

December 23, 2015

Dear Commissioners,

As you may know, the GEM committee consists of Valley residents who believe we should **grow with excellence** (Growth Excellence Mandate) and further believe in working through and improving the county planning process to that end.

Our last GEM meeting occurred the night after the December 2 OVPC meeting in which CUP2014-29 was on the agenda. We had a packed house and we spent our entire discussion on the action at the OVPC meeting the night before.

The consensus was that OVPC did the right thing to table CUP2014-29 and we commend you. We especially felt tabling was appropriate because so little notice was given to those who would be affected by the CUP; there was little time to prepare as neighborhood residents learned about the OVPC agenda over the Thanksgiving weekend. We thank you for providing time to study the CUP petition and we ask that *all* Conditional Use applications and meetings be noticed at least a month before the public OVPC meeting, including access to all pertinent documents through Mirada.

Toward the end of our GEM meeting, we decided to accept the challenge OVPC put out there to find a legal framework through which we could mitigate the harmful effects of a free-for-all for every conditional use in our Land Use Code. We wrote as useful a paper as we could about how OVPC could rule, in a legally defensible way, to deny a CUP when the proposal is inconsistent with our overall Land Use Code and General Plan. Its purpose is to serve as a reference document for discussions about CUP applications and we have distributed the paper to the people who live around Nordic Valley resort, asking them to voice their concerns within the legal framework of our Land Use Code.

We learned that some of the closest neighbors were too intimidated in the December meeting to speak and ask you to invite their voice into the discussion in January.

FYI, we asked the county and legal staff to tell us whether or not our arguments are flawed, but they say they never provide legal advice to ordinary citizens.

We want to thank the many GEM community who vetted the paper and provided ideas and feedback on short notice. We are all citizen volunteers in the planning effort, and we want to remain a participating part of your team as you work to plan the growth in Ogden Valley.

Cordially,

Kimbal Wheatley, GEM chair

[and some other supporters who wanted to sign on in support; we suspect some who did not make our get-this-out-before-Christmas deadline will express their support via email]

Alex Sawicki, Brenda Schussman, Carol Campbell, Chris Thomas, David Jenkins, Denise Haldeman, Diane Evans, Doug Haldeman, Fred Tissue, Helene Liebman, Howard Haldeman, James Evans, Julie Tissue, Lee Schussman, Lil Sedgewick, Mike Yauck, Natasha Zangerie, Pat Thomas, Ron Tymcio, Stephen Clark, Susan Yauck, Ron Gault, Kim Wheatley, Debbra Wheatley



# A legal framework for considering conditional uses in Ogden Valley

December 22, 2014

Utah Land Use Code (LUC) empowers OVPC to make reasonable decisions about Conditional Use Permit (CUP) applications based on whether or not reasonably anticipated detrimental effects can be substantially mitigated. Utah Land Use Code allows county land use planning authority (e.g., OVPC and/or WCC) to deny CUP applications when detrimental effects (as described in county LUC) cannot be substantially mitigated by applying additional conditions.

Title 17, Chapter 27 of Utah Code covers county land use and development. The General Land Use Authority section UC 17-27a-102(1) describes the purpose of this authority, granting counties the authority to use land use planning to promote a wide range of public purposes:

*(a) "The purposes of this chapter are to provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of each county and its present and future inhabitants and businesses, to protect the tax base, to secure economy in governmental expenditures, to foster the state's agricultural and other industries, to protect both urban and nonurban development, to protect and ensure access to sunlight for solar energy devices, to provide fundamental fairness in land use regulation, and to protect property values."*

Section (b) then grants counties the authority to employ a fairly full quiver of land use tools and public purposes to regulate county land use planning and code:

*"(b) To accomplish the purposes of this chapter, counties may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the unincorporated area of the county, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing uses, density, open spaces, structures, buildings, energy-efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities, fundamental fairness in land use regulation, considerations of surrounding land uses and the balance of the foregoing purposes with a landowner's private property interests, height and location of vegetation, trees, and landscaping, unless expressly prohibited by law."*

Utah Code 17-27a-506 covers conditional uses and subsection (1) enables counties to allow conditional uses as well as to enable compliance with standards established in LUC ordinances

*"(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."*

Then subsection (2) defines the conditions under which a CUP should be approved or denied (we think this is the section where "may" was changed to "shall" in the circa 2010 legislature):

*"(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."*

This appears to mean certain detrimental effects can be mitigated and, if so, the CUP must be approved. Then subsection (b) allows denial of CUP if detrimental effects can't be substantially mitigated:

*“(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.”*

The “applicable standards” are defined in “Standards” title 108 of Weber County LUC, which includes chapters for Design Review, Architecture, landscape and screening design, Conditional Uses, Lighting, Pathways, (and others). In the Conditions section (LUC Sec. 108-1-5) extends approval criteria beyond the specific zone and CUP chapter to broaden the definition of LUC standards:

*“Design approval may include such other conditions consistent with the considerations of this, and/or any other chapter of the Weber County Land Use Code, as the commission or planning director deem reasonable and necessary under the circumstances to carry out the intent of the Land Use Code.”*

Thus, OVPC can apply any part of Weber County LUC as criteria for approving conditional uses to carry out the intent of the Land Use Code, which is usually described in the “purpose and intent” sections of the code.

Also in the Standards title, LUC Sec. 108-4-4 gives OVPC clear instruction about the criteria for issuing a CUP, including an obligation to deny the CUP if there is not sufficient evidence to prove that detrimental effects can be mitigated enough to meet applicable standards:

*“Conditional uses shall be approved on a case-by-case basis. The planning commission shall not authorize a conditional use permit unless evidence is presented to establish: (1) Reasonably anticipated detrimental effects of a proposed conditional use can be substantially mitigated by the proposal or by the imposition of reasonable conditions to achieve compliance with applicable standards. Examples of potential negative impacts are odor, vibration, light, dust, smoke, or noise. (2) That the proposed use will comply with the regulations and conditions specified in the Land Use Code and other applicable agency standards for such use.”*

The examples used to illustrate detrimental effects in section (1) in no way limits the range of possible detrimental effects to odor, vibration, light, dust, smoke, or noise. These examples simply list the specific restrictions further imposed for excavations (LUC Sec. 18-4-1).

Throughout the LUC, and with the General Plan for guidance, various values are expressed that set the overall community standards against which the critical phrases “detrimental effects” and “substantially mitigated” can be evaluated by OVPC in the CUP evaluation process. We might call these our community values, or our desired future for the development of the Valley, or our vision for it... we wrote these ideas into our general plan as best we could and without them as a guiding reference and standard, words like “*detrimental*” and “*substantially*” are meaningless. The primary role of OVPC in the CUP process is to make a judgment around these two words.

Our Planning Department staff and public input into the process does a good job of identifying the possible detrimental effects. The role of OVPC is to determine if a detrimental effect is

serious enough to warrant mitigation. The second role of OVPC is to determine whether such “reasonably anticipated detrimental effects” can be mitigated by various means, either proposed by the CUP applicant or imposed by OVPC. The key judgmental action of OVPC is to find whether or not the mitigation designs and conditions are sufficient to substantially reduce the detrimental effect. Repeating LUC 108-4-4 of the Standards chapter pretty well sums it up:

*“The planning commission shall not authorize a conditional use permit unless evidence is presented to establish: (1) Reasonably anticipated detrimental effects of a proposed conditional use can be substantially mitigated by the proposal or by the imposition of reasonable conditions to achieve compliance with applicable standards.”*

It is important to note that the burden is on the CUP applicant or county staff or public input to prove (“presents evidence to establish”) that mitigation efforts will substantially reduce the harm (“detrimental effects”) of the CUP project going forward. Otherwise, OVPC “shall not approve”.

Accordingly, OVPC can and should consider effects of a CUP, but especially possible detrimental effects that run counter to the outcomes our LUC was created to achieve. Our Land Use Code clearly guides OVPC to evaluate specific possible detrimental effects in many cases; not so clearly in others. Here are some examples of where it is clear, but there are many more.

**In Chapter 2, Standards, we define desirable standards for architecture, landscaping, screening.**

- a) *The purpose and intent of design review by the planning commission is to secure the general purposes of this chapter and the master plan and to ensure that the general design, layout and appearance of buildings and structures and the development of property shall in no case be such as would impair the orderly and harmonious development of the neighborhood or impair investment in and occupation of the neighborhood. [LUC Sec. 108-1-1(a)]*
- b) *The purpose and intent of the architectural, landscape and screening design standards is to preserve the rural, mountainous landscape that exists in the Ogden Valley, and also accommodate new growth in commercial and industrial uses. The design standards include the following specific purposes: (1) Provide for commercial, industrial development that is aesthetically pleasing and compatible with the rural nature and natural setting of the Ogden Valley. (2) Provide a variety of colors, textures and forms in the environment that blend together in a harmonious manner. (3) Protect and preserve the appearance, character and public health, safety and welfare of the Ogden Valley. (4) Minimize the harmful impacts of noise, dust and other debris, motor vehicle headlight glare and other objectionable activities or impacts conducted or created by an adjoining or nearby uses. [LUC Sec. 108-2-1]*
- c) *Considerations relating to buildings and site layout. a. Consideration of the general silhouette and mass of buildings including location of the site, elevations, and relation to natural plant coverage, all in relationship to adjoining buildings and the neighborhood concept. b. Consideration of exterior design and building materials in relation to adjoining structures in height, bulk, and area openings, breaks in facade facing on a street or streets, line and pitch of roofs, and the arrangements or structures on the parcel. [Sec. 108-1-4 (a) & (b)]*
- d) *In order to preserve the rural character and public values of the Ogden Valley, this chapter is intended to regulate the permitted use of outdoor artificial illuminating devices*

*emitting undesirable rays into the night sky, glare to oncoming traffic, intrusion of light onto adjacent properties, and light pollution in general, which may have a detrimental effect on the welfare and safety of the populace, as well as the ambiance and rural character of the valley. [Sec. 108-16-1]*

- e) Considerations relating to *traffic safety and traffic congestion*. a. The effect of the development on *traffic conditions on abutting streets*. [Sec. 108-1-4(1)(a)]
- f) *Pathways shall be required in all subdivisions*, although some pathways may be of the shared roadway type described in subsection (1) a.4. of this section. The planning commission shall consider the master pathways map and determine whether a pathway corridor should be set aside and what the exact route and width of the corridor should be. Land set aside in this manner shall count toward the provision of open space for clustering and other requirements. [Sec. 108-17-4.(2)]

**In Chapter 1, General Provisions, we define what a conditional use is**

- g) *Use, conditional. The term "conditional use" means a use, because of characteristics peculiar to it, or because of size, technological processes, or type of equipment, or because of the exact location with reference to surroundings, streets and existing improvements or demands upon public facilities, requires a special degree of control that mitigates or eliminates any detrimental impacts the use might have on the county, surrounding neighbors, or adjacent land uses and makes such uses consistent and compatible with other existing or permissible uses in the same districts, and assures that such uses shall not be adverse to the public interest. [LUC Sec. 101-1-7]*

**In Chapter 1 we define the term “compatible”, which is used three times in the applicable standards.**

h) *“The term "compatible" means capable of orderly efficient integration and operation with adjacent developments. A development is compatible with an existing on or off-site development or property if its architectural features, building height and materials, approved uses, intensity of such use and other features are complementary and do not have a significant adverse economic and aesthetic impact on the existing development or property.”*

**The CUP process and application form further define our standards and communicate quite clearly the types of applications that will be denied:**

- i) Conditional uses not necessary or desirable or do not *contribute to the general well being of the community*. [CUP application form]
- j) Conditional uses *detrimental to the general welfare of persons or injurious to property or improvements in the community*. [CUP application form]
- k) Conditional uses that are not *compatible with and complementary to the existing surrounding uses*, buildings and structures when considering building design and location. [CUP application form]
- l) Conditional uses that do not conform to *the goals, policies and governing principles and land use of the General Plan for Weber County*. [CUP application form]
- m) Conditional uses that will lead to the *deterioration of the environment or ecology* of the general area. [CUP application form]
- n) Conditional uses that will *produce conditions or emit pollutants of such a type or of such a quantity so as to detrimentally effect, to any appreciable degree, private properties*

*including the operation of existing uses thereon, in the immediate vicinity of the community or area as a whole. [CUP application form]*

In our opinion It is clear that OVPC has the authority and obligation, both under state and county law, to anticipate harmful effects a CUP would have. The OVPC must then consider the intents and purposes of the Land Use Code and the General Plan in making judgments as to the extent of those harmful effects. If the OVPC finds sufficient, significant harmful effects, it must then asses and judge the degree to which the applicant will be able to mitigate them, and it must deny the application unless it is proven that the harmful effects are reduced to an acceptable level (as judged by OVPC).

Finally, there are meta “reasonably anticipated detrimental effects” that are not included in our LUC, but are certainly important in reality. All occur fairly regularly in CUP purgatory and our entire county planning process should seek to substantially mitigate them.

1. The detrimental effect of creating unwanted precedent
2. The detrimental effect of losing the public trust in the planning process and authority
3. The detrimental effect of bankruptcy when applicants fail in business
4. The detrimental effect of piecemeal approvals in the absence of a neighborhood plan
5. The detrimental effect of loopholes that undermine the intent of our LUC
6. The detrimental effect of pitting neighbors against neighbors

CUP2014-29 provided the impetus for this paper. Addendum 1 lists the specific issues we believe OVPC should consider in deliberations about CUP2014-29; all are based on specific sections of our Land Use Code. These concerns represent reasonably anticipated detrimental effects of the proposed use and many will be difficult or impossible to substantially mitigate to achieve compliance with the intent of the ordinances.

### **Addendum 1**

1. The mass, bulk, and height of the structure are not consistent with design norms for Ogden Valley. A structure of this size diminishes the rural, mountainous landscape and the appearance and character of Ogden Valley. The structure is a 71 foot high, 190,000 square foot building on 3.2 acres of land. The structure is extraordinary in height, bulk and mass by any reasonableness standard, but it helps to visualize its supersize with examples. The structure is the size of sixty-five 3,000 square foot residences stacked in a little over three acres. It has the square footage of a Walmart Super Center or four Home Depots. There is no structure within ten road miles that is even one-third the square footage size, and there is no building this tall along any county or state access route all the way to I-15. The detrimental impact of a precedent-setting building of this size, mass and bulk cannot be mitigated.
2. Existing residences directly south and adjacent to the structure will suffer significant adverse economic and aesthetic impact. Their views will be replaced by a five story building, averaging 54 feet high and running for 250 feet. Their decks are level with apartment block balconies and the building climbs to 71 feet in some places. Already their efforts to sell their homes are clouded by the prospect of a supersize condominium project within a few hundred feet of their bedrooms. The detrimental impact on the adjacent property owners cannot be substantially mitigated.
3. A structure of this size requires extraordinary measures to mitigate or eliminate any detrimental impacts the use might have on adjacent land uses.
  - a) The mass, bulk, and height of the structure impairs the orderly and harmonious development of a neighborhood in existence long before the CVR1 zone was created. Because of its size and location, It will have a detrimental impact on close by neighbors.
  - b) The mass of the proposed structure relates poorly to adjoining buildings and the neighborhood concept.
  - c) The structure is considerably oversized *in proportion to the recreational amenities* it is intended to service and clearly intended as its own attraction rather than as a service facility to the recreation asset. The Weber County Attorney stated in the December 2 OVPC meeting that such lack of proportionality is not allowed.
  - d) The proposed facility and uses to satisfy the 10% commercial requirement are not consistent with the intent of CVR1 zone.
  - e) Because of its bulk and mass, the 71 ft. high structure will create a “lantern effect,” spewing light pollution. *[CUP application requirements]*. Light pollution from a building as tall as the planned Pine Canyon Lodge will affect all who have it in their view shed. Light pollution will have the detrimental effect of destroying the economic value potential for the Valley through accreditation of North Fork Park.
  - f) The 54 lockout rooms can effectively double the impact of traffic generation during peak seasons.<sup>1</sup>

- g) Using a conditional use “loophole” in CVR1 to justify a 71-foot tall structure undermines the intent of County land use code. The use of CVR1 to enable high-density housing without going through any form of area or resort planning undermines the intent of County land use code.
- h) The condominium units are being sold as “residences,” a use not allowed in CVR1 zone.
- i) The condominium units are being sold as though nightly rentals are the norm, but nightly rentals are specifically excluded in CVR1. <sup>ii</sup>
- j) Granting this application is contradictory to actions taken in the past by the OVPC and sets precedents for other high-rise development in any of the other commercial zones in the Ogden Valley. Previous planning commissions have considered the overall “visual impacts” and the “heights” of planned structures very seriously. In the past, applicants have been directed to specifically show why exemptions from the visual impact and height requirements should be made if their buildings exceed the parameters in the zoning ordinances.

For example, before the commission granted a permit for the Wolf Creek Sewer building, which is 39 feet high, only 4 feet higher than the limit, the OVPC required that the applicant supply specific data documenting why the exemption to the height limit should be granted. (Ogden Valley Planning Commission; July 25, 2006; CUP #19-2006). Only after data was presented that the height was an engineering necessity to house the waste processing equipment inside and a desirable roof design would the commission approve the height.

Another example, also from 2006, was a request to rezone land to CVR1. The OVPC approved the rezone, but with this restriction included in the motion to approve: *“with the stipulation that there not be any expectation that a Conditional Use Permit would be issued to adjust the height of the CondoHotel”*. [Zoning Petition ZP#09-2006].

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<sup>i</sup> The CUP requests, as a conditional use, a lockout room attached to every dwelling unit. This conditional use essentially doubles the effective density of the project with respect to the detrimental effects of traffic and congestion caused by lockout rooms during peak seasons. In the 2006 Recreation Element addition to the General Plan, the threat of excessive density was acknowledged and various strategies were proposed to avoid “killing the golden goose” by reducing overall density. LUC Sec. 108-7-25 is intended to mitigate the detrimental impact of lockout rooms by restricting them to a minimum three-day rental in CVR1 zone. However, the county has proved unable to enforce and control effective density in lockout units; indeed, the applicant is currently representing to potential buyers that (illegal) nightly rentals are permitted in the structure (“...nightly/vacation rentals are allowed...” The detrimental density effect of lockout rooms cannot be mitigated.

<sup>ii</sup> *The rental of a sleeping room, apartment, dwelling unit, or dwelling for a time period of less than three days is considered a nightly rental. Nightly rentals are allowed only when listed as either a permitted or conditional use in a specific zone or when approved as part of a planned residential unit development (PRUD). [LUC Sec. 108-7-25.]*