

**TOOELE COUNTY  
RESOLUTION 2020-07**

**DECISION ON APPEAL OF THE TOOELE COUNTY PLANNING  
COMMISSION APPROVAL OF PUD-CUP 2019-01 (PARCEL 05-043-0-  
0006), SUNSET ACRES**

**WHEREAS**, the Tooele County Planning Commission approved PUD-CUP 2019-01 on September 4, 2019;

**WHEREAS**, on or about September 21, 2019, a group of Tooele County residents appealed the decision of the Tooele County Planning Commission to the Tooele County Commission;

**WHEREAS**, on October 15, 2019 and November 19, 2019, the Tooele County Commission considered the application and appeal at its regularly scheduled public meetings;

**WHEREAS**, the applicant filed a request for an advisory opinion from the Office of the Property Rights Ombudsman on October 29, 2019;

**WHEREAS**, the County has delayed action, in part, waiting for the Ombudsman's advisory opinion;

**WHEREAS**, the Office of the Property Rights Ombudsman issued the attached "Advisory Opinion" dated April 30, 2020; and

**WHEREAS**, the Tooele County Commission has reviewed the record in full, including the written and audio records from the Tooele County Planning Commission.

**NOW, THEREFORE, BE IT RESOLVED BY THE TOOELE COUNTY  
COMMISSION AS FOLLOWS:**

1. The appeal of PUD-CUP 2019-01 is denied consistent with the findings and legal conclusions of the attached "Advisory Opinion" from the Office of the Property Rights

Ombudsman dated April 30, 2020, and Tooele County adopts the Advisory Opinion as its decision.

2. Planning & Zoning staff and the Tooele County Planning Commission are hereby directed to proceed with the process provided in Tooele County Land Use Ordinance Chapter 9 which was in effect when the PUD-CUP 2019-01 was filed by the applicant.

3. Planning & Zoning staff and the Tooele County Planning Commission are hereby directed to address the requirements of Tooele County Land Use Ordinance (TCLUO) 7-5 as follows:

a. Identify the “**reasonably anticipated detrimental effects of the proposed use** in accordance with applicable standards in which a conditional use permit is required by the use regulations of that zoning district or elsewhere in these ordinances”;

b. Identify the “reasonable conditions” that may “be imposed to mitigate the reasonably anticipated detrimental effects of the proposed use”; and

c. Specifically address the conditions stated in Subsection (2) of TCLUO 7-5.

4. If necessary or required, the Tooele County Planning Commission is hereby directed to conduct a public hearing in a fair and impartial manner to ensure that all parties are treated equitably and to ensure that all public comment, oral and written, is considered prior to a decision being made.

5. However, the Tooele County Commission does **not** direct the Tooele County Planning Commission to issue a particular decision, and this resolution should not be interpreted as the Tooele County Commission being for or against PUD-CUP 2019-01.

Tooele County  
Res. 2020-07

**EFFECTIVE DATE:** This resolution shall take effect immediately upon passage.

**DATED** this 2nd day of June 2020.

**ATTEST:**

**TOOELE COUNTY COMMISSION:**


  
MARILYN K. GILLETTE, Clerk

 9 June 2020  
TOM TRIPP, Chairman



Commissioner Milne voted aye  
Commissioner Thomas voted aye  
Commissioner Tripp voted aye

**APPROVED AS TO FORM:**

  
SCOTT A. BROADHEAD  
Tooele County Attorney



GARY R. HERBERT  
*Governor*

SPENCER J. COX  
*Lieutenant Governor*

# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

CHRIS PARKER  
*Interim Executive Director*

JORDAN S. CULLIMORE  
*Division Director, Office of the Property Rights Ombudsman*

### ADVISORY OPINION

Advisory Opinion Requested By: Joseph White, Ironwood Real Estate, LLC

Local Government Entity: Tooele County

Applicant for Land Use Approval: Joseph White

Type of Property: Residential

Date of this Advisory Opinion: April 30, 2020

Opinion Authored By: Richard B. Plehn, Attorney  
Office of the Property Rights Ombudsman

### ISSUE

Does a third-party land use appeal of the Tooele County Planning Commission's decision to approve a concept plan for a planned unit development have merit?

### SUMMARY OF ADVISORY OPINION

A county is bound by the mandatory provisions of its land use regulations, and a land use authority must review land use applications under the land use regulations in effect at the time the application is submitted to the county for review and approval. While Tooele County may be in the process of amending its land use ordinance regarding Planned Unit Developments (PUDs)—for perceived deficiencies or otherwise—the existing scheme must still be applied to submitted applications, and interpreted in favor of a proposed use.

The County's existing PUD scheme treats an application for a planned development as a conditional use under a three-step approval process, and intentionally authorizes the planning commission to be flexible with certain aspects of existing zoning requirements, as deemed appropriate, and upon certain findings. Under the first step of approval, an applicant submits a Concept Plan identifying any use or lot characteristics of the PUD that may differ from existing zoning. If the County's land use authority approves this concept plan, the applicant is then

entitled to submit a preliminary plan application that the land use authority must review according to the approved concept and consider for approval under applicable standards for conditional uses. In the final step of approval, the land use authority determines and certifies compliance with the previously approved preliminary plan.

Here, Tooele County's planning commission approved the applicant's concept plan under the first step of the PUD approval process. A third-party group appealed the County's approval of the plan. The third-party appeal fails to prove any error by the planning commission in approving the concept plan. The decision at issue in the Advisory Opinion approved the applicant's concept plan. Accordingly, the County must now review the approved concept plan for code compliance under the preliminary and final plan steps of the approval process.

### **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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 Joseph White on October 29, 2019. A copy of that request was sent via certified mail to Marilyn K. Gillette, Tooele County Clerk, 47 South Main, #318, Toole, Utah 84074 on October 31, 2019.

### **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 Joseph White, received October 29, 2019.
2. Additional information from applicant, received November 19, 2019 and December 2, 2019.
3. Letter from Scott A. Broadhead, Tooele County Attorney, received December 4, 2019.

### **BACKGROUND**

Joseph White owns a little over 100 acres in unincorporated Erda, Tooele County. Mr. White has proposed a development named Sunset Acres that involves one (1) acre residential lots forming the perimeter of the property, smaller residential lots clustered toward the center of the



development down to approximately 0.50 acres, some designated open space, and three large agricultural “preservation” parcels, each with a single farmhouse residence, that provide a 500-foot buffer between the perimeter road and the interior residential lots.

The property is located in the County’s RR-5 (Rural Residential, 5 Acre Minimum) Zone, which lists a Planned Unit Development (PUD) as a conditionally permitted use. Tooele County’s Land Use Ordinance provides a three-step approval process for approving PUD projects as conditional uses. The Ordinance grants the planning commission authority to modify or waive certain code requirements as applied to the project, upon certain findings.

Mr. White submitted an application for the development as a PUD under the first step of approval, or Concept Plan. The planning staff reviewed the concept plan application, and found it to be consistent with neighboring uses and the general plan. Planning staff also determined the proposal was compliant with the Tooele County Land Use Ordinance. Planning staff had not received any public comments and did not identify any detrimental impacts that would require imposition of mitigating conditions. Staff therefore recommended approval of the concept plan to the planning commission, subject to the lone condition that the applicant provide information regarding planned water and sewer utilities, as well as additional details on design and maintenance of the agricultural preservation parcels, at the preliminary and final plan steps of the approval process. After staff completed the report, the County received 27 emails from the public regarding various concerns with, and dislike of, the proposed development.

At the September 4, 2019 planning commission meeting, following public comment, the planning commission approved the concept plan application subject to the staff’s recommended condition that the applicant provide additional information at the preliminary and final plan steps for approvals. The planning commission also added a condition that a stipulation be attached to the deeds of property that grantees acknowledge and accept the smells, activity, etc., of farming and agricultural use. The planning commission included a final condition suggesting that, to improve transportation, the developer should look at adding two stub roads to the west side of the property.

Following the planning commission meeting, a group of third-party county residents filed an appeal (“Appeal”) to the Tooele County Commission challenging the planning commission’s approval of the concept plan application. Specifically, the third party group raised the following points on appeal: (1) that the planning commission ignored comments from the City Attorney that a rezone should be required as a condition for approval, and the suggestion that the matter be tabled for a later date; (2) that the existing chapter of the Tooele County Land Use Ordinance on PUD’s is knowingly deficient; (3) that the planning commission engaged in ‘spot-zoning’; (4) that a submitted traffic study was inadequate; (5) that the PUD application contained procedural violations, and (6) that the official minutes did not accurately reflect the concerns raised by citizen comments.

The Tooele County Commission heard the appeal on November 19, 2019 and took the matter under advisement, but has yet to issue a decision. Mr. White has requested an Advisory Opinion from this Office to determine whether there is any merit to the third-party appeal.

## ANALYSIS

The County Land Use Development and Management Act (LUDMA) provides that any person adversely affected by the land use authority's<sup>1</sup> decision administering or interpreting a land use ordinance may, within the time period provided by ordinance, appeal that decision to an appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance.<sup>2</sup>

In reviewing a land use decision on appeal, a court will presume the decision is valid and will only overturn the decision if it is arbitrary, capricious, or illegal.<sup>3</sup> An administrative decision, such as the one at issue in this opinion, is arbitrary and capricious if the decision is not supported by substantial evidence in the record. A decision is illegal if it is based on an incorrect interpretation of a land use regulation or contrary to law.

This opinion will address whether any of the arguments raised in the Appeal meritoriously allege an error in the decision of the Tooele County Planning Commission in the administration or interpretation of the Tooele County Land Use Ordinance, such that the decision to approve the concept plan was arbitrary and capricious, or illegal.

### **I. Tooele County's Regulatory Scheme for Planned Unit Developments**

The proposed land use application subject to the Appeal is Mr. White's Concept Plan application for a Planned Unit Development ("PUD"). Part of the issues raised in the Appeal centers around the allegation that Tooele County's current PUD regulations are deficient, as the County appears to be in the process of working out a new regulatory scheme for PUDs.

However, this regulatory overhaul has not yet occurred, and the application must be reviewed under the laws in effect at the time the application was submitted. LUDMA gives counties broad discretion in how to address land development through ordinances, resolutions, rules, and other land use controls. Once these controls are enacted, zoning authorities are bound by the terms and standards of those ordinances and are not at liberty to make land use decisions in derogation thereof.<sup>4</sup> Review of a land use application is an administrative decision in which the mandatory provisions and existing standards of relevant land use ordinances must be applied<sup>5</sup>—for better or for worse.

Under the current scheme, the Tooele County Land Use Ordinance treats a PUD as "a distinct category of conditional use,"<sup>6</sup> and a PUD is listed as a conditional use within the RR-5 Zone.<sup>7</sup> Tooele County defines a PUD to mean "an integrated design for development of residential, commercial or industrial uses, or limited combinations of such uses, in which the density and

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<sup>1</sup> Here, the land use authority is the County's planning commission.

<sup>2</sup> UTAH CODE ANN. § 17-27a-703(1).

<sup>3</sup> UTAH CODE ANN. § 17-27a-801.

<sup>4</sup> *Thurston v. Cache County*, 626 P.2d 440, 444-45 (Utah 1981).

<sup>5</sup> UTAH CODE ANN. § 17-27a-508(2).

<sup>6</sup> TOOELE LAND USE ORDINANCE § 9-1.

<sup>7</sup> TOOELE LAND USE ORDINANCE § 15-5-3.7.

location regulations of the district in which the development is situated may be varied or waived to allow flexibility and initiative in site and building design and location, in accordance with an approved plan and imposed requirements.”<sup>8</sup>

A PUD appears to be apart and separate from a “Planned Community” development, for which the Planned Community Zone (P-C) has been created as a regulatory tool to re-zone large areas of land within the County according to a specific plan.<sup>9</sup> Development under the Planned Community scheme must contain a minimum of 150 acres and may contain multiple owners that combine their properties for planning and development purposes.<sup>10</sup> In contrast, a PUD is held under single ownership and qualified by a different minimum area development size for each zoning district. For the RR-5 district, a PUD must comprise a minimum of 20 acres.<sup>11</sup>

PUDs are governed by Chapter 9 of the Tooele County Land Use Ordinance, which provides three approval steps: (1) a Concept Plan, (2) Preliminary Plan approval, and (3) Final Plan approval.<sup>12</sup>

The first application step of approval is the Concept Plan. In accordance with the overall regulatory scheme for PUDs, this step appears to be intended to identify any aspect of the proposal regarding “density and location regulations”<sup>13</sup> that “would [not] be possible through strict application of other county land use ordinances and regulations,”<sup>14</sup> and would require the planning commission to exercise its given authority to “change, alter, modify or waive [certain] provisions of [the land use] ordinance as they apply to the proposed planned development.”<sup>15</sup>

At the concept plan step, an application must only include scaled drawings and number totals for proposed dwelling units, lot sizes and land areas, densities and intensity of each use.<sup>16</sup> If approved or conditionally approved, the commission adopts a motion “establishing the land uses and density for the proposed [PUD] and authorize[s] the applicant to submit an application for preliminary plan consistent with the approved concept plan.”<sup>17</sup> In other words, if the concept is approved with any land uses and densities that differ from the zoning district in which the PUD is located, this approval is an express exercise of the planning commission’s authority under Chapter 9 to modify or waive those existing zoning restrictions in the interest of flexibility.<sup>18</sup>

The approval of the concept plan leads to the second step “preliminary approval” application. In this step, substantive review of the project occurs under the County’s conditional use standards— with the specific modifications or waivers of density and location restrictions approved in the step one concept plan. At the preliminary approval step, the planning commission receives a

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<sup>8</sup> TOOELE LAND USE ORDINANCE § 2-2(194).

<sup>9</sup> TOOELE LAND USE ORDINANCE § 31-2.

<sup>10</sup> TOOELE LAND USE ORDINANCE § 31-4.

<sup>11</sup> TOOELE LAND USE ORDINANCE § 9-3.

<sup>12</sup> TOOELE LAND USE ORDINANCE § 9-5.

<sup>13</sup> See TOOELE LAND USE ORDINANCE § 2-2(194).

<sup>14</sup> See TOOELE LAND USE ORDINANCE § 9-1(1).

<sup>15</sup> See TOOELE LAND USE ORDINANCE § 9-2(1).

<sup>16</sup> TOOELE LAND USE ORDINANCE § 9-6(2).

<sup>17</sup> TOOELE LAND USE ORDINANCE § 9-6(5).

<sup>18</sup> See TOOELE LAND USE ORDINANCE §§ 9-1 thru 9-2(1).



more in-depth proposal including detailed architectural plans, a traffic impact analysis, technical drawings, and a preliminary plat for subdivision. The planning commission reviews these materials under the existing conditional use standards according to the approved concept, and approves, conditionally approves, or denies the PUD as a proposed conditional use. Lastly, the “final approval” step of the approval process determines and certifies compliance with any conditions imposed at the preliminary approval.

The application submitted by Mr. White, approved by the Planning Commission, and subjected to an appeal by a third-party group was for a concept plan under the first step of the PUD approval process. Therefore, the only decision subject to review in the Appeal is the planning commission’s decision to approve the concept of the PUD involving certain modification and waiver of density and lot size requirements of the RR-5 zone. It is with this understanding of the nature of the decision made by the planning commission under the current regulatory scheme for PUDs that we now review whether the arguments raised on appeal have proved any error in the planning commission’s decision.

## **II. The Appeal Has Not Proved An Error In the Planning Commission’s Decision**

The Appeal challenging the planning commission’s approval of the concept plan for Mr. White’s proposed PUD makes several arguments. As detailed below, the Appeal has not proved any error such that the decision would be considered arbitrary and capricious or illegal.

### *1. Tooele County Attorney’s Comments at the Meeting.*

The Appeal first points out that the County Attorney suggested that the property first undergo a rezone as a condition, and that the planning commission table the matter.

A land use authority’s decision to approve or deny a conditional use permit application is an administrative land use decision. An administrative decision involves the application of existing land use ordinances. It would not be appropriate to condition the approval of a proposed and already allowed conditional use on a future rezone—or change—to existing land use ordinances. The County must simply determine whether the proposed application complies with existing requirements.

Additionally, the planning commission is under no obligation to continue the matter at the County Attorney’s suggestion so long as there is sufficient evidence in the record to render the appropriate decision. Therefore, the planning commission did not err by failing to adopt the County Attorney’s suggestions.

### *2. Alleged Deficiencies with Chapter 9 on Planned Unit Developments.*

The Appeal alleges that Tooele County’s existing chapter on PUDs is knowingly deficient and is in the process of being revised. The appeal argues that because of these deficiencies, it would be more appropriate that the application be denied and re-submitted under what is alleged to be the “more comprehensive” Chapter 31 Planned Community Zone (P-C).

However, as discussed above, a “Planned Community” development is distinct from a PUD under the Tooele County Land Use Ordinance, and does not apply to Mr. White’s property. For example, a rezone for a Planned Community requires a minimum of 150 acres, whereas the property in question comprises a little over 100 acres. The Appeal also fails to specify the purported deficiencies with Chapter 9 or how these deficiencies resulted in any error of the County’s approval of the conditional use permit. Ultimately, as Chapter 9—as it exists—is the appropriate chapter applicable to the proposed PUD, the Appeal has not identified any error of the planning commission in applying Chapter 9 over any other provisions of the ordinance or version thereof.

### 3. Allegations of ‘Spot-zoning’.

The Appeal alleges that Tooele County’s regulatory scheme has resulted in the planning staff and planning commission engaging in “spot zoning” on a consistent basis, citing Mr. White’s proposal in addition to examples of other developments. The Appeal also mentions instances where the County has denied certain proposals on the basis of spot-zoning.

Under Utah law, spot zoning occurs when a zoning authority either grants a special privilege or imposes a restriction on a particular small property that is not otherwise granted or imposed on surrounding properties in the larger area, “without regard to a unified plan.”<sup>19</sup> Under this legal standard, it is not impermissible spot zoning when a land use ordinance allows for certain modifications to zoning requirements *as part of a general or comprehensive plan.*<sup>20</sup>

A county’s legislative body has broad discretion in establishing zoning regulations. “The wisdom of the zoning plan, its necessity, and the nature and boundaries of the district to be zoned are matters which lie solely within the discretion of the [the legislative body].”<sup>21</sup> “Though a [legislative body] may have a myriad of competing choices before it, the selection of one method of solving the problem in preference to another is entirely within the discretion of the [legislative body]; and does not, in and of itself evidence an abuse of discretion.”<sup>22</sup>

The current regulatory scheme for PUDs under Tooele County’s Land Use Ordinance treats a PUD proposal as a conditional use to be reviewed by the planning commission. This normally is an administrative decision involving strict application of legislatively enacted regulations. Here, the legislatively enacted land use ordinance grants the Planning Commission authority to make modifications to existing zoning regulations if deemed appropriate, and upon certain findings.

The Utah Court of Appeals has analyzed the issue of spot zoning under PUD ordinances nearly identical to the one at issue here in *Donner Crest Condo. Homeowners' Ass'n v. Salt Lake City.*<sup>23</sup>

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<sup>19</sup> *Marshall v. Salt Lake City*, 105 Utah 111, 126-127, 141 P.2d 704, 711 (Utah 1943) (emphasis added).

<sup>20</sup> *See id.*

<sup>21</sup> *Tolman v. Logan City*, 2007 UT App 260, ¶ 14, 167 P.3d 489 (quoting *Crestview-Holladay Homeowners Ass'n, Inc. v. Engh Floral Co.*, 545 P.2d 1150, 1152 (Utah 1976)) (alterations to original omitted).

<sup>22</sup> *Id.* (quoting *Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 24, 70 P.3d 47) (internal quotation omitted).

<sup>23</sup> 2005 UT App 163 (unpublished). In *Donner Crest*, third parties challenged the Salt Lake City Planning Commission’s approval of a PUD, claiming the City used the regulatory process “to essentially grant a variance” that was illegal. Similar to Tooele County’s Land Use Ordinance, SLC’s ordinance likewise treated PUDs as “a distinct category conditional use,” likewise required a minimum size for each zoning district, and likewise

In concluding that under such a regulatory scheme the approval of the PUD was not illegal, the Court noted that “the issuance of a special use permit<sup>24</sup> does not present an issue of spot zoning because it involves not a change of zone but rather a permitted use when certain conditions specified in the ordinance are met.”<sup>25</sup>

The authority delegated by the Tooele County Land Use Ordinance to the planning commission to make modification or waivers to existing zoning requirements is only approved upon finding that the PUD: “will achieve the purposes for which a planned development may be approved...” and “will not violate the general purposes, goals and objectives of this chapter and of any plans adopted by the planning commission or the county commission.”<sup>26</sup>

In approving the concept plan for the PUD, the planning commission adopted the recommendations of the planning staff, which had concluded that the concept was cohesive with surrounding uses in the area,<sup>27</sup> the Tooele County General Plan,<sup>28</sup> and the Tooele County Land Use Ordinance. While the Appeal disagrees and argues the PUD is not cohesive with the surrounding uses in the area, the Appeal does not rebut the planning staff’s findings that the property was surrounded by like residential uses of roughly similar parcel size.<sup>29</sup>

Because the planning commission acted within authority expressly delegated to it as part of a regulatory scheme allowing modification of zoning requirements for PUDs upon certain findings, and was supported by evidence in the record which has not been rebutted, the resulting decision to approve the concept plan was not an instance of illegal spot-zoning.

#### 4. Alleged Inadequacy of Submitted Traffic Study

The Appeal alleges that the submitted traffic study does not support the planning commission’s finding of “no detrimental impact” of the proposed PUD. This does not amount to an error in the planning commission’s decision to approve the concept plan. First, a traffic study is not necessarily required as part of the concept plan step of approval, but is rather considered at the preliminary approval review step. Second, while a traffic study may have already been available at this step, the planning commission does not appear to have relied on the study in making its decision to approve.

This is supported by the fact that the planning commission’s minutes stated that the transportation plan “can be improved” and suggested the applicant look at adding two stub roads for consideration in later steps for approval. Because the traffic study is not necessary until the

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delegated authority to the Planning Commission to “change, alter, modify [,] or waive any provisions of [the Ordinance] or of the City’s subdivision regulations as they apply to the proposed planned development.” 2005 UT App 163, pg. 3-7.

<sup>24</sup> “Special use permit” is another name for a conditional use permit.

<sup>25</sup> *Donner Crest*, 2005 UT App 163, at pg. 10.

<sup>26</sup> TOOELE LAND USE ORDINANCE § 9-2(2).

<sup>27</sup> It was identified that the property was surrounded by several legally nonconforming (in existence prior to zoning) parcels in the RR-5 zone that were typically 1 acre in size, as well as some areas of parcels that had been recently rezoned RR-1.

<sup>28</sup> The Future Land Use Map of the Tooele County General Plan Update 2016 indicated the property is located within a large geographical area anticipated to be comprised of parcels as small as one acre.

<sup>29</sup> See Comments 27-28, *supra*.

preliminary approval step, and was not relied upon by the planning commission in approving the concept plan, any inadequacy of the traffic plan does not amount to any error in the commission's decision to approve the concept plan.

5. Alleged Procedural Violations of Chapter 9-4.

The Appeal alleges that the planning staff failed to comply with Chapter 9-4 of the Tooele County Land Use Ordinance, which provides that before submitting a PUD application, the applicant is to participate in a pre-application conference with the zoning administrator, county planner, county engineer, sheriff's department, fire district, and the health department to enable the applicant to present the concept of the proposed PUD and discuss the procedures and standards for approval.<sup>30</sup> The required conference appears to solely benefit the application process itself. It is "intended to facilitate the filing and consideration of a complete filing," and "no representation by [county officials] during such conference shall be binding upon the county with respect to the application subsequently submitted."<sup>31</sup>

The Appeal alleges that Mr. White and county officials did not do the preconference as required, and went straight to the PUD application.<sup>32</sup> While Chapter 9 of the Tooele County Land Use Ordinance allows the planning commission to waive certain zoning regulations as they apply to a proposed PUD, Chapter 9 expressly provides that "[n]o change, alteration, modification or waiver authorized by this chapter shall authorize . . . a modification with respect to any standard established by this chapter."<sup>33</sup>

Because Chapter 9 states that prior to submitting an application, "an applicant *shall* participate in a pre-application conference,"<sup>34</sup> the meeting is clearly mandatory. However, the Appeal has not identified what error, if any, is attributed to the planning commission's *decision* that directly resulted from the failure to have a pre-application meeting. For purposes of land use appeal, it is not enough to simply allege *an* error in interpreting or administering a land use ordinance. Rather, the erroneous interpretation or administration must manifest as an error in the resulting decision itself, such that the *decision* adversely affects the party filing the appeal.<sup>35</sup>

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<sup>30</sup> TOOELE LAND USE ORDINANCE § 9-4(1)-(2).

<sup>31</sup> TOOELE LAND USE ORDINANCE § 9-4(2).

<sup>32</sup> While material submitted by Mr. White for this opinion appears to suggest that perhaps the meeting did occur in conjunction with a pre-application conference for another project, the provided material does not clearly establish that, as it shows a request for a pre-application conference for another project specifically. The Appeal states that a Planning Commission member admitted in a meeting that the County felt that with all of Mr. White's other applications that this PUD application would be okay. At exactly which meeting this comment was made is not referenced, and the comment is not found in the available Planning Commission minutes regarding this project. However, the Planning Staff Report for this PUD at least makes several references to communications Mr. White had with the planning staff regarding this project, specifically. The meeting minutes also indicate that Mr. White had obtained approval for the project from the fire department, and suggests he had discussions with the Sheriff, both of whom are listed participants of the pre-application conference.

<sup>33</sup> TOOELE LAND USE ORDINANCE § 9-2(2).

<sup>34</sup> TOOELE LAND USE ORDINANCE § 9-4(1) (emphasis added).

<sup>35</sup> See *Busche v. Salt Lake County*, 2001 UT App 111, ¶ 17, 26 P.3d 862 (finding four basic elements to a claim for land use appeal: (1) a person adversely affected, (2) a decision administering or interpreting a zoning ordinance, (3) a decision applying the zoning ordinance, and (4) *an error in the decision* administering or interpreting the zoning ordinance); see also *Potter v. S. Salt Lake City*, 2018 UT 21, ¶ 29, 422 P.3d 803 ("we do not overturn a decision of a lower court or administrative body upon a mere showing of error; proof of prejudice is typically required").

Because the party seeking appeal bears the burden of proving that the land use authority erred, and the Appeal associates no error *in the decision* due to any failure to hold the pre-application conference, the Appeal has not proved a valid error by the procedural violation.

6. *Allegations that Official Minutes Were Inaccurate.*

The Appeal takes issue with the official meeting minutes from the planning commission meeting, in that the concerns raised by 17 citizens who spoke against the project were inaccurately reduced to a one paragraph summary. However, official meeting minutes only serve to document what occurred at the meeting. They have no bearing on what was actually decided. Because the Appeal only takes issue with the accuracy of the minutes, but does not allege that the planning commission erred in its decision in light of the comments actually made at the meeting, the alleged error of the meeting minutes does not present any appealable error.

### CONCLUSION

The nature of the decision of the Tooele County Planning Commission subject to appeal is limited to the approval of a concept plan for a planned unit development. The appeal is likewise limited to the nature of the decision made, and must prove that the planning commission erred. Because the third-party appeal failed to prove that the planning commission's decision approving the concept plan was made in error under the County's current regulatory scheme for planned unit developments, the appeal is without merit, and the County must allow the applicant to proceed to the next steps of the approval process.



Jordan S. Cullimore, 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

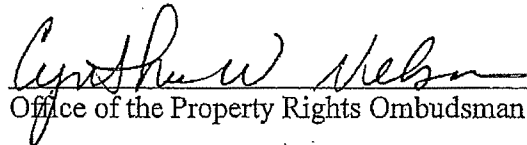
Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with UTAH CODE § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Marilyn K. Gillette, Tooele County Clerk  
Tooele County  
47 South Main, #318,  
Toole, Utah 84074

On May 1, 2020, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

  
Office of the Property Rights Ombudsman