Advisory Opinion #174

Parties: Sugarbowl Developers, LLC, Summit County
Issued: November 9, 2016

TOPIC CATEGORIES:
Interpretation of Ordinances

The applicable ordinances do not prohibit single family structures. Summit County has denied the developer's application for single-family structures in order to enforce a prohibition on permanent residential uses in the zone. However, single-family structures easily fit the definition of Hotel/Lodging Uses, as described in the zoning. Nothing in the plain language of the ordinance justifies denial of the developer's desired single-family structures in the zone. If the intent was to prohibit single-family structures, the ordinance needs to plainly say so.

The County has clearly and plainly restricted permanent residences as a use within the zone. Nevertheless, enforcement of that restriction by prohibiting single-family structures is arbitrary. Permanent occupancy could be established in any type of residential structure, including multi-family structures. The County should approve the application for single-family structures, and find another method for enforcing its restriction on permanent residences.

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.

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ADVISORY OPINION

Advisory Opinion Requested By:	Bruce R. Baird, Esq.
Local Government Entity:	Summit County
Applicant for Land Use Approval:	Sugarbowl Developers, LLC
Type of Property:	Residential Subdivision
Date of this Advisory Opinion:	November 9, 2016
Opinion Authored By:	Brent N. Bateman Office of the Property Rights Ombudsman

ISSUE

Did the Snyderville Basin Planning Commission correctly determine that stand-alone single-family structures do not comply with, and are not permitted within, the Hotel/Lodging Units zone?

SUMMARY OF ADVISORY OPINION

The applicable ordinances do not prohibit single family structures. The County has denied the developer's application for single-family structures in order to enforce a prohibition on permanent residential uses in the zone. However, single-family structures easily fit the definition of Hotel/Lodging Uses, as described in the zoning. Nothing in the plain language of the ordinance justifies denial of the developer's desired single-family structures in the zone. If the intent was to prohibit single-family structures, the ordinance needs to plainly say so.

The County has clearly and plainly restricted permanent residences as a use within the zone. Nevertheless, enforcement of that restriction by prohibiting single-family structures is arbitrary. Permanent occupancy could be established in any type of residential structure, including multi-family structures. The County should approve the application for single-family structures, and find another method for enforcing its restriction on permanent residences.

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 behalf of Sugarbowl Developers, LLC on December 16, 2015. A copy of that request was sent via certified mail to Mr. Bob Jasper, County Manager, Summit County, 60 North Main, Coalville, Utah 84017.

EVIDENCE

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

1. Request for an Advisory Opinion, submitted by Bruce R. Baird, on behalf of Sugarbowl Developers, LLC on December 16, 2015, with attachments.
2. Supplemental information submitted by Mr. Bruce R. Baird, received March 31, 2016, with attachments.
3. Letter submitted by David Thomas, Deputy Summit County Attorney on April 21, 2016, with attachments.
4. Letter submitted by Mr. Baird on July 18, 2016.
5. Letter submitted by Mr. Thomas on July 19, 2016.

BACKGROUND[1]

Sugarbowl Developers, LLC (Sugarbowl) is the owner and developer of a planned unit development in Summit County, Utah, titled "The Vintage on the Strand" (Vintage). Vintage is located at the Canyons Ski Area.

The zoning for the Vintage project is controlled by the *Amended and Restated Development Agreement for the Canyons Specially Planned Area* (Development Agreement).[2] The County and several landowners entered into the Development Agreement in 1998, and the County adopted

[1] Both parties in this matter have provided very lengthy and detailed submissions. Nevertheless, the material facts do not appear to be in significant dispute. Many of the facts are simply summarized herein.

[2] The Development Agreement controls the development of the entire Canyons Specially Planned Area, of which the Vintage property is a very small part.

the Amended and Restated Development Agreement by ordinance in 1999.[3] Therein, the Vintage property is and has been zoned "Hotel/Lodging Units." The Development Agreement defines "Hotel/Lodging Units" as "A unit which shall contain attributes of a hotel or facility established for similar purposes and which shall be available for short term occupancy by the unit owner or others." The definition then lists several physical attributes of the Hotel/Lodging Units, including for example a central reservation service, central access to the building, centralized parking, etc.

In addition, the Development Agreement includes and incorporates an appendix document entitled *Statement of Global Principles*. This document sets guidelines and standards for the Canyons SPA, including some that are applicable to uses within the Hotel/Lodging Units zone.

The development of the Vintage property has taken several years, and has included multiple phases, discussions, plans, and reviews. All along, Sugarbowl has consistently and repeatedly expressed its intent to develop single-family units on the property. Likewise, Summit County, through the entire Vintage development process, has provided multiple and consistent expressions of intent that the development conform to the Hotel/Lodging Unit zoning restriction.

In 2005, Phase 1 of Vintage (Vintage Phase 1) was approved and constructed. Vintage Phase 1 includes two single-family structures, along with several townhomes and multi-family structures. During the review and approval of the Phase 1 plat, the single-family structures received significant discussion by the County commissioners. The discussion addressed the concern that the single-family structures in Phase 1 would become primary residences rather than hotel units.[4]

Sugarbowl's clear intent to develop single-family structures, and the County's clear intent to require conformance with the Hotel/Lodging Units zone seems to have been reconciled in a statement by the Deputy County Attorney that "the lodging units under the terms of the SPA do not necessarily have to be hotel rooms." The matter was then resolved and Vintage Phase 1 was approved, including the single-family structures.

The final recorded Vintage Phase 1 plat shows ten lots in white, numbered 1-9a, representing Phase 1. Each of those lots, except lot 9a, specifies the type of building that will appear on the lot. Two of the lots, lot 5 and lot 8, are designated as single-family.[5] The recorded Phase 1 plat also shows an additional 15 building lots, shaded in gray, that do not appear to be part of Phase 1, but are designated on the recorded plat as "Additional Lands." These Additional Lands depict specific locations, sizes, and dimensions of lots, but do not specify the types of buildings that

[3] The Summit County Board of Commissioners enacted Summit County Ordinance #333 on July 6, 1998, creating the Canyons SPA. In that ordinance, the County stated that the "SPA Zone District will be implemented through an appropriate form of a development agreement." Later, on November 15, 1999, Summit County adopted Ordinance #334-A, adopting the *Amended and Restated Development Agreement*. The parties do not dispute that the Development Agreement controls the zoning and development of the property. *See Save Beaver County v. Beaver County*, 2009 UT 8 ¶18 (recognizing the County's intent to adopt a development agreement legislatively). Purely for simplification, and without examination of the implications or propriety thereof, the *Amended and Restated Development Agreement* for the Canyons SPA will be referred to as a zoning ordinance and interpreted as a typical zoning ordinance. No effort will be made to separately interpret the Development Agreement as a contract.

[4] For example, the minutes indicate that Chair Richer stated "if the units approved at the Canyons turn into primary residences, everything . . . is being done for nothing." Further, County Planner Will Pratt stated that "the units are for hotel lodging, even though they are residences."

[5] Seven other lots are designated as either multi-family or townhouse. Lot 9a has no designation.

will appear. A note was also added to the final plat, apparently intended to discourage use of the structures as primary residences.[6] The note reads in part:

> Based upon the primary purpose for which the project was approved, each owner hereby agrees and acknowledges that if he or she occupies his or her Dwelling within the Project as a full-time residence, then such Dwelling is not eligible for the primary residential tax exemption . . . and said Dwelling shall be assessed at the secondary residential tax rate.[7]

Sugarbowl claims that this note was later "found to be discriminatory." The county refutes the claim. The record is empty of any indication that the controversy was resolved or that any kind of authoritative "finding" of discrimination was made.

Recently, Sugarbowl applied to complete Phase 3[8] of Vintage (Vintage Phase 3). Vintage Phase 3 covers the property designated in gray as "Additional Lands" on the Vintage Phase 1 plat. Sugarbowl's current Vintage Phase 3 application includes several single-family structures, and these single-family structures are the primary source of this dispute. The Vintage Phase 3 application has received a negative recommendation from the Snyderville Basin Planning Commission, who found that the single-family structures did not comply with the applicable zoning for Hotel/Lodging Units. Sugarbowl believes that the single family structures comply with the zoning and that the application is entitled to approval.

ANALYSIS

The Development Agreement does not expressly prohibit stand-alone single-family structures, nor does it exclude them from being used as Hotel/Lodging Units. Accordingly, single-family structures are permitted within the zone.

I. *Single-Family Unit* as a Physical Structure or as a Land Use

Throughout the extensive materials provided, terms such as "single-family unit," or "single-family dwelling" are used interchangeably. However, the terms refer to two distinct concepts: (1) a single-family unit as a physical structure --- a stand-alone building designed and constructed to house a single family, rather than a duplex or multi-family structure, and (2) a "single-family unit" as a use --- the use of any structure as a primary or permanent residence.[9] The *structure* and the *use* of the structure are distinct concepts. *See generally Brown v. Sandy City Bd. of*

[6] The staff report to the County Commission indicates that "The allowed use for the SPA is for Hotel/Lodging. In order to ensure that these units meet the intended lodging use, staff suggests that language be added to the plat in the form of a note and to the CCRs for the project clarifying that none of the units in the project are eligible for primary residence status."

[7] This note on the plat applies equally to all buildings shown on the plat – not just to the single-family structures.

[8] Vintage Phase 2, consisting of one multi-family structure, is also complete.

[9] In order to be clear throughout this Advisory Opinion, the physical structure will be referred to as a "single-family structure," and the use will be referred to as a "permanent residence."

Adjustment, 957 P.2d 207 (Ut App 1998). Existence of a structure in which a use can take place does not necessarily control the use. *See id*. at 212, n.6.

This distinction is critical to this Advisory Opinion. Sugarbowl's application seeks approval of single-family *structures*. The zoning restrictions restrict *use* to transient temporary occupancy. The County rejected the structures in an attempt to enforce the use restriction. Whether structures and/or a uses are allowed or prohibited in Vintage Phase 3 is a question or ordinance interpretation.

II. The Rules of Ordinance Interpretation

Ordinance interpretation requires employment of the canons of statutory construction. *Foutz v. City of South Jordan*, 2004 UT 75, ¶8. It always begins with an analysis of the plain language of the ordinance. *Carrier v. Salt Lake County*, 2004 UT 98 ¶30. The primary goal of interpretation is "to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Foutz*, 2004 UT 75, ¶11. If the plain language of an ordinance is sufficiently clear, the analysis ends there. *General Construction & Development, Inc. v. Peterson Plumbing Supply*, 2011 UT 1, ¶ 8. (citations omitted).

Further, it is presumed that the legislative body used each word advisedly. *Selman v. Box Elder County*, 2011 UT 18, ¶18. "In addition 'statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and . . . interpretations are to be avoided which render some part of a provision nonsensical or absurd.'" *Perrine v. Kennecott Mining Corp.*, 911 P.2d 1290, 1292 (Utah 1996) (quoting *Millet v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980)). Finally, "omissions in statutory language should be taken note of and given effect." *Biddle v. Washington Terrace*, 1999 UT 110, ¶14.

It is also important to recognize that zoning ordinances should be strictly construed in favor of allowing a property owner's desired use, since such ordinances are in derogation of an owner's use of land. *Carrier* 2004 UT 98 ¶31.

III. The Development Agreement Does Not Prohibit Single-Family Structures

The Vintage Phase 3 parcel is zoned *Hotel/Lodging Units*. The Development Agreement provides this definition:

> *Hotel/Lodging Units means a unit which shall contain the attributes of a hotel of[sic] facility established for similar purposes and which shall be available for short term occupancy by the unit owner or others. Attributes shall include:*
> *-Central reservation service for all units, including central check-in with full-time front desk service, bellhops, and concierge, operated by the owner/operator, a property management company chosen by the owners association, or as a function of the owner's association;*
> *-Central access to the building, with no private entrances for individual units or wings, except in structures which include up to but not to exceed four dwelling units, unless otherwise approved by the Director;*

-Pedestrian traffic funneled through a central lobby area, except in structures which include up to but not to exceed four dwelling units, unless otherwise approved by the Director;
-Centralized parking, with no assigned spaces, except in structures which include up to but not to exceed four dwelling units, unless otherwise approved by the Director;
-Utilities centrally controlled, including cable television, telephone, electricity, gas, and water; and
-Limited storage area for owners.

This definition places specific requirements and parameters on both the structures and uses permitted in the *Hotel/Lodging Unit* zone. The majority of the parameters in this definition refer to structure. However, some portions refer to use, such as "which shall be available for short term occupancy by the unit owner or others." Beyond these few parameters, the definition restricts neither the design nor appearance of any structures. Moreover, this ordinance expressly contemplates that some structures will have few units, often excepting "structures which include up to but not to exceed four dwelling units." A single family structure could easily comply with the restrictions in this definition. Every parameter listed here is either excepted for smaller structures, or could be incorporated into the physical building of a single-family structure.

In addition, the Statement of Global Principles also provides guidelines and regulations pertinent to the *Hotel/Lodging Units* zone.[10] This document pertains primarily to *use*, discussing the principle of temporary lodging uses in the central area and restricting units in the development from being occupied as permanent residences:

[10] The Statement of Global Principles is a lengthy appendix to the Canyons SPA Amended and Restated Development Agreement, and addresses many topics, including accommodation types. The stated purpose of the Statement of Global Principles is "to clarify and elaborate on community and resort development policies" and resembles in many respects a general plan. Nevertheless, the Statement of Global Principles is part of the Development Agreement, which has been adopted by ordinance and acts as the current zoning for the development property. The Statement of Global Principles states that "No development shall be approved unless it is compatible with the policies of the general plan and the principles set forth herein."
The parties argue at length about the legal status of the Statement of General Principles. Sugarbowl argues that the Statement is not a substantive regulation but is instead a "non-substantive preamble" and consists of hortatory statements of policy, unenforceable under *Price Development Company v. Orem City,* 2000 UT 26. The County argues that the Statement of Global Principles has been specifically and repeatedly incorporated into the Development Agreement as substantive regulation.
It is unnecessary in this Advisory Opinion to decide the overall legal effect of the Statement of Global Principles. Even if we consider it legally binding and enforceable, it does not prohibit construction of single-family residences in Vintage Phase 3. Conversely, even if it is not law, the Statement of Global Principles is not nothing, and cannot be dismissed wholesale. If it is only hortatory, it provides important interpretive guidance. "The effect to be given these provisions is the same: they provide guidance to the reader as to how the act should be enforced and interpreted, but they are not a substantive part of the statute. They may be used to clarify ambiguities, but they do not create [or limit] rights." *Price* ¶23.
The impression given upon review of the Statement of Global Principles is that it is somewhere in the middle. It contains many hortatory statements, statements of policy, and interpretive guidelines. However, it also contains numerous restrictions, objective parameters, administrative procedures, and many words that cannot be considered hortatory like "shall" and "must." Thus, the Statement of Global Principles cannot be categorized wholly as either "policy" or "law."

> Units that shall be maintained and managed in a short-term rental arrangements[sic], where there shall be a required central check-in on or off-site, common maintenance and services provided for guests, and other similar features that will be defined prior to an SPA amendment, shall be considered resort and guest accommodations.

The Statement of Global Principles does contain some restrictions and requirements on structures. However, no rule can be found in the document that prohibits the lodging units from being single-family structures as stand-alone lodging units. At most, the document states:

> Typical units that can be considered a resort and guest accommodations [sic] include traditional hotel and lodging rooms and suites, and interval and timeshare ownership units.

Single-family structures can easily be, and often are, interval and timeshare ownership units.

It should be noted that the Statement of Global Principles may specifically prohibit single-family structures in other zones, but even then not clearly: "Within the areas designated as resort Support/Mountain Recreation within the General Plan, primary single family dwelling units are not permitted." Nevertheless, a clear restriction on single-family structures could have been made in the area that includes Vintage Phase 3. However, nothing can be found that plainly does so.

According to the rules of statutory construction, "omissions in statutory language should be taken note of and given effect." *Biddle*, 1999 UT 110, ¶14. Single family structures could have been, but were not prohibited in the *Hotel/Lodging Units* zone, and are thus permitted. *See Brown*, 957 P.2d at 211. *See also Carrier* 2004 UT 98 ¶31. Summit County has acknowledged this, through previous approval of single-family structures on the Vintage Phase 1 plat.[11] This is consistent with the county attorney's correct statement at the Vintage Phase 1 meeting that "the lodging units under the terms of the SPA do not necessarily have to be hotel rooms." Thus, by its plain language, the development agreement does not prohibit single-family structures in the *Hotel/Lodging Units* zone. The County must permit Sugarbowl's desired single-family structures that comply with the ordinance parameters.

IV. The Development Agreement Restricts Permanent Residences as a Use

Likewise, the Development Agreement unambiguously and consistently mandates that the structures in the Hotel/Lodging Units zone be used as temporary lodging and not as permanent residences. The definition of Hotel/Lodging Units in the Development Agreement states that: "Hotel/Lodging Units means a unit which shall contain the attributes of a hotel of[sic] facility established for similar purposes and which **shall be available** for **short term occupancy** by the

[11] The County argues that it permitted single-family structures in Vintage Phase 1, not because they fit within the zoning, but as a concession due to an error in the official Land Use and Zoning chart. Although that error does appear on the zoning chart, absolutely no support can be found in the submissions of the parties that the single-family structures were approved as a concession to that error. Rather, the great weight of the evidence, primarily the statements of County officials in the minutes, indicates that single-family structures were permitted in Vintage Phase 1 because they could be used as Hotel/Lodging Units.

unit owner or others." (emphasis added). That definition is not ambiguous. It indicates (1) a requirement ("shall"), (2) a duration ("available for short term occupancy"), and that (3) applies to the owner of the property as well as to others. By its plain language it restricts permanent residences as a use.

The restriction against permanent residences as a use is consistently discussed throughout the documents provided, including in statements of general intent, in development guidelines, and in specific building restrictions. The Statement of Global Principles states that

> For purposes of the Canyons SPA, "resort and guest accommodations" shall include those units in which all beds are occupied on a temporary short-term basis, and not occupied as full-time primary residential dwelling units.

These guidelines relate to use (permanent or temporary occupancy, primary or secondary occupancy, full-time occupancy, etc.), rather than type of physical structure. The restrictions regulate beds rather than buildings:

> [G]enerally no less than eighty percent (80%) of all beds established at any time in the Canyons Resort Center, (regardless of type, configuration, or location) shall be allocated to 'resort and guest accommodations.' . . . . Within the resort core, . . . the targeted bed allocation shall be at least ninety percent (90%) resort and guest accommodations. There shall be no more than 10% of the beds allocated to primary residential dwelling units in the Resort Core.

Note that this discusses beds "regardless of type, configuration, or location." This contemplates that the beds will appear in many types of structures. The phrase "regardless of type, configuration, or location" must be given effect. "Statutory enactments are to be so construed as to render all parts thereof relevant and meaningful." *Perrine*, 911 P.2d at 1292. This paragraph places no prohibition on the type of structure, but clearly delineates the use.[12] Permanent residences as a use are expressly and plainly restricted in the Hotel/Lodging Units zone.

V. Prohibiting Single-Family Structures to Enforce the Restriction on Permanent Residences is Arbitrary

In submitting a negative recommendation of the Vintage Phase 3 application, the Snyderville Basin Planning Commission attempted to enforce the use restriction on permanent residences by denying the single-family structures. However, single-family structures are not prohibited in the ordinance, and must be allowed. Other means must be found to enforce the use restriction.

The restriction on permanent residences in the Development Agreements makes no distinction between types of structure. The limitation requiring temporary occupancy applies equally to single-family structures as it does to a duplex, townhome, or multi-unit structure. A large multi-unit building may see its unit owners make permanent residence therein, in violation of the restrictions, just as the owners of any other type of unit in any structure. Permanent residency in

[12] Even if this language, in particular the word *unit*, could be interpreted to apply to structures and not just uses, this paragraph imposes a limitation on primary residential dwelling units, not a prohibition.

a duplex may be less attractive to some than in a single-family structure, but not to others. It's equally possible to take permanent residence in a one-room condo. The restriction applies to all types of units. Enforcement must also apply to all structures, not just single-family structures. Thus, prohibiting single family structures in order to enforce the restriction on permanent residences is arbitrary.

It is unknown how the County is to enforce the permanent resident restrictions. Documents included with the submissions argue that any such restriction on occupancy, no matter how achieved, would be discriminatory and/or illegal.[13] The County should find another legal enforcement avenue to restrict permanent occupancy of all structures, not just the single family buildings.[14]

CONCLUSION

Single-family structures are not prohibited in Vintage Phase 3, and therefore should be approved. The County's restriction on the use of the properties as temporary lodging rather than permanent residences should be enforced some other way rather than by denying single-family structures.

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

[13] By no means should any inference arise that this Advisory Opinion or the Office of the Property Rights Ombudsman agrees with these arguments.

[14] One additional major point of dispute between the parties concerns whether or not the doctrine of zoning estoppel applies to this matter. Because this Advisory Opinion concludes that the governing regulations do not prohibit single-family structures, it is not necessary to decide the zoning estoppel issue. Nevertheless, we note that the arguments presented for zoning estoppel appear to support the right to develop the Vintage Phase 3, but do little to support *how* to develop Vintage Phase 3, whether by single-family structures or any other configuration.

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.