Advisory Opinion #212

Parties: Village Development Group / Silver Creek Village
v. Summit County
Issued: June 21, 2019

TOPIC CATEGORIES:

Compliance With Land Use Ordinances
Entitlement to Application Approval (Vested Rights)
Interpretation of Ordinances

The principles of ordinance interpretation mandate that all relevant provisions be given weight and meaning. Also, relevant provisions should be read in harmony if possible. Both parties place emphasis on certain provisions regarding allowed uses, and disregard others. The correct interpretation requires that they all be read in harmony.

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ADVISORY OPINION

Advisory Opinion Requested By:	Wade R. Budge Attorney for Silver Creek Village
Local Government Entity:	Summit County
Applicant for Land Use Approval:	Silver Creek Village
Type of Property:	Commercial
Date of this Advisory Opinion:	June 21, 2019
Opinion Authored By:	Brent N. Bateman, Lead Attorney Office of the Property Rights Ombudsman

ISSUE

Did the Summit County Community Development Director correctly determine that Reception Center was not an allowed use on Parcel 8.4 of Silver Creek Village?

SUMMARY OF ADVISORY OPINION

The principles of ordinance interpretation mandate that all relevant provisions be given weight and meaning. Also, relevant provisions should be read in harmony if possible. Both parties place emphasis on certain provisions regarding allowed uses, and disregard others. The correct interpretation requires that they all be read in harmony. Therefore, "Reception Center" is an allowed use on Parcel 8.4 as long as it is "generally for non-commercial use."

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 Wade R. Budge, counsel for Silver Creek Village, on May 9, 2019. A copy of that request was sent via certified mail to Thomas Fisher, Summit County Manager on May 10, 2019.

EVIDENCE

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

1. Letter from Wade Budge to Pat Putt, titled *Request for Use Determination, DA Parcel 8.4, Silver Creek Village, Parcel Number SCVC10*, dated March 14, 2019.
2. Letter from Patrick Putt to Wade Budge, titled *Use Determination, DA Parcel 8.4, Silver Creek Village, Parcel Number SCVC10*, dated April 11, 2019.
3. Letter from Wade Budge to Patrick Putt titled *Appeal of Land Use Determination for Silver Creek Village, DA Parcel 8.4*, dated April 18, 2019.
4. Letter from Wade Budge to County Council of Summit County titled *Initial Submission, Appeal of Land Use Determination for Silver Creek Village, DA Parcel 8.4*, dated April 26, 2019.
5. Document prepared by Jami Bracken, Deputy Summit County Attorney, titled *Response of the Community Development Director to the Appeal of an Administrative Decision*, Dated May 3, 2019.
6. Letter from Wade Budge to County Council of Summit County, titled *Reply, Appeal of Land Use Determination for Silver Creek Village, DA Parcel 8.4*, dated May 8, 2019.
7. Various maps and attachments to the above documents.
8. Letter from Jami Bracken, Deputy Summit County Attorney, titled *Advisory Opinion Request: Village Development Group (Silver Creek Village Parcel 8.4 or Lot 10)*, dated May 24, 2019.

THE QUALITY OF SERVICES MATRIX

A well-known matrix applies perhaps to all service industries, but especially to the provision of legal services, and in particular to the services of the Office of the Property Rights Ombudsman. The matrix consists of three options with regard to the quality of services provided:

Cheap	Fast	Good

The rule associated with this matrix is that only two of the three options are available at any one time. Although customers may want all three, providing all three is not possible. Nevertheless, the customer is free to choose any two, but always at the detriment of the third. To explain, if the customer would like something both *good* and *cheap*, it will not be *fast*. *Good* and *fast* will not be *cheap*. *Cheap* and *fast* will not be *good*.

The Office of the Property Rights Ombudsman provides its services for *cheap* (essentially free), and expends every effort to make sure the services are *good*. However, that is often at the sacrifice of *fast*. Good work takes time. Due process takes time. Our small staff and inability to work into the night collecting overtime pay means that we cannot set other work and life concerns aside to produce quality legal work quickly. Moreover, we consistently have a queue of Advisory Opinions, and each must wait its turn. *Good* and *fast* is a niche reserved for private law firms and attorneys who produce excellent work quickly as long as clients are willing to pay the fee. *Cheap* and *fast* are the purview of the con artist.

From the moment this Advisory Opinion was requested, Silver Creek Village ("Developer") made clear that *fast* is crucial here. However, as explained above, *fast* is not in our normal toolbox.[1] However, our desire to help overwhelms us and thus we attempt to produce this Advisory Opinion with record speed. Nevertheless, the very laws of physics require that in order to do so we must sacrifice either *good* or *cheap*. No one is suggesting, or should I say offering (or maybe tendering), any solution that would allow us to forego *cheap*. So our only option is to sacrifice *good*.

Thus, in the interest of speed, we will cut some corners in this Advisory Opinion where otherwise we absolutely would not.[2] It is our intention to do so in ways least damaging to quality, and especially to legal accuracy. But in the interest of *fast* we will, for example, cut a lengthy exposition of the background (the parties know it and it is undisputed), a restatement of the arguments of the parties (the parties know those too), and lengthy citations to the record or to generally accepted and well-known legal principles (the attorneys involved here are sophisticated land use attorneys and they should have no trouble getting the gist). Most riskily, we will not exhaustively search and commit to memory the voluminous record. The conclusion of this Advisory Opinion does not mandate that we do. We will instead assume the submissions of both parties are factually accurate and complete.

Finally, we freely offer both parties the option, after receiving this *fast* and *cheap* Advisory Opinion, to request afterward that we fill any gaps that cause this Opinion to be anything less than *good*, as long as they will grant us the time to do so. Our goal is accuracy. This Office

[1] This is especially true when the parties submit piles of documents and arguments so massive that they cannot be contained on our email server nor printed, and must be conveyed to us by dropbox or by thumb drive. This is a sign of two things: (1) reviewing the record will take significant time, and (2) the questions presented for opinion are complicated, and will take significant time to sort out. This further explains why *fast* is a difficult service for us to provide. It does not explain, however, why a very high volume of paperwork and complication level is ALWAYS accompanied with a request to complete the Advisory Opinion as quickly as possible.
[2] And will not in the future so don't ask.

always accepts requests for reconsideration and corrections of fact that we may have overlooked. The informal nature of the Advisory Opinion process demands it.[3]

BACKGROUND

This dispute involves interpretation of a Development Agreement. The Development Agreement contains multiple provisions concerning allowable land uses, and dictates the appropriate uses of the lot in question. Thus, the Development Agreement is appropriately treated as legislation. Accordingly, the provisions of the Development Agreement will be interpreted under the rules of ordinance interpretation. The key question in dispute here regards whether a "Reception Center" is an allowed use in the Development Agreement on a particular lot. The dispute arises because there are provisions in the Development Agreement that indicate that it is, and provisions to indicate that it is not.

ANALYSIS

The *County's Community Development Director's Decision* ("Director's Decision") that Reception Center is not an allowed use, and the *Response of the Community Development Director of the Appeal of an Administrative Decision* ("County's Response") defending the Director's Decision, rely heavily on reasoning that can best be summed by this statement from the County's Response:

> In looking at the competing provisions of the Development Agreement and Code, it is clear that the overwhelming majority of provisions favor the interpretation made by the [Community Development Director].

Although this statement appears true and was no doubt provided in an admirable attempt to marshal the evidence, it perpetuates the wrong approach. The County must rely on this argument because it cannot deny the existence of a certain provision in the Development Agreement: Exhibit D1. Exhibit D1 lists reception centers, recreation facilities, and bars as allowed uses in the Civic land use category.

We have never encountered a principle of statutory construction to support the "overwhelming majority" of the provisions theory. Instead, the rules of ordinance interpretation require that we presume that the legislative body used each word advisedly. *Selman v. Box Elder County*, 2011 UT 18, ¶18. Also we construe an ordinance so that "all parts thereof [are] relevant and meaningful." *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996). Further, "our interpretation of a statute requires that each part or section be construed in connection with every other part or section so as to produce a harmonious whole." *State in Interest of J.M.S.*, 2011 UT 75 ¶13. Both parties cite these critical principles, but neither adequately considers them.

The Developer demands that Exhibit D1, which lists "Reception Center" as an allowed conditional use, be given weight and meaning. Exhibit D1 is directly referenced in the body of the Development Agreement as a source for determining and interpreting uses. Thus, Exhibit D1

[3] None of this should imply that the submissions and attached documents were not read or considered carefully, or that every effort was not made to ensure that the result is legally accurate.

cannot simply be ignored or disregarded. According to the principles of ordinance interpretation cited above, the Developer is correct. Exhibit D1 must be given relevance and meaning. *Reception Center* must be a conditional use in the zone.

The Director's justification for his decision to prohibit *Reception Center* essentially distills down to two points: (1) that a reception center is not similar to the example uses in the Development Agreement, and (2) that the reception center would be a commercial use and the Development Agreement limits uses to "buildings and facilities . . . generally for non-commercial use . . . ." The first argument is easily dismissed. The Development Agreement lists examples "such as schools, churches, community center, public service building, arts or other cultural facilities." A reception center is quite similar to the listed uses here. In fact, it is difficult to see a meaningful distinction between a reception center and a "community center" or "cultural facilities." Moreover, a distinction does not arise because a reception center is a commercial use, and the listed items here are non-commercial. All of the listed items here, including schools and churches, can and have been run as for-profit commercial enterprises.

The crux of this matter then, is the statement limiting land uses to "buildings and facilities . . . generally for non-commercial use . . . ." The fact that the reception center, and associated bar and fitness facility will be run for profit as a commercial business seems to be the real basis of the Director's decision to deny.

This is important because the Developer is guilty of the same mistake as the County. The Developer overlooks, or at least does not satisfactorily address, this statement that uses should be "buildings and facilities . . . generally for non-commercial use . . . ." Likewise, this provision of the Development Agreement must be given weight, and not disregarded. The Developer apparently would like the reception center to be a commercial venture. However, this statement appears to prohibit that.

It is not difficult, in line with the principles of statutory interpretation, to read these two provisions in harmony rather than in contradiction. We conclude is that a reception center, or any other use listed in Exhibit D1, is allowed as a conditional use as long as it is operated "generally for non-commercial use." That gives weight and validity to both provisions. Moreover, this reading does not lead to an absurd result, as a reception center, a fitness facility, and perhaps even a bar can be operated non-commercially. It may not often be practical to do so, but it is possible.[4]

[4] We see no reason to change this conclusion because "Reception Center" is defined in the Development Agreement as "[a] room or rooms in a Retail Business suitable for entertaining guests or hosting events such as weddings, parties and meetings, esp. a lounge or dining room." The fact that a reception center is defined as located in a retail business does not mandate that the reception center itself be operated commercially. Nor do we reach a different conclusion because Exhibit D1 lists other uses that must be commercial. All must be read in harmony to the extent possible with the phrase "generally for non-commercial use." Some of these uses, such as "Child Care" or "Recreation or Athletic Facility, Commercial" would indeed present a greater problem than "reception center" does, but they are not currently under examination, and we believe that reading them in harmony would lead to the same the ultimate result.

Accordingly, a reception center that is generally[5] for non-commercial use is an allowed conditional use on the lot. If the Developer is proposing a reception center that is "generally for non-commercial use," the County must approve it with conditions.[6]

CONCLUSION

All phrases in the Development Agreement must be given meaning and read in harmony. The fact that reception center is an allowed use on the property must be given meaning. Likewise the statement "generally for non-commercial use" must be given meaning. Reading them in harmony leaves us to conclude that the intent of the parties was to allow the uses in Exhibit D1, as long as they are "generally for non-commercial use."

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

[5] The word "generally" also merits consideration and weight. We invite the parties to consider and weigh it in their future discussions.

[6] This conclusion, of course, raises the question regarding whether a valid distinction exists between a commercial and non-commercial facility undertaking the exact same operation. A non-commercial reception center may attract the same amount of cars, people, and events as a commercial reception center – the only difference being whether or not someone made money. It's a fascinating question, but not fascinating enough to hold up this Advisory Opinion while researching.

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:

Thomas C. Fisher, County Manager
Summit County
60 North Main
Coalville, UT 84017

On this 25th Day of June, 2019, 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.

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Office of the Property Rights Ombudsman