregate care facility is categorized as an “Assisted living, convalescence home” use, which is a conditionally permitted use.

Regarding conditional uses, Chapter 10-6A states that “uses of land listed as conditional may be permitted within a planned commercial development project, subject to compliance with applicable requirements of this title and those contained within” the City’s Design Guidelines. CEDAR HILLS MUNICIPAL CODE §10-6A-2(A).

There are no additional references to conditional use standards in Chapter 10-6A, but the Design Guidelines provides the following:

[C]onditions shall be imposed to mitigate or alleviate any expected or foreseeable adverse impacts the proposed conditional use may have on adjacent uses or the surrounding area. Typically, conditions of approval address issues such as noise, lighting, traffic and aesthetics. Even so, the City shall impose any and all conditions they find to be necessary to protect the integrity and quality of the master planned area or the surrounding neighborhoods.

CEDAR HILLS DESIGN GUIDELINES § 3.2.

In addition to this generally applicable standard for conditional uses, the Design Guidelines grant the land use authority further discretion to, on a case by case basis, impose specific conditions on *any* use, conditional or permitted, subject to the Guidelines:

The following specific conditions may be applied to various permitted or conditional uses. Any of the below prescribed conditions, and additional conditions, may be applied to any permitted or conditional uses at the discretion of the Planning Commission and/or City Council.

- a. any bay doors shall be screened, to the greatest extent possible, from residential areas and public streets
- b. the outdoor storage of materials and debris is prohibited
- c. outdoor overnight storage of vehicles is prohibited
- d. any drive through window and sufficient vehicular staking shall be screened, to the greatest extent possible, from residential areas and public streets
- e. volume control devices, at drive through windows, shall be utilized so as to limit any audio impact on the surrounding area
- f. refuse collection shall be performed so often as to prevent the development of offensive odors
- g. the outdoor storage of materials is prohibited with the exception of live plants that may be stored outside, at the discretion of the Planning Commission and/or City Council, but only in clearly defined locations
- h. the keeping of animals outside is prohibited

CEDAR HILLS DESIGN GUIDELINES § 3.2.

Finally, the Design Guidelines contain various sections that include both rules and standards¹⁰ regarding building size and orientation, architecture, landscaping, lighting, parking, signage, etc.

¹⁰ For a detailed explanation regarding the legal distinction between a rule and a standard, see Chapter 17. *Rules and Standards*, in *The Legal Analyst: A Tool Kit for Thinking about the Law*. In short, “[t]he general difference between a rule and a standard [is]: the consequences of a rule are triggered once we settle the facts; a standard requires a judgment about the facts before it kicks in.” *Ward Farnsworth, The Legal Analyst: A Tool Kit for Thinking about the Law*, at 164 (2007).

When imposing a condition on a conditionally permitted use pursuant to UTAH CODE §10-9a-507, the discretion rests with the designated land use authority, which may exercise its judgment to impose reasonable conditions. Such conditions must reasonably mitigate legitimately identified detrimental effects in accordance with a clearly applicable standard designed to address such issues. Moreover, as indicated above, each condition must be supported by substantial evidence in the record.

In light of these principles, we turn to the individual conditions imposed by the City on CHFL's proposal to determine whether the conditions are reasonable and designed to mitigate anticipated detrimental impacts in accordance with the standards listed above. Each condition's connection to the relevant applicable standard must be clearly ascertainable to avoid being deemed unassociated with the applicable standard, and therefore improper. Moreover, any identified connection cannot be a strained or ambiguous one. Finally, and as indicated previously, each condition must be supported by substantial evidence in the record and may not be based simply on individual preferences or other unrelated or improper bases.

B. Analysis of Conditions Imposed by Cedar Hills City

Condition No. 4: The Rosegate Development should be limited to no more than 165 residential units. Currently, the densest residential zone in the city (the PR 3.4 Zone) allows for only 6 units per structure. The Rosegate building is an anomaly in the city with a proposed 291 units in the structure. Any more than 165 units on the subject property would be irresponsible planning practices. This condition will ensure that the property has an intensity that is less than the use in the neighborhood retail sub-district, a requirement listed in the design guidelines. In addition, this condition must take into account the reality that there is little public transportation in our area, so residents will need to drive regularly, causing additional intensity far beyond an assisted living building and even more than a typical senior housing development that might be more conveniently located to nearby shops and services. The Rosegate development should be compatible with the surrounding properties and the City's intent to create a viable, mixed use commercial center for the reasons described in concern 2 and concern 3.

The City's land use regulations do not directly regulate density. The Code specifically provides that "[t]he intent and purpose of the large scale development provisions [governing the proposed project] shall be to...[p]ermit developers to vary density...on a project by project basis, rather than on the basis of traditional zoning concepts." CEDAR HILLS MUNICIPAL CODE § 10-6-1(B).

Accordingly, any condition numerically limiting density must be connected to an identified detrimental effect in light of the City's applicable standard for conditional uses. The applicable standard allows conditions to "mitigate or alleviate any expected or foreseeable adverse impacts" the use may have on adjacent uses or the surrounding area related to such concerns as noise, lighting, traffic, etc. There is no evidence in the record that, in this case, the proposed density will produce detrimental effects or adverse impacts relative to these concerns. No evidence was presented that the proposed density would produce noise that would exceed an unacceptable

threshold, or that the existing or proposed transportation infrastructure would not be able to accommodate the traffic impact associated with the density, etc.

Instead, the justifications and evidence used to limit the number of units to 165 instead of the proposed 291 were related to concerns that the project proposal was too intense, and that the proposed density seemed unreasonable and not comparable to or congruous with existing development in the City. These concerns stemmed from provisions in the Design Guidelines discussing undefined notions of intensity, atmosphere, and congruity with the overall area. The 165-unit limit was derived by looking to an adjacent care facility and calculating a similar density. The condition attempts to advance a preference of lower density without a legal justification for doing so.

Perceived dissimilarity to adjacent uses is not a detrimental effect in light of the applicable standard, nor is a perceived difference in intensity. There is no evidence in the record that a 291-unit facility will inherently constitute a detrimental *use of land* relative to adjacent uses or the surrounding area. Since the record provides no evidence that limiting the density to 165 units is necessary to mitigate detrimental effects or impacts in accordance with the City Code's applicable standards, the condition is unlawful, and may not be enforced.

Condition No. 5: The Rosegate development must include on-site services for the convenience of its residents, so they can age in place. These services should be provided as direct services, provided directly by management of the housing facility. These services should include a restaurant that provides three meals a day seven days a week; home health care services from qualified professionals, including help with medications, bathing, dressing, and other hospice needs; physical therapy; other routine health care services; fitness classes; regular social activities; and a shuttle to nearby destinations that are too far for walking. This will ensure the development qualifies for a conditional use that is "substantially similar to" assisted living, as discussed in concern 4.

This condition does not attempt to mitigate detrimental effects of the proposed use of land in light of the applicable ordinance standards. It appears to relate back to certain concerns expressed by Councilmembers in the December 2, 2014 City Council meeting. In that meeting, some Councilmembers expressed concern that the congregate care facility, as proposed, would not operate or be sufficiently similar to as an assisted living facility. Nonetheless, the Council, by majority vote, made an unambiguous finding that for the purpose of development review and approval the development proposal would be reviewed and regulated as an assisted living facility.

This condition appears to attempt to further address some Councilmembers' concerns related to the facility's business model and how they envision it should operate. Effectively, the condition seeks to mandate the facility's business plan to ensure it will operate as certain Councilmembers envision that it should. The condition, however, does not address land use impacts or attempt to mitigate detrimental effects in accordance with applicable standards designed to address land use impacts. This is an inappropriate use of conditions in the conditional use context.

Use categories in land use ordinances exist to identify which use types are compatible in a given zoning district. Moreover, they exist to enable the local government to determine which

regulations will govern development of the project proposal. Use categories do not exist to enable the local government to micromanage the use and determine its business model. Such a practice exceeds the realm of land use regulation.

Consequently, the condition is unlawful and may not be enforced.

Condition No. 6: The Rosegate development must include 1.4 parking stalls per residential unit. The developer's description of the proposed use is more closely akin to a senior apartment complex than an assisted living center. Accordingly, for the reasons discussed in concern 4 and concern 5 of my letter, the number of residential units must be reduced, in order to accommodate active senior living.

The parties appear to agree that the City Code does not impose a base parking requirement for the proposed use. Adequate parking is an appropriate traffic concern related to the City's applicable conditional use standard. See CEDAR HILLS DESIGN GUIDELINES § 3.2. Accordingly, the City may consider the characteristics of the proposed use and apply a reasonable parking standard to address traffic concerns. As long as the City's condition imposing a standard of 1.4 stalls per residential unit is supported by substantial evidence, it is appropriate and will not be disturbed by a court.

The Council reviewed the applicant's proposal, became familiar with its general characteristics, and determined that a multi-family apartment parking standard would accommodate the facility's parking needs better than the standard proposed by CHFL. In reaching this conclusion, the Council considered the unique characteristics and services of the proposed use, the demographic that would occupy the facility, and the surrounding environment.

The Council supported its decision with definitions and evidence presented in a parking generation study produced by a reputable engineering firm indicating that an appropriate parking standard for an apartment-type use is 1.4 per unit. This is enough relevant evidence to convince a reasonable mind to support the conclusion the City reached. See *Bradley v. Payson City*, 2003 UT 16, ¶ 15. A court will not weigh the evidence anew to determine whether the evidence relied upon for the decision was the best or most convincing evidence.¹¹ Consequently, the imposed condition is appropriate.

Condition No. 7: Outdoor overnight parking of vehicles shall be prohibited in areas adjacent to single family homes, with covered parking provided in these areas. This restriction is imposed in accordance with the City Council's power to take reasonable steps to preserve the integrity of the General Plan and the intent of the mixed-use sub-district in the commercial zone, and to minimize effects on residents as discussed in concern 5.

¹¹ Arguably, the parking study prepared for CHFL, also by a reputable engineering firm, more closely analyzed the characteristics of the proposed use, while the City's study spoke in generalities. This may indicate that CHFL produced a better quality parking study. While this may be true, it does not obligate the City to choose one valid parking study over another, in light of all the evidence. As long as the substantial evidence standard is met, the land use authority may exercise its judgment and discretion in determining which evidence is more persuasive.

The Design Guidelines specifically permit the land use authority to impose a condition prohibiting outdoor overnight storage of vehicles. While it is apparent that this condition, on a site-wide basis, is intended for commercial development, it may be applied to any conditional use if it will mitigate detrimental effects in accordance with the applicable standards.

Here, it is admittedly difficult to see how prohibiting outdoor storage of vehicles adjacent to residential dwellings mitigates a detrimental effect. The Council cites light and noise as concerns, but parked vehicles do not usually have their lights on, nor are they running. The same justifications and evidence were provided for the covered parking requirement, and the relationship seems strained in that regard as well.

Regardless, a court would likely find it reasonable to infer that prohibiting parking adjacent to residential uses and requiring covered parking may have the effect of reducing occasional and intermittent headlights through windows, and may reduce intermittent vehicle noises in adjacent residential areas. Consequently, the condition would likely not be disturbed by a court, and is appropriate.

Condition No. 8: In accordance with the Design Guidelines, the landscaping and open areas shall create a park-like atmosphere with linked pedestrian corridors designed to promote pedestrian activity. For the reasons discussed in concern 6 of my letter, the landscaping needs to promote integration with the surrounding property uses and not limit the open-space and pedestrian traffic areas to the interior courtyards of the facility. The landscaping should provide open walkable space between separated buildings. Currently, the landscaping is not accessible to the pedestrian uses from surrounding neighborhoods and is not linked in a way to create the pedestrian corridors and park-like environment required by the Design Guidelines.

This condition does not mitigate detrimental effects of the proposed care facility. The standards used to justify this condition are intended and designed to simply advance preferences, goals, aspirations, or legislative purposes, not mitigate detrimental effects of a proposed land use. Since the standards are not intended to mitigate detrimental effects, they fall outside the purview of the conditional use permit scheme outlined in UTAH CODE § 10-9a-507.

Instead, the established common law principle that any ambiguities in a land use ordinance should be resolved in favor of the property owner's desired use applies.¹² A local government is obligated to approve an applicant's proposed interpretation of such a standard if the applicant's interpretation is reasonable and appropriate in light of the ordinance's plain language.¹³ As long

¹² “[B]ecause zoning ordinances are in derogation of a property owner’s common-law right to unrestricted use of...property, provisions...restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner.” *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah App. 1995).

¹³ Ordinance interpretation begins with an analysis of the ordinance’s plain language. *Carrier v. Salt Lake County*, 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 v. City of South Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171 (emphasis added). “When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.” *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804.

as the applicant's proposal arguably fulfills the implied or stated purposes and goals of the standard, the City may not impose additional requirements or conditions.

Consequently, the City inappropriately imposed this condition. Here, City staff and the Planning Commission previously concluded that the proposal fulfilled the landscaping and walkability goals of the Design Guidelines. This provides sufficient evidence to support the conclusion that CHFL's proposal adequately fulfills the intent of the standard and the City may not impose additional conditions on the proposed configuration.¹⁴

Condition No. 9: The Rosegate development should be constructed in phases that include both commercial and residential development, consistent with the primary intent of the sub-district being a mixed-use development. The proposed phased construction is inappropriate because the primary purpose of the development is to place residential use in the heart of the City's commercial center, the commercial aspect of the development is ancillary to the overall development, the timing of the commercial portion of the development is uncertain, and for each of the other reasons discussed in concern 7. This mitigates the potential impact of the City being left with a building purely residential in nature in a commercial zone. Commercial uses must have adequate parking, separate from residential uses.

This condition does not attempt to mitigate a detrimental effect of the proposed congregate care facility, but instead attempts to dictate what the developer's project must include. It also attempts to dictate timing and sequencing of the development, arguably in a manner unsubstantiated by market forces. The timing and sequencing of a project does not constitute a detrimental effect of the proposed land use on adjacent uses or the surrounding area once constructed. Accordingly, this is an improper use of conditions in the conditional use context, and may not be enforced.

Condition No. 10: The Rosegate development should be reduced in scale, size and intensity in order to mitigate the impacts on the City's public safety services. No more than 165 units should be permitted in the development for the reasons discussed in concern 8, and in keeping with concerns listed in concern 3 and 4.

All new development places some additional burden on public safety services. The question here is whether the proposed use at the proposed density would impose a detrimental effect on public safety services that could not be mitigated by reasonable conditions. This condition does not address this question. Instead, it mandates a reduction in density.

The record gives no indication that CHFL's proposed density would impose a detrimental effect on public safety services that could not be mitigated with reasonable conditions. The only evidence presented was in the form of concerns that the proposal would increase the burden on the City's services by a certain magnitude. There was no evidence that these increases would create undue burden on the service providers. If it could be shown that excessive burdens would

¹⁴ Moreover, imposing a condition that *requires* the property owner to allow the general public to access pedestrian thoroughfares likely amounts to an exaction, and would need to satisfy the rough proportionality analysis advanced by the U.S. Supreme Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Since the condition is inappropriate, however, there is no need to further address this issue.

result, and services could not be adequately provided, the City could require the facility to offset such costs and burdens. But there is no evidence in the record that the effects of a 291-unit facility could not be mitigated, and that the only solution would be to require a lower density. Consequently the condition is improper and may not be enforced.

Condition No. 11: Each residential unit shall be occupied by at least one resident that is 55 years of age or older, and there shall be no residents younger than 25. This mitigates the concern for traffic impacts and crowding in schools. For the reasons discussed in concern 9, reasonable rental restrictions are required in order to prevent an erosion of the living accommodations and services available to the senior community.

The Council supports this condition with the conclusion that limiting the age of residents to the determined range will ensure that students and others with cars do not occupy the proposed facility. There is no evidence in the record, however, that such drivers would produce a detrimental effect in excess of that produced by drivers within the defined age range. Since the condition is not associated with a detrimental effect in light of applicable standards, and since it is not supported by substantial evidence, it is unlawful and may not be enforced.

Condition No. 12: To add that these conditions be in the CC&Rs and that lights in parking areas adjacent to single family homes should be low to the ground in bollards, rather than on light poles.

The City's conditional use standard allows conditions to mitigate detrimental effects related to lighting. The record contains discussions and substantial evidence that low elevation lighting adjacent to residential uses may reduce detrimental effects related to parking lot lighting. Consequently, the condition is lawful and appropriate.

Condition No. 14: That all review and approval must be made by both the Planning Commission and this Council and prior to the review by Council the approved conditions must have legal review.

Condition 14 appears to simply restate a process that is already required by the City Code and the City's existing development review process. It is therefore unnecessary.

CONCLUSION

The City may only impose reasonable condition on CHFL's development proposal to the extent that the conditions mitigate the use's reasonably anticipated detrimental effects in accordance with the City Code's applicable standard for conditional uses. We have provided an analysis of the extent to which each of the conditions the City has imposed complies with these standards.

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:

Colleen A. Mulvey
City Recorder, City of Cedar Hills
10246 N. Canyon Road
Cedar Hills, UT 84062

On this _____ Day of _____, 2017, 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