

Advisory Opinion #184

Parties: City of Saratoga Springs, Concord Holdings, LC

Issued: April 28, 2017

TOPIC CATEGORIES:

Vested Rights

Entitlement to Application Approval

The 2009 Agreement entitles the developer to develop 32 acres of its project at a density of at least 6 units to the acre, but no more. The language of the agreement is unambiguous in this regard. The City may, of its own volition, grant higher densities if it decides doing so would advance the public interest, but has no obligation to do so.

Regardless of whether or not the City has fulfilled its obligations under the 2009 Agreement relative to Fairfield Road, the City may, pursuant to its inherent police power, continue to use the remaining stretch of Fairfield Road, and may realign or reconfigure the road to accommodate future growth and advance the public interest as it sees fit. The 2009 Agreement cannot limit the City's authority to do this.

DISCLAIMER

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



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

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



GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI
Executive Director

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

ADVISORY OPINION

Advisory Opinion Requested By: City of Saratoga Springs
Local Government Entity: City of Saratoga Springs
Type of Property: Residential
Date of this Advisory Opinion: April 28, 2017
Opinion Authored By: Jordan S. Cullimore
Office of the Property Rights Ombudsman

ISSUES

1. Is the developer, pursuant to a 2009 development agreement between the developer and the City of Saratoga Springs, entitled to a density of more than 6 units to the acre?
2. Is the City of Saratoga Springs, pursuant to the 2009 development agreement, obligated to prevent any future increase in traffic along Fairfield Road?

SUMMARY OF ADVISORY OPINION

The 2009 Agreement entitles Concord to develop 32 acres of its project at a density of at least 6 units to the acre, but no more. The language of the agreement is unambiguous in this regard. The City may, of its own volition, grant higher densities if it decides doing so would advance the public interest, but has no obligation to do so.

Regardless of whether or not the City has fulfilled its obligations under the 2009 Agreement relative to Fairfield Road, the City may, pursuant to its inherent police power, continue to use the remaining stretch of Fairfield Road, and may realign or reconfigure the road to accommodate future growth and advance the public interest as it sees fit. The 2009 Agreement cannot limit the City's authority to do this.

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 Kevin S. Thurman, Attorney for Saratoga Springs City, on May 16, 2016. A copy of that request was sent via certified mail to Concord Holdings, LC, at 12308 South Raleigh CT, PO Box 1094, Draper, UT 84020. Concord Holdings received the request on May 25, 2016.

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 Kevin Thurman, Attorney for the City of Saratoga Springs. Received May 16, 2016.
2. Response submitted by Paxton Guymon, Attorney for Concord Holdings, on July 22, 2016.
3. Reply submitted by Kevin Thurman, Attorney for Saratoga Springs, on August 26, 2016.
4. Letter submitted by Kevin Thurman, Attorney for Saratoga Springs, on February 21, 2017.

BACKGROUND

Concord Holdings, LC ("Concord") owns 44 acres of undeveloped real property in Saratoga Springs (the "City"). Prior to 2009, the undeveloped property also included an additional 11.5 acres, which Concord sold to the City shortly after the property was annexed in 2009. The sale enabled the construction of Pony Express Parkway and Foothill Boulevard. These roads now border Concord's remaining 44 acres to the south and east, respectively.

Under the terms of the purchase agreement (the "2009 Agreement") for the 11.5 acres, the City paid Concord \$141,570 per acre along with "other consideration identified" in the agreement. This "other consideration" is the subject of the present dispute between the parties. Additional consideration was provided because the parties agreed that "the value of the subject property may be higher than the agreed upon purchase price due to additional severance damages that Concord may be entitled to if the property were otherwise obtained by the City through condemnation proceedings."

The terms of the agreement state that Concord would be entitled to build 252 apartments on approximately 12 of the 44 acres. On the remaining 32 acres, Concord would be entitled to "zoning with a comparable density not less than the City's current R-6 zone for an approximate yield of not less than 6 units to the acre. The parties disagree as to what constitutes *not less than* 6 units to the acre. Concord asserts that the language entitles it to 8 units to the acre because the

City's 2009 PUD Overlay Zone allowed for a density bonus of 2 additional units in the R-6 Zone if certain performance standards were met. The City maintains that the agreement simply entitles Concord to the base density of the R-6 Zone, which is 6 units to the acre. The City further argues that the PUD Overlay Zone does not apply because it is not addressed in the agreement. The agreement references the underlying R-6 Zone only.

The other disputed issue of "other consideration" in the agreement relates to Fairfield Road, which bounds Concord's property to the north. The 2009 Agreement states that "[t]he City agrees to dead end, abandon or otherwise limit the traffic on the existing Fairfield Road in a manner to be mutually agreed upon by City and Concord" after the Pony Express Parkway and Foothill Boulevard are constructed. The City asserts that it fulfilled this term of the agreement when it dead ended Fairfield Road where it runs into Pony Express Parkway. The City claims that whereas Fairfield Road used to be a main thoroughfare to Eagle Mountain, Pony Express now serves this purpose, and the remaining stretch of Fairfield Road may be used for local purposes and/or realigned to serve other developing properties to the west of Concord's property without violating the terms of the 2009 Agreement.

Concord contends, however, that, pursuant to the 2009 Agreement, it did not agree to such an arrangement, and that any change in the existing traffic or use of Fairfield Road may only occur through mutual agreement between the City and Concord. Concord asserts that the City may "not allow any increase in traffic on [Fairfield Road] from future developments."

Saratoga Springs City has requested this Advisory Opinion to address these issues.

ANALYSIS

I. Density Entitlements under the 2009 Agreement

Whether the 2009 Agreement entitles Concord to a density of 6 or 8 units to the acre is a question of contract interpretation.¹ When interpreting a contract's terms and provisions, courts look first to the plain meaning of the agreement's language to determine the intent of the parties involved. *See Judge v. Saltz Plastic Surgery*, 2016 UT 7, ¶ 24, 367 P.3d 1006. If a contract term or provision is unambiguous, the contract is interpreted as a matter of law according to the agreement's plain meaning. *Id.*

If, however, a contract provision is ambiguous, "the intent of the parties becomes a question of fact," and the court may look to extrinsic evidence to resolve the ambiguity. *Id.* A contract provision is ambiguous "if it is capable of more than one reasonable interpretation because of 'uncertain meanings of terms, missing terms, or other facial deficiencies.'" *Id.* (quoting *WebBank v. Am. Gen. Annuity Serv. Corp.*, 2002 UT 88, ¶ 20, 54 P.3d 1139).

The relevant provision of the 2009 agreement entitling Concord to not less than 6 units to the acre is unambiguous, and should be interpreted according to its plain meaning. Moreover, since

¹ Contract interpretation is not among the subjects for Advisory Opinions found in the Property Rights Ombudsman Act, Utah Code § 13-43-205. We provide the following opinion here at the parties' request with the sole intent of assisting to resolve a dispute.

the density bonus allowed by the Overlay Zone is not expressly addressed or contemplated by the plain language of the agreement, it does not apply, and the agreement does not entitle Concord to 8 units to the acre.

The agreement states that Concord is entitled to develop at a density “not less than the City’s current R-6 zone for an approximate yield of not less than 6 units to the acre.” Admittedly, this language is broad and somewhat open-ended, but it is not ambiguous. The language is not “capable of more than one reasonable interpretation” on its face. *Id.* The phrase “not less than 6 units to the acre” plainly includes 6 units to the acre as an acceptable density, but it does not plainly entitle Concord to develop at 8 units to the acre. Moreover, the referenced R-6 zone, according to the information provided this office, allows 6 units to the acre, but not 8. The two references, read in conjunction with one another, produce the interpretation that Concord is *entitled* to develop at a density of at least 6 units to the acre.

The apparent purpose of the agreement’s open-ended “not less than” language is to set a floor density, while giving the City discretion to approve a higher density than 6 units to the acre if the City determines that such an increase would be in the public interest. However, the express terms of the agreement do not impose upon the City an *obligation* to grant a density increase.

Accordingly, since the agreement plainly entitles Concord to at least 6 units to the acre, but does not expressly entitle it to 8 units to the acre, the City may fulfill its obligation and meet the terms of the agreement by granting Concord the right to develop its property at a density of at least 6 units to the acre. The City has no obligation under the plain and express terms of the agreement to approve a development application proposing a density of 8 units to the acre.

II. Obligations Related to Fairfield Road under the 2009 Agreement

As stated above, the City asserts that it fulfilled its obligation “to dead end, abandon or otherwise limit the traffic on the existing Fairfield Road in a manner to be mutually agreed upon by City and Concord” when it dead ended Fairfield Road at Pony Express Parkway. The City further contends that, moving forward, it may use the remaining section of the right-of-way however it deems appropriate, and that it may allow future development to connect to what is left of Fairfield Road. Concord maintains, however, that the City may “not allow any increase in traffic on [Fairfield Road] from future developments,” because Concord did not mutually agree to future use of the road, pursuant to the 2009 Agreement.

The parties have asked for our opinion on the following question: whether the City in fact fulfilled its obligation under the terms of the 2009 Agreement when it dead-ended Fairfield Road. We decline to reach this question because the answer is not dispositive in light of overriding legal principles.

State law authorizes the use of development agreements² to give developers and local governments a flexible tool to address unique circumstances and provide both parties with a greater degree of certainty. Through a development agreement, a developer may obtain a vested right to certain development standards such as density, lot size, setback distance, as well as other

² See UTAH CODE § 10-9a-102(2).

standards commonly found in a traditional zoning ordinance. However, parties to a development agreement may not limit the local government's ability to exercise its legislative discretion and authority.

Whenever a local government exercises its legislative authority to promote the public health, safety, or general welfare, it is exercising its "police power." *See Retan v. Salt Lake City*, 226 P. 1095, 1097 (Utah 1924). When entering into agreements, a city may not "bargain away or divest itself of the right to make reasonable laws, and to exercise the police power whenever it becomes necessary to conserve or promote the health, safety or welfare of the community." *Id.* at 1096 (quoting 3 McQuillan, *Municipal Corporations*, § 1169).

Moreover, a local government's power "to contract respecting a particular thing does not confer power, by implication, to contract even with reference to such thing so as to embarrass and interfere with its future control over the matter, as the public interests may require." *Id.* Consequently, when a local government enters into an agreement that purportedly limits its legislative authority, the agreement is "subject at all times to the free and full exercise by the city of its police power in the public interest." *Id.* at 1096.

The Utah Code grants broad legislative authority to municipalities to "lay out, establish, open, alter, widen, narrow, extend, grade, pave, or otherwise improve streets...."³ UTAH CODE § 10-8-8. This authority constitutes a valid exercise of the police power. Consequently, any agreement the City enters into limiting this authority is, as previously stated, "subject at all times to the free and full exercise by the city of its police power in the public interest." *Retan*, 226 P. at 1096. "No matter what the terms of the contract, it is subject to the right of the city to exercise its police power for the public benefit." *Id.* at 1097.

Accordingly, regardless of whether the dead-ending of Fairfield Road fulfilled the City's obligation under the terms of the 2009 Agreement, the City is well within its authority to continue to allow public use of the remaining stretch of Fairfield Road and approve realignment or reconfiguration of the road to accommodate future development. Concord does not possess authority under the 2009 Agreement to prevent or proscribe the City's ongoing jurisdiction and authority in this area.

CONCLUSION

The 2009 Agreement entitles Concord to develop 32 acres of its project at a density of at least 6 units to the acre, but no more. The language of the agreement is unambiguous in this regard. The City may, of its own volition, grant higher densities if it decides that doing so would advance the public interest, but has no obligation to do so.

Regardless of whether or not the City has fulfilled its obligations under the 2009 Agreement relative to Fairfield Road, the City may, pursuant to its inherent police power, continue to use the remaining stretch of Fairfield Road, and may realign or reconfigure the road to accommodate

³ *See also Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112. (In order for a government to be effective, it needs the power to establish or relocate public thoroughways...for the convenience and safety of the general public.)

future growth and advance the public interest as it sees fit. The 2009 Agreement does not limit the City's authority to do this.

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

On this _____ Day of May, 2017, I caused the attached Advisory Opinion to be delivered via the United States Postal Service, postage prepaid, and certified mail, return receipt requested and addressed to the person shown below.

Concord Holdings, L.C.
Attn: LaVar Christensen
12308 S. Raleigh CT
PO Box 1094
Draper, Utah 84020

Office of the Property Rights Ombudsman