

# Advisory Opinion #178

Parties: Kit Kosakowski, Wasatch County

Issued: December 16, 2016

## TOPIC CATEGORIES:

**Compliance with Mandatory Ordinances**

**Interpretation of Ordinances**

The Lodge at Stillwater was originally approved as a condominium hotel. When the Lodge's HOA Management Committee terminated the hotel rental pool program and ceased offering hotel amenities and services, it changed the use from the approved hotel condominium use to a residential condominium use. Consequently, and in accordance with Utah Code § 17-27a-802(2)(b) and sections 16.01.11 and 16.01.13 of the Wasatch County Code, the HOA Management Committee must obtain any applicable permits and approvals necessary, as determined by Wasatch County, to comply with current Wasatch County Code requirements associated with the change of use.

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### ADVISORY OPINION

Advisory Opinion Requested By: Kit R. Kosakowski  
Local Government Entity: Wasatch County  
Type of Property: Commercial/Multi-family  
Date of this Advisory Opinion: December 16, 2016  
Opinion Authored By: Jordan S. Cullimore  
Office of the Property Rights Ombudsman

### ISSUES

1. Did the Lodge at Stillwater Board of Directors, by deciding to no longer provide hotel amenities and services at the Lodge, change the legal use of the Lodge from a condo-hotel to a residential condominium?
2. If a change of legal use has occurred does the change require Lodge management to obtain appropriate permits and comply with additional Wasatch County Code regulations applicable to the new use?

### SUMMARY OF ADVISORY OPINION

The Lodge at Stillwater was originally approved as a condominium hotel. When the Lodge's HOA Management Committee terminated the hotel rental pool program and ceased offering hotel amenities and services, it changed the use from the approved hotel condominium use to a residential condominium use. Consequently, and in accordance with Utah Code § 17-27a-802(2)(b) and sections 16.01.11 and 16.01.13 of the Wasatch County Code, the HOA Management Committee must obtain any applicable permits and approvals necessary, as determined by Wasatch County, to comply with current Wasatch County Code requirements associated with the change of 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 Kit R. Kosakowski on May 23, 2016. A copy of that request was sent via certified mail to Scott H. Sweat, Attorney for Wasatch County, at 805 West 100 South, Heber City, Utah. The return receipt does not specify the date the City received the request.

## 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 Kit R. Kosakowski on May 23, 2016.
2. Response from Richard W. Jones, Attorney for the Lodge at Stillwater Board of Directors, received June 1, 2016.
3. Response from Tyler J. Berg, Deputy County Attorney for Wasatch County, received July 1, 2016.
4. Reply from Kit R. Kosakowski, received July 12, 2016.

## BACKGROUND

On December 13, 1999, the Wasatch County Planning Commission approved Phase 1 of the Stillwater Master Plan, which included an eighty-five unit lodge building (the "Lodge"). According to the meeting minutes, the Lodge consisted of "hotel rooms, condo units, and commercial uses." The parties do not dispute that these uses were allowed under the then-applicable zoning regulations. Subsequently, the County issued a building permit on August 23, 2000 authorizing construction of the Lodge. The permit identified the Lodge as a "hotel" and the certificate of zoning compliance issued with the permit authorized the construction of "one hotel" in accordance with applicable zoning requirements. The first phase of the Lodge was accordingly built and units were sold and operated.

According to the submitted materials, Ski Stillwater LLC, the successor in interest to the original developer of the Stillwater Project, obtained approval from the Wasatch County Council in 2008 to change the configuration of the Lodge.<sup>1</sup> Concurrently with this approval, and apparently to reflect the actual operations at the Lodge at the time, the County amended the definition of "commercial use" in the County Code to include a statement that "[a]ny condo hotel units considered commercial [for purposes of calculating density] must be in a rental pool, have the

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<sup>1</sup> The submitted materials do not describe the details of this configuration change and we assume, for purposes of this opinion, that the change did not alter the actual use of the Lodge at that time.

availability of a front desk, room service and be professionally managed....” WASATCH COUNTY CODE § 16.04.02.

Moreover, in 2011 the County, ostensibly to provide further clarification, defined the term “condo hotel” in the County Code as a “hotel that has individual units with each unit recorded as a condominium that can be individually owned.” WASATCH COUNTY CODE § 16.04.02. The definition further provides that “[t]o be considered a condo hotel, there must be a front desk on site, or on an adjacent property, common hallways for room access, professional hospitality management, and be in a professionally managed rental pool.” *Id.* The definition also states that “[c]ondo hotels shall be in one or several large buildings and from all appearances function and appear as a hotel.” *Id.*

The submitted materials indicate that the Lodge functioned in harmony with these definitions until December 2014, although the parties disagree about how many of the unit owners availed themselves of the rental pool program and hotel services and amenities. In December 2014, the Lodge’s Homeowners Association (“HOA”) Management Committee decided to eliminate the Lodge’s on-site nightly rental pool program as well as most of the Lodge’s hotel amenities.<sup>2</sup> In accordance with this decision, the front desk of the Lodge was walled in sometime in Spring 2015.

On June 11, 2015, in an email to the County addressing a separate matter, Mark Shea, a member of the Lodge’s HOA Management Committee, confirmed that the Lodge had “closed its front desk for nightly rentals as of December 1, 2014, as the lodge is now being operated solely as a condo building as same is set forth within it’s [*sic*] original CCR’s and Bylaws and not as a condotel<sup>3</sup> as its original developer has operated it in the past.” Mark Shea Email to Luke Robinson, dated June 11, 2015.

On April 11, 2016, Kit Kosakowski and Candace Rust, owners of condominium units in the Lodge, submitted a petition to Doug Smith, the Wasatch County Planning Director, asserting that the actions of the Lodge’s HOA Management Committee amounted to an unauthorized change of use in violation of Utah Code § 17-27a-802(2)(b), which makes it unlawful to “change the use of any building...within [the] county without approval of a building permit.” The petition additionally asserts that the alleged change of use without County approval violates Wasatch County Code §§ 16.01.11 and 16.01.13, requiring land uses to conform with approvals granted by certificates of occupancy, land use compliance certificates, and approved plans, permits and specifications.

On May 23, 2016, Ms. Kosakowski submitted to our office a request for Advisory Opinion asking us to examine the question of whether the Lodge may legally operate solely as a residential condominium and cease operation as a condo hotel without additional approvals from Wasatch County.

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<sup>2</sup> As of July 12, 2016 the services that have been discontinued in addition to the rental pool program include on-site maid service, front desk services, shuttle van, year-round heated pool, and electronic keycard locking system.

<sup>3</sup> “Condotel” is an industry term used to describe a “condominium project that is operated as a hotel with a registration desk, cleaning service and more. The units are individually owned. Unit owners also have the option to place their unit in the hotel rental program where it is rented out like any other hotel room.” *Condotel*, Investopedia, <http://www.investopedia.com/terms/c/condotel.asp/>.

Wasatch County and the HOA Management Committee assert that the changes made by the Management Committee to the services and amenities provided at the Lodge have not changed the legal use of the Lodge. They argue that the original approvals contemplated the legal use of the Lodge as purely a residential condominium.

## ANALYSIS

We first review the initial approvals granted to the Lodge's original developer, in order to determine whether the Lodge was approved as a condominium hotel, or if it was approved as a residential condominium with discretion to rent out rooms on a nightly basis. This inquiry will guide the subsequent question of whether the HOA Management Committee's actions to remove the front desk and stop providing hotel services and amenities constituted a change of use.

### **I. The Lodge was Originally Approved as a Condominium Hotel**

As indicated above, Ms. Kosakowski asserts that the original approvals granted to the developer of the Lodge permitted a condominium hotel, as opposed to a residential condominium. The County, and the Lodge's Management Committee, dispute this assertion. The County and the Management Committee contend that the Lodge's Condominium Declaration proves that the original intended use of the Lodge was as a residential condominium because the Declaration nowhere mentions the term "condo hotel" and it doesn't detail how a condo hotel should be operated. Accordingly, the Management Committee asserts that the Lodge was never a condominium hotel. Thus, a change of use is not possible since it has always operated as a residential condominium with the option to rent the condo units on a nightly basis.<sup>4</sup>

The County concedes that the original conditional use permit issued to the Lodge was to operate as a condominium hotel. However, the County asserts that the original approvals granted to the Lodge's developer also permitted the Lodge to operate as a residential condominium with the option to rent out the condos on a nightly basis. Since the original approval permitted both a condominium hotel and a residential condominium use, the County asserts that it cannot require that the Lodge operate as a condominium hotel instead of a residential condominium.

The weight of the evidence presented supports the conclusion that the Lodge was originally approved to operate as a condominium hotel, as opposed to a residential condominium with the option for individual owners to rent units on a short term basis. Admittedly, the record of project approval is incomplete since some of the original documents were lost in a flood before they could be digitally preserved. However, the authoritative documents that were preserved—the

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<sup>4</sup> The Management Committee further supports its arguments by citing to the definitions of "hotel" and "condo hotel" in the Wasatch County Code to show that the Lodge does not satisfy these definitions. However, these arguments are immaterial since the earliest version of this Code provision was enacted in 2002, after the Lodge was approved. There has been no evidence presented that these definitions applied when the Lodge was initially approved.

building permit and certificate of zoning compliance—unequivocally identify the approved use as a hotel.<sup>5</sup>

The fact that the County Code was later amended multiple times to clarify what constitutes a “condo hotel” reveals that the Code, at the time the Lodge was approved, did not contain terminology to fully describe the approved use of the Lodge. This explains why the building permit and certificate of zoning compliance do not specifically describe the approved use as a “condominium hotel”, but simply as a “hotel.” However, ample evidence exists in the submitted materials to show that the originally approved hotel use was a condominium hotel use. For instance, the project was developed as a condominium project in accordance with the requirements of the Utah Condominium Ownership Act and the units are separately owned as condominiums. This, considered in conjunction with the fact that the County approvals plainly identify the use as a hotel, supports the conclusion that the project was originally approved as a condominium hotel.

This conclusion is further supported by the fact that the Lodge is referred to as a condominium hotel in the County Code. The architectural guidelines of the Jordanelle Specially Planned Area (JSPA), of which the Lodge is a part, specifically refer to the Lodge as a “condominium hotel.” WASATCH COUNTY CODE § 16.41.06(6.2.3). Moreover, the Stillwater Master Plan identifies the property as commercial, as opposed to residential. A hotel has more features associated with a commercial use, while a residential condominium is purely a residential use. Additionally, and practically speaking, there is a general acknowledgement among individuals familiar with the Lodge that it has operated from its inception as a condominium hotel.<sup>6</sup>

The parties disagree about whether the Lodge is governed by the definitions of “condo hotel” added to the County Code in 2008 and 2011. We conclude, however, that for the purposes of this Opinion, this question is immaterial. Regardless of whether the Code definition or the generally accepted definition<sup>7</sup> of a condo hotel applies to the Lodge, the originally approved use of the Lodge, as explained above, was a condominium hotel. Consequently, it was originally contemplated that the Lodge would, in some fashion, operate a hotel rental service and provide other hotel services and amenities.

## **II. The Decision to Stop Providing Hotel Services and Amenities Constitutes a Change of Use**

Having established that the County originally approved the Lodge as a condominium hotel, we now consider whether the HOA Management Committee changed the use classification of the Lodge to a new use that would require Lodge management to obtain additional permits and approvals to comply with County Code requirements applicable to the new use, such as parking standards, landscaping requirements, setback distances, etc. Ms. Kosakowski asserts that when the Lodge ceased to provide hotel services and amenities, a change of use occurred. The County

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<sup>5</sup> The Declaration of Condominium is, as noted by the Management Committee, a binding and enforceable contract against the members of the condominium HOA, but it is not an authoritative document in determining permitted uses under the Wasatch County Code.

<sup>6</sup> This is evidenced by Ms. Kosakowski’s statements in the submitted materials as well as Mr. Shea’s statement that the original developer operated the Lodge as a “condotel”.

<sup>7</sup> See note 2 above.

and the HOA Management Committee do not address whether the Management Committee's actions effected a change of use under applicable law, or what criteria would need to be met for a change of use to occur.

The classification of a land use is a question of statutory interpretation. Statutory interpretation begins with an analysis of the plain language of the applicable 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 v. City of South Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171.

Ordinances should be construed in a manner that renders all parts of the ordinance “relevant and meaningful,” *Foutz*, 2004 UT 75, ¶ 11, 100 P.3d 1171, and a correct reading should not “impose an unreasonable and unworkable construction,” *Miller*, 2003 UT 12, ¶ 19, 66 P.3d 592, or “render some part of a provision nonsensical or absurd.” *Perrine*, 911 P.2d at 1292.

Accordingly, we look to the plain language of the Wasatch County Code for guidance. The County Code does not specifically articulate when a change of use occurs, but it does contain an appendix identifying land use classifications into which different land uses categories fall. *See* WASATCH COUNTY CODE CHAPTER 16.36. The various zoning districts in the County use these categories to identify which uses are permitted, and how they are permitted, in the respective zones. It naturally follows that if the use of a structure changes from one identified land use category to another within the list of land use classifications, a change of use has occurred. Since the purported use change occurred in December 2015, the current use categories will guide the inquiry.

In this case, changing the use of the Lodge from a condominium hotel to purely a residential condominium moves the use classification from one use category to another and constitutes a change of use under the Wasatch County Code. The classification matrix does not specifically identify a “condominium hotel” use, so it is necessary to categorize this use into one of the existing use categories. We conclude that when the Lodge was operated as a condominium hotel and provided a hotel rental pool program and other hotel services and amenities, it fit under category “1511 Hotels.” The certificate of zoning compliance issued with the building permit plainly and specifically authorized the construction of a hotel and there isn't a more specific use category to describe a condominium hotel in the Code.

Moreover, we conclude that when the Lodge's HOA Management Committee ceased to provide hotel services and amenities, and, by its own admission, converted the structure into a residential condominium with the option of renting units on a short- or long-term basis, it changed the use category of the structure to land use classification “1150 Apartment (high rise) (includes condominiums)”<sup>8</sup>. This moved the use from a “transient lodgings” (commercial) category of uses to a “household unit” (residential) category of uses. We are unable to find any use category in the Code that would apply to both circumstances.

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<sup>8</sup> Specifically, the Lodge would now be classified under subcategory “1153 (high rise) attached on nonresidential parcel” because it contains 5 or more units, 3 or more stories in height on one parcel. *See* WASATCH COUNTY CODE CHAPTER 16.36.

Because of this, Utah Code § 17-27a-802(2)(b) and sections 16.01.11 and 16.01.13 of the Wasatch County Code require the Lodge's Management Committee to obtain necessary permits and approvals, if any, required by the Wasatch County Code. The Lodge will need to comply with additional standards<sup>9</sup> applicable to a residential condominium use under the applicable zoning if those standards are different than standards governing a condominium hotel use.

## CONCLUSION

The Lodge at Stillwater was originally approved as a condominium hotel. When the Lodge's HOA Management Committee terminated the hotel rental pool program and ceased offering hotel amenities and services, it changed the use from the approved hotel condominium use to a residential condominium use. Consequently, and in accordance with Utah Code § 17-27a-802(2)(b) and sections 16.01.11 and 16.01.13 of the Wasatch County Code, the HOA Management Committee must obtain applicable permits and approvals necessary, as determined by Wasatch County, to comply with current Wasatch County Code requirements associated with the change of use.

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

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<sup>9</sup> Such as parking, landscaping, setbacks, etc.



**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.**

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**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.**