Advisory Opinion #4

Parties: Dan Christensen and Sandy City

Issued: August 8, 2006

TOPIC CATEGORIES:

B: Conditional Uses
R(viii): Other Topics (Appealing Land Use Decisions)

A conditional use permit may only be denied if the municipality finds that the proposed use has detrimental effects that cannot be mitigated with reasonable conditions. Appeals from land use decisions must exhaust administrative remedies and follow procedures established by local ordinances and state law. A municipality's decision is entitled to a great deal of deference, and will be sustained if it is supported by substantial evidence, and is not arbitrary, capricious, or illegal.

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Advisory Opinion

Advisory Opinion Requested by:	Dan Christensen
Local Government Entity:	Sandy City
Applicant for the Land Use Approval:	Dan Christensen and others
Project:	The Village at Park Avenue 7585 – 7703 South Union Park Avenue Sandy, Utah
Date of this Advisory Opinion:	August 8, 2006

Issue: Would a court find that the approval of the preliminary development plan and conditional use permit for mixed uses at the Village at Park Avenue was legal?

Review:

The request for an advisory opinion in this matter was received by the Office of the Property Rights Ombudsman on June 5, 2006. A letter with the request and all the attachments included was sent by certified mail, return receipt requested, to Sandy City on July 10, 2006. The letter was addressed to Diane Aubrey, City Recorder, at the address shown on the Governmental Immunity Act Database at the Utah State Department of Commerce, Division of Corporations and Commercial Code as required by statute. The letter to the City Recorder was sent certified mail, with return receipt requested, and was received by the City on July 11, 2006. A copy of the letter was also sent to Michael Coulam, the Sandy City Director of Community Development.

My decision to proceed with the preparation of the opinion was made on July 28, 2006 and the parties were notified of that decision via a letter sent on that date.

Prior to the preparation of this opinion, I visited via telephone several times with Greg Christensen, who represented the interests of the person requesting the opinion. I also spoke with Perry Bolyard, an individual who has been involved in the process of review for the Village at Park Avenue project and who is a plaintiff in some litigation against the City which relates to the project. I also met with Mike Coulam, Gil Avellar, and Jim McNulty, all of whom are planners in the Sandy Community Development Department on August 3, 2006, where they made available to me a number of documents related to the project which is the subject of this opinion. After narrowing the issues by this

process, I sent an email to Mike Coulam, Perry Bolyard, and Greg Christensen asking for input on issues raised. Greg responded with an analysis related to the evidence in the record to support the issuance of the conditional use permit in this matter.

Record:

The parts of the record I have to review include:

1. Sandy City Land Development Code, particularly provisions related to development applications, appeals, conditional use permits, and the SD(Harada) Zone.
2. Minutes of the Planning Commission Meetings:
   June 10, 2003
   August 19, 2005
   July 7, 2005
   September 15, 2005
   September 21-22, 2005
   October 6, 2005
   December 1, 2005
   January 19, 2006
   February 2, 2006
   February 16, 2006
   May 4, 2006
3. Memorandums dated September 9, 2005: September 30, 2005; November 23, 2006: January 11, 2006: February 8, 2006; and April 27, 2006 to the Planning Commission from the Community Development Staff
4. Synopsis of the Planning Commission meetings held for the Village at Park Avenue, undated, with Sandy City Logo on the first page.
5. The Village at Park Avenue Planning Commission chairman's Talking Points, undated, with the Sandy City Logo on the first page.
6. Bound set of materials provided by Perry Bolyard, Chairman, Friends and Neighbors of Union Park. The first page is a letter dated March 17, 2006 addressed to the Members of the Sandy City Council. There are five tabs with exhibits and information bound with that letter. A copy of this bound volume was in the files related to this project at the Sandy Community Development Offices. The copy I viewed was delivered to my office by Perry Bolyard in June of 2006.
7. Copy of email from Dennis Tenney to Phil Glenn and others, dated May 6, 2006.
8. Board of Adjustment Application, dated June 2, 2006, filed by Friends and Neighbors of Union Park c/o Perry Bolyard. Seventeen page document including exhibits attached.

9. Letter from Perry Bolyard, Chairman of Friends and Neighbors of Union Park, dated 2 June 2006, to the Sandy City Board of Adjustment.

I have also reviewed the following materials which are not part of the record, but appropriate for my review:

10. Request for an Advisory Opinion filed with my office on June 1, 2006.
11. Copy of letter from Dan Christensen to Jeffrey N. Walker dated June 13, 2006, including attachments. These attachments include a copy of Perry Bolyard's June 2, 2006 letter to the Sandy City Council, a document titled "Response to Board of Adjustment Appeal", a document entitled "Mitigating Design Changes Introduced by the Developer Benefiting Cottonwood Heights", and a copy of section 15-29-10 from the Sandy City Land Development Code, SD (Harada) Zone.
12. Letter addressed to me from Greg Christensen of CMI Mortgage and Investment, dated June 1, 2006 and transmitted to be via email.
13. Letter addressed to Sandy City Council from Greg Christensen of CMI Mortgage and Investment, dated June 5, 2006.
14. Email to Craig Call from Greg Christensen, dated August 7, 2006, providing the developer's response to my questions sent by email on August 3, 2006,

Facts:

1. The Village at Park Avenue (the project) is a multi-use development involving four multi-story condominium buildings plus a 5 ½ story commercial office building.
2. The project is located at approximately 7700 South on Union Park Boulevard (1300 East) in Sandy.
3. The site for the project is currently occupied by single family residences that face Union Park Boulevard.
4. The terrain of the site is quite steep to the East, and there is a dramatic fall in elevation between the Union Park Boulevard frontage to the West and the Creek Road frontage to the East.
5. The site was assembled by acquiring a series of adjacent residential lots and properties that are located between Union Park Boulevard and Creek Road.
6. Creek Road approximately parallels Union Park Boulevard and runs generally North and South on the East side of the project site.
7. The project site is located on the West side of Creek Road. On the East side of Creek Road is a row of single family residences facing the project to the West, across Creek Road. Beyond those residences to the East is a single-family residential neighborhood.

8. The project is located in the SD(Harada) Zone (SDH Zone), which is a zoning district regulated under section 15-20-10 of the Sandy City Development Code. (SCDC)
9. The SDH Zone requires that all site plans for proposed development shall be reviewed and approved by the Planning Commission.
10. Under the applicable ordinances the project was required to be reviewed by the staff of the City (SCDC 15-06-02(A)). The same provision also allows the Community Development Department Director to require that the Planning Commission also review the site plan.
11. Additional development procedures are provided for in Chapter 15-11 SCDC, which at Section 15-11-4 describes the preliminary review and approval process. Whether or not the preliminary review process has involved the Planning Commission, final review can be accomplished by the staff under Section 15-11-5 and related provisions.
12. The SDH Zone provides at SCDC 15-29-10(d)(1) that "buildings shall be erected to a height no greater than 35 feet from average grade, except for the following. With the anticipated uses of this property, structures oriented towards Union Park Avenue may exceed 35 feet in height, as may be approved by the Planning Commission."
13. The SDH Zone also provides that proposed mixed use, residential and office developments require a conditional use permit. SCDC 15-20-10(c).
14. Conditional use permits are reviewed under the provisions of SCDC 15-05-07.
15. SCDC Section 15-05-07(C) outlines standards that are to be used to evaluate conditional use permit applications. It states that conditional use permits shall be granted only when evidence is presented that establishes five specific criteria noted in the ordinance.
16. The project was discussed in at least eleven meetings of the Sandy City Planning Commission held between June 19, 2003 and May 4, 2006.
17. The Planning Commission voted to grant preliminary approval of the site plan for the project on February 16, 2006.
18. The Planning Commission also voted to grant a conditional use for the project on February 16, 2006.
19. Under SCDC 15-11-02(J), appeals arising from the development process may be made under Chapter 15-01. That chapter provides for the Board of Adjustments to hear appeals from decisions applying the zoning ordinance. SCDC (15-01-30(A)(1)).
20. Under SCDC 15-05-07(G), appeals may be made to the City Council from decisions regarding conditional use permits.
21. Appeals related to conditional use permits must be confined to the administrative record developed by the Planning Commission. (SCDC 15-05-07(G)(3)).

22. On appeal, the City Council can override any approval or disapproval of a conditional use permit, impose additional conditions, or remand the appeal back to the Planning Commission. (SCDC 15-05-07(G)(5)).
23. The decision of the City Council related to the appeal of a conditional use permit issue is final. (SCDC 15-05-07(G)(6)). It can then be appealed to the district court under Utah Code Annotated Section 10-9a-801 within 30 days of the date the decision is final.
24. On March 17, 2006 the Friends and Neighbors of Union Park, composed of citizens and residents in the area, filed an appeal to the City Council of the decisions made by the Planning Commission to grant the conditional use permit.
25. No appeal was filed on the preliminary approval of the project to the Sandy City Board of Adjustment within 30 days of the date that the February 16, 2006 decision to grant preliminary development plan approval became final.
26. Subsequent to the preliminary approval by the Planning Commission, the developer of the project revised the site by reducing the land area that had been previously included in the site plan and proposed an alternative plan for preliminary approval to the Planning Commission
27. On May 4, 2006 the Planning Commission voted to grant approval to an alternative preliminary development plan for the project
28. On May 4, 2006, the Planning Commission voted to approve an amended conditional use permit for the alternative preliminary development plan for the project.
29. On May 9, 2006, the appeal to the City Council related to the Planning Commission's February 16, 2006 conditional use permit decision was heard.
30. On May 30, 2006, the City Council again reviewed the appeal.
31. On June 2, 2006, the Friends and Neighbors of Union Park appealed the May 4 decision of the Planning Commission to approve the alternative preliminary development plan for the Union Park Avenue project. The appeal was made to the Sandy Board of Adjustment.
32. On June 6, 2006 the City Council voted to approve the conditional use permit for the project as related to the February 16, 2006 preliminary development plan approval, with some revisions.
33. On July 5, 2006, the Friends and Neighbors of Union Park LLC filed suit against Sandy City in the Third District Court, alleging that the decision by the City Council to approve the conditional use permit was arbitrary, capricious, and illegal.
34. A hearing before the Sandy Board of Adjustment related to the appeal of the May 4 preliminary development plan approval of the project has been scheduled for August 10, 2006.

Analysis:

Factors:

This is an administrative decision. Administrative land use decisions will be overturned by a court if:

1. they are properly within the jurisdiction of the court to review, and
2. they are not supported by substantial evidence in the record, or
3. they do not conform with the mandatory requirements of existing statute or ordinance, or
4. the discretion allowed by the ordinance and/or state statute is exceeded.

1. Does a court have jurisdiction to hear the matter?:

This advisory opinion was requested by the developer of The Village at Park Avenue to determine whether or not the approval of the project by the city would be ruled invalid by a court of law. First of all, we must decide if a court would have jurisdiction to hear the matter in the first place.

This issue hinges on two subsets. 1) were necessary local appeals processes exhausted? And 2) was the final decision in the local appeals process appealed to the court in a timely manner?

In this matter, there were two concurrent decisions made with regard to the development at each stage in the approval process. The first was to grant preliminary approval of the project development plan. The second was the granting of a conditional use permit for the mixed-use aspects of the development.

The preliminary approval of the development plan included decisions about building heights, placement, setbacks, densities, and various other aspects of the plan. The great majority of discretionary acts taken by the City in the development review process were part of the preliminary development plan approval process, not the conditional use permit approval process. The conditional use permit only dealt with the potential of the project to include both residential and commercial uses – the "mixed use" issue.

Each of these two issues has a different appeals path set forth in the ordinances.

Appeal of the preliminary approval of the development plan

The preliminary approval decision is an administrative decision applying the zoning ordinance. A person challenging this decision must appeal that decision administratively before filing a legal action. See *Patterson v. American Fork City*, 2003 UT 7. Case law,

state statute, and the Sandy Development Code provide for that appeal to be made to the Board of Adjustment (which is the appeal authority required by state statute). See *Bennion v. Sundance Development*, 897 P.2d 1232 (Utah 1995); Utah Code Annotated Sec. 10-9a-701; and SCDC 15-01-30(A) and 33(A)(1).

In this matter, the preliminary approval of the project by the Planning Commission on February 16, 2006 was not appealed to the Board of Adjustment. Since that appeal is a necessary step in the requirement to exhaust administrative remedies, those challenging the project have lost the chance to take that matter to court. The granting of that preliminary site plan approval is at this time not subject to review by the court or the Board of Adjustment. The February 16 approval is legal and may not be challenged at this time. See *Bennion*, which held that a person may not challenge an administrative land use decision in court if no appeal was made to the board of adjustments and *Brendle v. City of Draper,* 937 P.2d 1044, 1047 (Utah Ct. App. 1997), which held that appeals from city decisions must be timely made, in strict accordance with the deadlines imposed in local ordinances. See SCDC 15-01-33(A)(2)

Although the February 16, 2006 approval of the preliminary development plan was not appealed, the Planning Commission made another decision on May 4, 2006, granting preliminary approval to an alternative plan for the project. The approval granted on May 4, 2006 was appealed in a timely manner to the Board of Adjustment. Issues raised with regard to the May 4 approvals are therefore subject to review by the Board, and the decision of the Board may be appealed to the District Court within 30 days of the date the decision by the Board becomes final.

Appeal of the approval of a conditional use permit.

The appeals path for conditional use permit actions is not to the Board of Adjustment under the Sandy City Development Code, which provides in 15-07-07(G) that such decisions are appealed to the City Council.

The decision by the Planning Commission to approve the conditional use permit allowing mixed uses in the project on February 16, 2006 was appealed to the City Council within the time allowed by the ordinance. The City Council's June 6 decision to approve the conditional use permit with revisions to the conditions imposed was properly appealed within the time period allowed on July 5, 2006. All issues related to the decision to approve the conditional use are also therefore properly before the court and can be resolved by the court through the litigation process.

No appeal has apparently been filed from the decision by the Planning Commission to approve a conditional use permit for the alternative plan approved on May 4, 2006.

Summary – issues that remain unresolved:

The height, density, setbacks, and other issues decided on February 16, 2006 by the Planning Commission which are part of the preliminary development plan approval are final since they were not timely appealed to the Board of Adjustment.

The Board of Adjustment may review the May 4, 2006 decision by the Planning Commission to grant approval of an alternative preliminary plan. If that decision is not supported by substantial evidence in the record, does not comply with mandatory provisions of the law, or exceeds the discretion afforded the Planning Commission in ordinance, then the Board may overturn that decision. A person potentially aggrieved by the decision by the Board of Adjustment may then appeal that decision to the district court within 30 days of the date the Board's decision is final. See Utah Code Annotated, 10-9a-801.

A court may review the June 6 decision by the City Council to grant a conditional use permit for mixed uses in the project since that matter was appealed to the district court within 30 days of the date it became final. If that decision was not supported by substantial evidence in the record, did not comply with mandatory provisions of the law, or exceeds the discretion afforded the City Council in ordinance, then the district court will overturn that decision. The effect of a negative decision against the conditional use permit in the court would not affect height, density, setbacks, etc., but only the developer's ability to have mixed uses in the project.

What Deference is Given by the Courts to Administrative Land Use Decisions?

All land use decisions are entitled to a great deal of judicial deference:

> This court has long recognized that municipal land use decisions should be upheld unless those decisions are arbitrary and capricious or otherwise illegal. Gayland v. Salt Lake County, 11 Utah 2d 307, 358 P.2d 633, 636 (Utah 1961) ; Marshall v. Salt Lake City, 105 Utah 111, 141 P.2d 704, 709 (Utah 1943) . Indeed, municipal land use decisions as a whole are generally entitled to a "great deal of deference." Springville Citizens for a Better Cmty. v. City of Springville, 1999 UT 25, P23, 979 P.2d 332 . However, in specific cases the determination of whether a particular land use decision is arbitrary and capricious has traditionally depended on whether the decision involves the exercise of legislative, administrative, or quasi-judicial powers. When a municipality makes a land use decision as a function of its legislative powers, we have held that such a decision is not arbitrary and capricious so long as the grounds for the decision are "reasonably debatable." Marshall, 141 P.2d at 709 (reviewing municipal zoning decision as legislative function and employing reasonably debatable standard); Smith Inv. Co.

> v. Sandy City, 958 P.2d 245, 252 (Utah Ct. App. 1998) (same). When a land use decision is made as an exercise of administrative or quasi-judicial powers, however, we have held that such decisions are not arbitrary and capricious if they are supported by "substantial evidence." Xanthos v. Bd. of Adjustment of Salt Lake City, 685 P.2d 1032, 1034-35 (Utah 1984) (reviewing board of adjustment decision as an administrative act and employing substantial evidence standard).

Bradley v. Payson City Corp., 2003 UT 16, P10. The definition of "substantial evidence" in land use jurisprudence is:

> We have defined substantial evidence as "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." First Nat'l Bank of Boston v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990).

Bradley, at P15. In a recent case, the Utah Supreme Court indicated that "substantial evidence" can be found where there were repeated hearings and meetings, many submittals of information, and extended public discussion. If the required documentation was before the land use authority and "numerous conditions" are imposed, then substantial evidence will be found to exist for the decision:

> In the case at bar, the undisputed facts demonstrate that the City's decision was not arbitrary or capricious but was the result of careful consideration and was supported by substantial evidence. Of significant import, consideration of the P.U.D. spanned nearly a year and a half and involved more than a dozen separate meetings wherein public input was heard, objections voiced, and modifications to the P.U.D. imposed. Although certain materials were not timely submitted, the majority of the required documentation was before the planning commission and the city council when the P.U.D. ultimately was approved. That documentation, as well as the other evidence before the commission and the council, supported approval of the P.U.D. Moreover, throughout the approval process and in an effort to meet the P.U.D. requirements, the city council required Peay to satisfy numerous conditions concerning the proposed development, all of which Peay eventually fulfilled. In short, the undisputed evidence reveals without question that substantial evidence supported the City's decision and that a reasonable person could have reached the same decision as the City. We conclude, therefore, that the City's decision to approve the P.U.D. was not arbitrary or capricious.

Springville Citizens v. Springville, 1999 UT 25, P25-30. In a situation that parallels the facts in the Springville case, substantial evidence would likely be deemed to exist.

The second inquiry is whether or not administrative actions comply with the mandatory provisions of local ordinances and state statutes:

This conclusion *(that substantial evidence exists to support the decision)* does not end our inquiry, however. Under Utah Code Ann. § 10-9-1001(3)(b), we must also determine whether the City's decision was illegal. Plaintiffs argue convincingly that the City's decision to approve the P.U.D. was illegal because the City violated its own ordinances during the approval process. Plaintiffs highlight that compliance with the city ordinances at issue was, under the City's own legislatively enacted standard, mandatory. Plaintiffs point to Springville City ordinance 11-10-101, which states, "For purposes of this Title, certain words and terms are defined as follows: . . . (4) Words 'shall' and 'must' are always mandatory." (Emphasis added.)

Title 11 of the Springville ordinances, entitled "Development Code," details the procedures and requirements for P.U.D. approval, including those that plaintiffs contend the City violated. Those procedures and requirements, as indicated in the ordinances quoted above, frequently are prefaced by the words "shall" and "must." Thus, according to the City's own rule of interpretation, compliance with the P.U.D. procedures and requirements containing these words was mandatory.

In its ruling granting summary judgment in favor of the City, the district court appeared to recognize the mandatory nature of the city ordinances but concluded nonetheless that substantial compliance with those ordinances was sufficient. In fact, one of the express legal principles upon which the district court premised its ruling was that "the city's actions approving the PUD must be upheld if those actions are in substantial compliance with the city's ordinances."

The district court's use of the substantial compliance doctrine in the face of ordinances that are expressly mandatory was erroneous. While substantial compliance with matters in which a municipality has discretion may indeed suffice, it does not when the municipality itself has legislatively removed any such discretion. The fundamental consideration in interpreting legislation, whether at the state or local level, is legislative intent. See Board of Educ. v. Salt Lake County, 659 P.2d 1030, 1030 (Utah 1983). Application of the substantial compliance doctrine where the ordinances at issue are explicitly mandatory contravenes the unmistakable intent of those ordinances.

Municipal zoning authorities are bound by the terms and standards of applicable zoning ordinances and are not at liberty to make land use decisions in derogation {979 P.2d 338} thereof. See Thurston v. Cache County, 626 P.2d 440, 444-45 (Utah 1981). The irony of the City's position on appeal is readily apparent: the City contends that it need only "substantially comply" with ordinances it has legislatively deemed to be mandatory. Stated simply, the City cannot "change the rules halfway through the game." Brendle v. City of Draper, 937 P.2d 1044, 1048

> (Utah Ct. App. 1997). The City was not entitled to disregard its mandatory ordinances. Because the City did not properly comply with the ordinances governing P.U.D. approval, we conclude that under Utah Code Ann. § 10-9-1001(3)(b) , the City's decision approving the P.U.D. was illegal.

Springville Citizens, at P25-30 (language in italics added). Thus, if the City of Sandy's actions are clearly not in compliance with mandatory provisions of the ordinances, they will be overturned in the courts. However, if the issue is one of discretion, the courts will usually support local decisions if made within the guidelines the ordinances provide.

Standard of Review

This leads us to the precedents the courts have set up to interpret the ordinances and the general plan. In interpreting and applying the ordinances the standard is:

> A municipality's land use decisions are entitled to a great deal of deference. See Xanthos v. Board of Adjustment, 685 P.2d 1032, 1034 (Utah 1984); Triangle Oil, Inc. v. North Salt Lake Corp., 609 P.2d 1338, 1339-40 (Utah 1980); Cottonwood Heights Citizens Ass'n v. Board of Comm'rs, 593 P.2d 138, 140 (Utah 1979); Naylor v. Salt Lake City Corp., 17 Utah 2d 300, 410 P.2d 764 (Utah 1966). Therefore, "the courts generally will not so interfere with the actions of a city council unless its action is outside of its authority or is so wholly discordant to reason and justice that its action must be deemed capricious and arbitrary and thus in violation of the complainant's rights." Triangle Oil, 609 P.2d at 1340. Indeed, the statute that forms the basis of this appeal requires the courts to "presume that land use decisions and regulations are valid." Utah Code Ann. § 10-9-1001(3)(a) . However, this discretion is not completely unfettered, and the presumption is not absolute. If a municipality's land use decision is arbitrary, capricious, or illegal, it will not be upheld. See id. § 10-9-1001(3)(b).

Springville Citizens, P23.

> Our "primary goal in interpreting statutes 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 S. Jordan, 2004 UT 75, P 11, 100 P.3d 1171 (internal quotation omitted). Cited in *Mouty v. Sandy City*, 2005 UT 41.

> The courts shall:
> (i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and

> (ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.
> (b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if the decision, ordinance, or regulation is reasonably debatable and not illegal.
> (c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.
> (d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

Utah Code Ann. 17-27a-801(3)(a). In determining whether the "decision, ordinance or regulation" violates existing law, the courts have given the following guidelines:

> To resolve conflicts in interpretation of statutes or ordinances, we look to well-settled rules of statutory construction. First, "in cases of apparent conflict between provisions of the same statute, it is the Court's duty to harmonize and reconcile statutory provisions, since the Court cannot presume that the legislature intended to create a conflict." Madsen v. Brown, 701 P.2d 1086, 1089-90 (Utah 1985).
>
> Further, "a provision treating a matter specifically prevails over an incidental reference made thereto in a provision treating another issue, not because one provision has more force than another, but because the legislative mind is presumed to have stated its intent when it focused on that particular issue." Id. at 1090.

Bennion v. Sundance Development, 897 P.2d 1232 (Utah 1995). These citations clearly indicate that the courts will give deference to local government entities where that is appropriate.

There is another context, however, where local discretion is limited in Utah jurisprudence:

> "In interpreting the meaning of . . . ordinance[s], we are guided by the standard rules of statutory construction." Brendle v. City of Draper, 937 P.2d 1044, 1047 (Utah Ct. App. 1997). However, "because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602, 606 (Utah Ct. App. 1995). We first look to the plain language of the ordinance to guide our interpretation. See Brendle, 937 P.2d at 1047. Only if the ordinance is

> ambiguous need we look to legislative history to ascertain legislative intent. See id.

Brown v. Sandy City Board of Adj., 957 P.2d 207. Based on these guidelines, a third party has an uphill battle to challenge local decisions where the city or county has made a land use decision. The courts will "seek to uphold" local discretion. Where there is real ambiguity, issues in conflict will be resolved "in favor of the property owner." It would seem that the third parties thus have two strikes against them when challenging local decisions that favor landowners under Utah's land use jurisprudence.

This is not to say that neighbors and others challenging local decisions always lose. Some prominent cases, including the *Springville Citizens* case, indicate otherwise. But for our present purposes, I will discuss the challenges to the City's review of the applications filed with the following guidelines:

1. The City's approval must conform to the provisions of the ordinance and state statute.
2. If any part of the approval clearly does not comply with the ordinances and state statutes, the approval is therefore invalid.
3. If the provisions of the ordinance or statutes are not clear and the issue of compliance is one of interpretation, then the City will be given the benefit of the doubt under the precedents above so long as the interpretation used by the City is logical and reasonable.
4. Where ambiguities exist, the City also has a duty to resolve ambiguities in favor of the property owner.

2. Were the decisions by the Planning Commission and City Council in this matter supported by substantial evidence in the record?

Preliminary development plan approval – May 4, 2006

As was the case in the *Springville Citizens* case, there were extensive discussions held in the process of approval for the project, a multitude of documents produced, and repeated hearings and meetings were held. The issue of height of the buildings was discussed extensively, particularly by the time that a second preliminary development plan was presented to the Planning Commission in May of 2006. By that time, the conditional use permit had been appealed to the City Council, and the concerns of the neighbors and other third parties were well known by the Commission as it deliberated.

Where the February 16, 2006 approval was vested by May 4, and where the May 4 decision was to actually scale back from the February 16 plan in density and impact, it would be difficult to find that there was not substantial evidence to support the *reduction* in the February 16 version of the project's impact occasioned by the May 4 approval of a

less-intensive plan. To challenge this decision, those bringing the appeal must show that there was no substantial evidence to support a scaling back of the project, which puts them in an ironic position. They would have to argue that all the evidence presented in that review process was that the project should be more dramatically scaled back, but not less dramatically scaled back. I do not believe a court would opt to second-guess the local land use authority in that context.

Even absent the factor that the May 4 decision would be reviewed in light of the fact that the February 16 decision was final and unappealable, I believe that a court would not upset the local government's discretion in this matter. Again, because of the volume of material presented, the extended discussion over three years, the give-and-take that occurred as the project evolved, and the deliberate manner in which the review occurred would work to support its approval, as it did in the *Springville Citizens* case.

The most contentious aspects of the project are not really quantifiable in terms of expert witnesses and evidence. The height issue is a judgment call, for example, and there are no scientific statements in the record about what can be quantified as "too tall" and thus harmful to the general welfare. In light of the guidelines cited above for judicial deference, I do not believe a court would impose its judgment on local land use decision-makers where there are no clear rules in the ordinances. Again, the precedent is "because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." *Brown.*

3. Did the decisions comply with mandatory provisions of the City ordinances and state law?

There is mandatory language in a provision in the Conditional Use Permits section of the land use ordinances at SCDC 15-05-07(C) that reads:

> Determination. Uses other than permitted use shall not be allowed. However, the Planning Commission may allow a use to be located within any district in which the particular use is allowed as a conditional use by this Code if it determines the use is appropriate after due consideration and evaluation. In authorizing any conditional use, the Planning Commission shall impose such requirements and conditions necessary for the protection of adjacent properties and the public welfare. The conditional use permit shall not be approved unless the evidence presented is such as to establish:
>
> 1. That the proposed use of the particular location is necessary or desirable to provide a service or facility which will contribute to the general well-being of the community and the neighborhood; and

2. That such use will not, under the circumstances of that particular case, be detrimental to the health, safety, or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity; and
3. That the proposed use will comply with regulations and conditions specified in this Code for such use; and
4. that the proposed use will conform to the intent of the Sandy City Comprehensive Plan; and
5. That conditions imposed by the Planning Commission shall be based upon guidelines described in his Section or any special conditions or requirements as may be specified elsewhere in this Code.

The state code also provides some mandatory guidelines:

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

Utah Code Ann. Sec. 10-9a-507. Based on the provisions of the Sandy City ordinance, a conditional use permit can only be approved if there is evidence to establish the five factors outlined in the ordinance. This seems to place the burden on the applicant to provide substantial evidence to support the approval of the conditional use permit. Since this provision does not require the Planning Commission to enter findings on the record, however, identifying that evidence and finding it to be substantial and applicable, then a court would be able to review the record and determine if there is sufficient evidence to establish the requirements of the ordinance were met, even thought the Planning Commission did not do so specifically.

The Planning Commission did find:

1. Development of this property will further the goals of the Sandy City General Plan for residential and commercial development in the area.
2. Development of this property will eliminate and improve a presently underdeveloped parcel of land and provide new economic opportunities in the ares.

Minutes of the Sandy City Planning Commission, February 16, 2006, at page 3. Identical language is found in the May 4, 2006 approval of the alternative preliminary development plan by the Planning Commission and the June 9, 2006 City Council approval of the conditional use permit for the project. While the language of these findings does not parallel the ordinance precisely, these findings are helpful in coming to the conclusion that there was sufficient evidence presented to establish the five criteria. There are several large piles of paper associated with the review that would have to be plowed through to determine if all of the criteria were supported by some evidence presented, and the developer has offered his opinion, backed up from the record, that the criteria are established in the record.

That exhaustive inquiry may not be necessary in this case, however, since the provisions of the ordinance only prevail if not superseded by state statute. In this case the state statute does supersede the general tone of the ordinance and the burdens on applicants that the ordinance seems to impose. The state statute indicates that a conditional use "shall" be approved if reasonable conditions can be imposed to mitigate the anticipated detrimental effects of the use in accordance with applicable standards (in the ordinance.)

When read together, it would appear that the ordinance is necessary and helpful in identifying uses that are to be considered as conditional uses in the ordinance. It also provides guidelines to identify and mitigate the detrimental effects of the proposed use, if the reviewing land use authority chooses to use them. But the state statute was written to limit very general and wide-ranging forays into nebulous concepts, and requires a more defined and specific approach in reviewing conditional use permit applications.

In dealing with a conditional use application, the reviewing authority is to:

1) identify detrimental effects of the proposed use, and then
2) determine whether those effects can be mitigated with reasonable conditions.

If the detrimental effects can be mitigated, the land use authority must approve the conditional use. If they cannot, and substantial evidence in the record demonstrates that they cannot, then the permit can be denied.

One can review the record of this matter with some diligence, however, and find no mention in the oral comments made or the written protests filed of the detrimental effects of mixing residential and commercial uses at this site. The staff reports say little, except that a document entitled "Planning Commission Chairman's Talking Points" states: "A mixed use development including residential and office uses is a conditional use in the SD (Harada) zone. There's a synergistic relationship between land uses in this vicinity, thus creating a truly horizontal mixed use area . . . "

If, in the record, there is no evidence of what the detrimental effects of mixed use developments are, and no evidence that those detrimental effects cannot be mitigated, then the conditional use permit must be approved under state law. In this case, the conditional use permit was approved by the Planning Commission on February 16 and supported, after changes were made in the project, by the City Council on June 6.

To be successful, those challenging the approval of the conditional use are restricted to the record established by the Planning Commission and the City Council. If approval of a conditional use is to be overturned, *the record* must show what the detrimental effects were and how they could not be mitigated. Since the record is devoid of any argument about the detrimental effects of allowing mixed uses as opposed to requiring that the entire project be either residential or office uses, the challenge to the conditional use permit must fail. Those speaking or writing against the project in the record talk about a number of detrimental effects of the proposed project, such as its height, bulk, density, etc., but do not address how any of those detrimental effects would be different if the project were entirely residential or entirely office rather than mixed in uses.

Looking at the record in the light most favorable to challenging the conditional use permit approval, one can only find two implied detriments of mixing residential and office uses: the negatives associated with commercial uses that might occur before 6 a.m. or after 10 a.m. (condition 11 on the Feb 16 and May 4 approvals) and the clutter that might occur if there are not adequate sign controls (condition 16 on May 4 and condition 17 on Feb 16). There appear to be some general statements in the Feb 16 Planning Commission minutes on page 7 that the changing of the proposed plan to eliminate 80,000 square feet of retail space would eliminate parking, reduce traffic, and increase landscaping, so perhaps that was part of the mitigating process related to mixed uses, but that was not part of the final approval since that part of the proposed project was eliminated.

The litigation filed in this matter to challenge the conditional use permit contains many allegations about building heights, densities, setbacks, and other such impacts of the project, but does not explain how those are issues, which are clearly related to the preliminary project approval (not before the court), also relate to the conditional use permit to allow mixed uses (the only issue before the court). The complaint misstates the issue:

> Under the substantial evidence test, the City must show that its decision was based on a quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support its conclusion that the conditional use permit allowing building heights in excess of 148 percent greater than the maximum height of 35 feet should have been granted.

Complaint filed July 5, 2006 in the Salt Lake City Third District Court in *Friends and Neighbors of Union Park, L.L.C., v. Sandy City*, as Case No. 069091117, at paragraph 32. Such a statement might be appropriate and relevant in a challenge to the preliminary development plan approval granted by the Planning Commission, but that issue is not before the court in the case where the language occurs. The record of this matter indicates that there is no conditional use issue in the building height matter. The conditional use is only about mixing the residential and office uses, and neither the complaint nor the record ties the height issue to the mixed use issue.

Indeed, it is possible that the evidence in the record will show that the particular concerns of the plaintiffs in the legal action challenging the conditional use permit approval are mitigated by the mixed use nature of the project, and not aggravated by the allowing of mixed uses. Office and commercial uses, for example, are typically daytime uses and thus may intrude less on the privacy of the neighbors. Residential uses were clearly criticized in the record as intrusive on privacy. The hours of the office uses are limited in the conditions imposed by the planning commission and city council, for example. The court might find that the conditional use permit thus acts to soften the impact of the project as compared to one with 100% residential use, and the plaintiff's arguments in the record to paint the residential uses harshly could work against them in arguing that the conditional mixed uses would actually harm them.

4. Did the decisions exceed the discretion of the land use authority?

The SDH Zone allows the Planning Commission, without any restrictions, to modify the height requirements of buildings that face Union Park Boulevard. See SCDC 15-29-10(d)(1). Since land use decisions are entitled to great deference, and any ambiguities therein interpreted "liberally in favor of the use of property", I believe a court would uphold the decision by the Planning Commission to approve the proposed heights and other aspects of the May 4 preliminary development plan. I believe the court would also uphold similar provisions of the February 16, 2006 preliminary development plan approval for the same reasons, were that issue not already rendered moot by the failure to file a timely appeal.

While such an analysis is not essential to make the decision legal, the court would likely be influenced by considering that the development was proposed with structures that were higher and more massive in its original configuration, and was reduced in size, height, and bulk over the process of review. Since the Planning Commission and the City Council's deliberative process resulted in mitigation of the impact of the structures, although not eliminating that impact, I would conclude that a court would find substantial evidence to support the decision to allow the height that was approved.

Conclusion of the Advisory Opinion:

The conditional use permit approved for the Village at Park Avenue is valid, in that the only detrimental effects hinted at in the record (that is the tendency for mixed uses to have cluttered signage, extended hours, and retail-style activities) were all mitigated as the project evolved. There were no negative aspects of the mixed use that were identified in the record and not mitigated.

The preliminary development plan approval for the project that was granted on February 16, 2006 was not appealed in a timely manner and is therefore legal and valid.

The preliminary development plan approval of May 4, 2006 is also valid, because that approval acted to lessen the impacts from the February 16 approval and thus was even supported by the evidence presented by those challenging that decision. There is no evidence in the record supporting a more intensive development; both the applicant and those opposing the project argued to reduce its impact, so abundant evidence presented in the process of approval over three years supported a reduction in intensity. There was also sufficient evidence in the process of a three-year review of the project (as in the *Springville Citizen* case) to support approval of the alternative plan.

The Planning Commission's decision to once again approve the height of the project on May 4 was also within its discretion, as the ordinance places no limit on the Planning Commission's discretion as to the height issue. The February 16 decision was already vested and final. That additional factor also supports the Planning Commission's exercise of its discretion as to the building height.

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NOTE:

This is an advisory opinion as defined in Utah Code Annotated, 13-43-205. 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.