BEFORE THE SUMMIT COUNTY COUNCIL

In the matter of **The Building Permit Application for** **Parcel No. CSP-8B-A** ("Michael J. Radford")	**RESPONSE of the** **COMMUNITY DEVELOPMENT** **DIRECTOR to the APPEAL of an** **ADMINISTRATIVE DECISION**

INTRODUCTION

Michael J. Radford ("Appellant") applied for a building permit to extend the deck of Appellant's twin home condominium unit in the development known as The Cove at Sun Peak. Appellant's extension would extend beyond the allowed square footage for each unit presented in the recorded subdivision plat. Appellant's extension would also extend into the "common area" of the subdivision as defined in Utah Code Annotated § 17-27a-606(1)(b). With few exceptions, the "common area" of a subdivision may only be changed to "private area" through a plat amendment process. Appellant argues that the CDD's Final Land Use Determination is in error because it is "based solely on review of the condominium plat[.]" He argues, the Utah Condominium Ownership Act (the "Condominium Act") should apply instead because the developer filed a Declaration of Protective Covenants, Agreements, Conditions and Restrictions for the Cove at Sun Peak ("CC&Rs") in conjunction with the recording of the condominium plat. The Applicant now appeals.

APPLICABLE LAW

Standard of Review

In this appeal, the Summit County Council is acting in a quasi-judicial manner[1] with the guidance of the Summit County Administrative Appeals Procedure.[2]

It is the Appellant's obligation to allege and prove that the land use authority (in this case the CDD) erred in his land use decision.[3]

The Council's responsibility is to serve as the final decision maker regarding the interpretation and/or application of land use regulations.[4] In making that determination, the scope of review for

[1] Utah Code Ann. §17-27a-701 and §17-27a-707(5).
[2] Adopted March 2018.
[3] Utah Code Ann. §17-27a-703 and §17-27a-705.
[4] Utah Code Ann §17-27a-701

the Council is bi-furcated between factual matters (findings of fact) and the interpretation and application of the regulations (conclusions of law).[5]

For factual matters, the review is a de novo review without deference to the land use authority's determination of the facts.

The scope of review for the legal conclusions of the decision itself, however, is one of correctness. To determine if the decision was correct, the Council must make a two-pronged determination. The first is whether the land use authority erred in **interpreting** the plain meaning of the regulatory language, and the second is whether the land use authority erred in **applying** the plain meaning of the regulatory language.[6] The Utah Code mandates that the Council interpret and apply the regulatory language to favor the land use application unless the regulation plainly restricts the application.[7]

Thus, the Council is instructed by the Utah Code to answer two questions: (1) given the facts, was the regulation interpreted correctly, and if so (2) given the facts, was the regulation applied correctly.

Statutory Construction

Under Utah law, statutes (including local land use regulations) should be interpreted to give effect to the intent of the legislative body making the regulation. To do so, you look first to the plain language of the regulation(s) and only if there is ambiguity or conflict in the plain language should legislative histories and policy considerations be considered in order to give effect to the intent of the legislative body.

Under commonly accepted norms of statutory interpretation, courts attempt to give effect to the legislative intent of statutes as evidenced by the statute's plain language.[8] This is because courts have determined that "[t]he best evidence of the [legislative] intent is the statute's plain language."[9] In doing so, courts "presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning."[10] Courts "presume that the expression of one [term] should be interpreted as the exclusion of another."[11] Further, courts "interpret statutes to give meaning to all parts, and avoid rendering portions of the statute superfluous."[12] "To do so, [courts] read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters."[13]

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[5] Utah Code Ann §17-27a-707.
[6] Id.
[7] Id.
[8] Summit Water Distribution Company v. Summit County, 2005 UT 73, ¶ 17, 123 P.3d 437; Jensen v. Intermountain Health Care, Inc., 679 P.2d 903, 906 (Utah 1984).
[9] Marion Energy, Inc. v. KFJ Ranch Partnership, 2011, UT 50, ¶ 14, 267 P.3d 863.
[10] C.T. ex. Rel. Taylor v. Johnson, 977 P.2d 479, 481 (Utah 1999).
[11] Marion Energy, Inc., 2011 UT 50, ¶ 14.
[12] State v. Watkins, 2013 UT 28, ¶ 23, 309 P.3d 209.
[13] State v. Barrett, 2005 UT 88, pp. 29, 127 P.3d 682 (Utah 2005).

In Nelson v. Salt Lake City, 905 P.2d 872, 875 (Utah 1995) (also quoted in Olsen v. Eagle Mountain City 2011 UT 10, ¶22) the Utah Supreme Court stated: "Only when we find ambiguity in the statute's plain language need we seek guidance from the legislative history and relevant policy considerations."[14]

ISSUES

1. Whether there was substantial evidence to show that the application met the provisions of the Snyderville Basin Development Code and Utah Code as required for approval.

2. Whether the CDD erred by denying the building permit based on his finding that approval of the application requires Appellant to record a plat amendment, supported by a 2/3 vote of all property owners in the subdivision.

BACKGROUND AND PROCEDURAL HISTORY

On May 20, 2020, the Appellant, Mr. Radford, applied for a building permit to construct a deck onto his condominium in the Cove at Sun Peak subdivision. On May 1, 2020, Molly Orgill, Assistant Planner for Summit County, advised Appellant that the application could not be approved until the proposed deck met the 12' setback requirement and until the application was stamped by the Homeowners' Association. However, the letter from Ms. Orgill recommended that Appellant "wait to upload revised plans" until Appellant had "received comments from all departments. (Building, Engineering, and Planning)[.]"[15]

On May 29, 2020, Ms. Orgill again wrote Appellant, informing him the Summit County Planning Division could not approve the applied for permit because:

> In speaking with the Summit County Attorney's Office and Peter Barnes, Planning and Zoning Administrator, as page 3 of the Cove at Sun Peak recorded subdivision plat includes a diagram of the footprints for the condo units within the development as well as a chart of total allowed square footage for each unit, the proposed deck would be located outside of those parameters. As well as the area that is being proposed to place the deck extension is located within the common area. The common area cannot be converted to private space without a 2/3 majority vote action of all property owners though the HOA. And if the HOA does obtain a majority vote to convert the common area to private area, it must be noted on the plat. This would require a Plat Amendment.
>
> Therefore, the deck extension that you have applied for cannot be approved until a plat amendment has been approved and completed.[16]

[14] (Quoting World Peace, 879 P.2d at 259); see also Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108, 1112 (Utah 1991), ("We first look to the statute's plain language. Only if we find some ambiguity need we look further.").
[15] R: 000071.
[16] R: 000073.

On July 23, 2020, the CDD, Mr. Putt, issued a response to Appellant's inquiry regarding the proposed deck extension.[17] The CDD indicated that Appellant's proposed building permit application indicated that portions of the deck would be constructed in Common Area, and that it was his determination that "constructing the deck in the proposed location will require changing said portion of Common Area to Private Area through a plat amendment process."[18] The CDD, citing Utah Code § 17-27a-606, found:

> [a] step precedent to filing the plat amendment application to convert the Common Area [to] Private Area is a 2/3 majority vote action of all property owners through the Homeowner's Association. I have confirmed the need for the plat amendment and the requirement for the 2/3 property owner consent with the County Attorney's Office.

The CDD further stated that he was aware "there are CC&R provisions for the Cove at Sun Peak which address the use of the Common Area; however, Summit County is not a party to, or cannot administer, these private agreements."[19]

Appellant appealed, arguing that the CDD's Final Land Use Determination is in error because it is "based solely on review of the condominium plat" when it should recognize the CC&Rs definition of "limited common areas."[20]

ARGUMENT

1. THE CDD CORRECTLY FOUND THAT APPELLANT'S PROPOSED CHANGES SEEK TO CONSTRUCT IMPROVEMENTS FOR APPELLANT'S SOLE USE THAT ARE OF THE "COMMON AREA."

The CDD found that Appellant's proposed changes "will be constructed in Common Area, specifically Common Area 3 of the Cove at Sun Peak Subdivision Plat." The County Land Use, Development, and Management Act ("CLUDMA") (Utah Code Title 17, Chapter 27a) defines "common area" as "property that the association: (a) owns; (b) maintains; (c) repairs; or (d) administers."[21]

Appellant argues that "[i]f the area where Appellant's proposed deck extension is to be located is, in fact, 'common area' as defined by section 57-8a-102, subdivision (5), then there would be no appeal."[22] However, Appellant argues that the Condominium Act definition of "limited common areas and facilities" should apply to the area of the proposed extension.[23] Under that definition, "limited common areas and facilities are "those common areas and facilities designated in the

[17] R: 000068–69.
[18] *Id.*
[19] *Id.*
[20] R: 000053–54.
[21] Utah Code Ann § 17-27a-606(1)(b); Utah Code Ann § 57-8a-102(5).
[22] R: 000061.
[23] *See* Utah Code Ann § 57-8-3(24).

declaration as reserved for use of a certain unit or units to the exclusion of the other units."[24] Declaration is defined as "the instrument by which the property is submitted to the provisions of this act, as it from time to time may be lawfully amended."[25] When read apart from the rest of statute, this would seem to support Appellant's proposition. However, like CLUDMA, the Condominium Act requires a condominium plat to be recorded.[26] Further, it specifies that

> [w]hen converting all or any portion of any convertible space into one or more units or limited common areas and facilities, the declarant shall record, with regard to the structure or portion of it constituting that convertible space, a supplemental condominium plat showing the location and dimensions of the vertical and horizontal boundaries of each unit formed out of this space.[27]

Appellant has provided no evidence that the proposed area into which he proposes to extend his deck is defined as "limited common areas and facilities" in the recorded plat, as required under CLUDMA and the Condominium Act. To the contrary, the recorded plat indicates that the disputed area is "common area." Thus, the CDD correctly found that Appellant proposes to make changes to the "common area."[28]

2. THE CDD CORRECTLY FOUND THAT APPELLANT'S PROPOSED CHANGES TO "COMMON AREA" REQUIRE A PLAT AMENDMENT.

CLUDMA provides, and Appellant has not disputed, that changes to "common area" require a plat amendment:

> Utah Code § 17-27a-606(2) provides:
>
> > A person may not separately own, convey, or modify a parcel designated as a common area . . . on a plat recorded in compliance with this part, independent of other lots, units, or parcels created by the plat unless:
> > (a) an association holds in trust the parcel designated as a common area for the owners of the other lots, units, or parcels created by the plat; or
> > (b) the conveyance or modification is approved under Subsection (5).
>
> Subsection (5) of the same provides:
>
> > Notwithstanding Subsection (2), a person may modify the size or location of or separately convey a common area or common area and facility if the following approve the conveyance or modification:
> > (a) the local government;

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[24] *Id.*
[25] Utah Code Ann § 57-8-3(16).
[26] Utah Code Ann § 57-8-13.
[27] Utah Code Ann § 57-8-13.
[28] Based upon this finding, Appellant has conceded the rest of the argument: "[i]f the area where Appellant's proposed deck extension is to be located is, in fact, 'common area' as defined by section 57-8a-102, subdivision (5), then there would be no appeal." *See* R: 000061.

(b)
(i) for a common area that an association owns, 67% of the voting interests in the association; or
(ii) for a common area that an association does not own, or for a common area and facility, 67% of the owners of lots, units, and parcels designated on a plat that is subject to a declaration and on which the common area or common area and facility is included; and
(c) during the period of administrative control, the declarant.

Each owner in the subdivision shares an undivided interest in the common area.[29] In this case, as a common area that an association does not own, the CDD correctly found that 67% of the owners of lots, units, and parcels designated on the plat must approve the conveyance or modification. Such approval must be manifest as signatures on a duly recorded plat amendment.

3. THE CDD CORRECTLY FOUND THAT SUMMIT COUNTY IS NOT A PARTY TO AND CANNOT ADMINISTER PRIVATE CC&R AGREEMENTS.

The CDD correctly found that Summit County is not a party to the private CC&R agreement. This is not disputed by Appellant. The CDD correctly found that Summit County cannot administer private CC&R agreements. Appellant argues that the definition of "limited common areas and facilities" grants Summit County authority to enforce private CC&Rs if they are filed as "declarations." Appellant's argument is moot because, as shown above, Appellant does not propose to build in "limited common areas and facilities" under the Condominium Act. Even if Appellant's argument was applicable, Summit County would not enforce a private CC&R agreement – especially where that agreement conflicts with state statute and duly recorded plat amendments.

CONCLUSION

The facts in this case are essentially undisputed. It is the CDD's conclusions of law that Appellant disputes. The standard of review when reviewing those conclusions is one of correctness. In other words, this body must determine whether the CDD correctly applied the law (definition of "common area") to the facts of this case, or whether his denial was arbitrary, capricious or illegal. The CDD applied the simplest and plainest interpretation of the plain language (i.e. that when "common area" is so designated on a duly recorded plat in conformance with CLUDMA and the Condominium Act, it is not "limited common area and facilities," even where a private agreement says otherwise). The substantial evidence in the record supports the CDD's decision in both interpreting and applying state statute and county code. Appellant failed to establish that the area designated on a duly recorded plat note as "common area" can be designated as "limited common area and facilities" where the only support for such proposition is in a private agreement, whether or not that agreement is recorded at the same time as the plat note.

[29] R: 000084.

Respectfully submitted this 17th day of August, 2020.

Summit County Attorney

/s/ Blaine S. Thomas
Blaine S. Thomas, Deputy

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2020, a true and correct copy of the foregoing was delivered via electronic mail (email) to the following.

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