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# UTAH DEPARTMENT OF COMMERCE

## Office of the Property Rights Ombudsman

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### ADVISORY OPINION

Advisory Opinion Requested by: Magna Investments & Development, LTD

Local Government Entity: Sandy City

Property Owner: Magna Investments & Development, LTD

Type of Property: Mixed-use

Date of this Advisory Opinion: December 28, 2023

Opinion Authored By: Marcie M. Jones, Attorney  
Office of the Property Rights Ombudsman

### Issues

1. Does the proposed development, which includes residential, retail, and live/work units, qualify as a “mixed-use development” as defined in the city code?
2. Is the developer entitled to have its conditional use permit application for the proposed development processed?

### Summary of Advisory Opinion

The proposed development includes residential, retail, and live/work space vertically integrated in one building with uninterrupted pedestrian connections and reduced parking and/or traffic impacts. Accordingly, it meets the definition of a “mixed-use development” provided in city code. Such a mixed-use development is a conditional use in the applicable CN – Neighborhood Commercial zone. As such, the developer is entitled to have its conditional use permit application processed, including review by the planning commission.

The city may not lawfully impose the requirements contained in a separate “MU – Mixed-use” zoning district upon the proposed development. These requirements only apply to property in the MU – Mixed-use zone and do not apply “similar to an overlay zone” onto the subject property which is zoned CN – Neighborhood Commercial.

## Evidence

The following documents and information with relevance to the issue involved in this Advisory Opinion were reviewed prior to its completion:

1. Request for Advisory Opinion submitted by Wade Budge, P.C., Snell & Wilmer, on behalf of Magna Investments and Development dated April 20, 2023.
2. Letter dated May 24, 2023 submitted by Darien Alcorn, Senior Civil Attorney, on behalf of Sandy City.
3. Letter dated July 13, 2023 submitted by Wade Budge, P.C., Snell & Wilmer, on behalf of Magna Investments and Development.
4. Letter dated August 18, 2023 submitted by Darien Alcorn, Senior Civil Attorney, on behalf of Sandy City.

## Background

Magna Investments & Development, LLC (Developer) owns property located at 10165 S 1300 E in Sandy, Utah (Property) which is zoned CN – Neighborhood Commercial.<sup>1</sup> Mixed-use projects are a conditionally permitted use in this zone. Accordingly, Developer filed a Conditional Use Permit application (Application) with Sandy City (City) in December of 2021 to develop the Property. Developer has met with City planning staff several times and made several changes to the Project as a result of conversations during those meetings.

According to the Developer, the proposed project includes nearly 200 residential units, 7 live/work units, and 14,000 square feet of retail and office uses (Project). The Project is vertically integrated and laid out to promote walkability throughout with uninterrupted pedestrian trails and sidewalks. It is anticipated that the design will reduce the parking and traffic impact as compared to a single-use development.

The parties agree that if the Project constitutes a “mixed-use development”, as provided in ordinance, the Application for a conditional use permit should be processed.

However, the Developer and City staff fundamentally disagree on whether the Project constitutes a mixed-use development. The City maintains that the Developer has submitted several iterative plans that partially address the code requirements, but none of which fully achieve a true mixed-use development proposal. According to Sandy City Code (City Code), the Community Development Director may make this threshold determination, or City staff may take this matter to the planning commission for “further interpretation” as allowed by City Code. CITY CODE § 21-1-6.

Accordingly, City planning staff originally slated the question as to whether the Project constitutes a “mixed-use development” for further interpretation by the planning commission. Before the issue was heard, however, the Developer requested that this interpretation question be removed from the

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<sup>1</sup> The full name of the zoning designation is “Planned Center – Neighborhood District” which both parties refer to as Neighborhood Commercial throughout the submittals. For ease of understanding, we have used “Neighborhood Commercial” throughout this advisory opinion.

agenda so that an Advisory Opinion could be obtained first. The Developer does not believe interpretation by the planning commission is necessary. The Developer believes the Project, as proposed, clearly and unambiguously meets the requirements expressed in the Code for a “mixed-use development” and therefore is entitled to have the conditional use permit processed, including being heard by the planning commission. The Developer maintains that no “further interpretation” in an administrative process is needed.

The City accommodated the Developer and removed this item from the planning commission agenda. The City nonetheless maintains that it is appropriate for the planning commission to determine whether the Project constitutes a mixed-use project, and that the planning commission is the authorized final decision-making body. The City further maintains that the Advisory Opinion process only delays the planning commission’s decision-making process.

The Developer has requested this advisory opinion to answer (1) whether the Project is a “mixed-use development” as defined by City Code and (2) whether the conditional use Application is therefore entitled to be processed and have the permit issued.

## Analysis

### I. The proposed Project meets the applicable definition of “mixed-use development.”

The parties disagree as to whether the Project meets the definition of mixed-use development. It appears that difference of opinion arises because the parties are using different sections of Code for their definitions.

As an initial matter, we note that the Property is zoned CN – Neighborhood Commercial. The City’s permitted land use matrix for commercial districts lists “mixed-use development” under its land use categories, and which is designated as “conditional” in the CN – Neighborhood Commercial district.<sup>2</sup> CITY CODE § 21-8-2. Furthermore, the City Code includes a definition of “mixed-use development” that outlines the required components:<sup>3</sup>

“Mixed-use development” is defined as “a development project that includes residential and one or more of the following land uses: retail, service, commercial, or office; and which vertically or horizontally, integrates critical massing of physical and functional components into a coherent plan the promotes walkability through

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<sup>2</sup> The archived Sandy City Code which was in place December of 2021 when the conditional use permit Application was submitted has been used throughout.

<sup>3</sup> The Code further defines “mixed-use horizontal” and “mixed-use vertical.” “Mixed-use, horizontal” is defined as “commercial and residential uses, etc., which are in *close proximity to each other* and designed in a village manner, but *not necessarily within the same building or structure.*” CITY CODE § 21-37-14 “M” Definitions (12) (emphasis added). “Mixed-use, vertical” is defined as “commercial, office, or residential uses, etc. designated in a village manner which are *within close proximity to each other within the same building structure.*” CITY CODE §21-37-14 (emphasis added).

uninterrupted pedestrian connections, and reduces traffic and parking impacts.” CITY CODE § 21-37-14(11).

However, the City Code also uses the same group of words – “mixed-use development” – to apply to another separate sets of regulations. This has resulted in confusion for the parties.

First, the reference to “mixed-use development” in the permitted land use matrix for commercial districts is a reference to mixed-use development as a *use*, which is allowed within the CN – Neighborhood Commercial zone upon securing a conditional use permit.

Second, the City also has a separate and distinct MU – Mixed-use zoning *district*. See, CITY CODE §§ 21-4-5 and 21-23-24. However, the requirements in MU – Mixed-use zoning *district* do not apply to every instance of mixed-use development as a *land use category*. The City has misattributed the standards set forth in the MU – Mixed-use zoning *district* to discredit the Project as a defined mixed-use *land use* in the CN – Neighborhood Commercial zone.

To determine whether a municipality correctly interpreted and applied its ordinance to a development application, a court will follow established rules of statutory construction. *Foutz v. City of South Jordan*, 2004 UT 75, ¶8. Because the interpretation of ordinances is a pure question of law, local governments are afforded no deference in interpreting their own ordinances; rather, courts review a local government’s interpretation of an ordinance for correctness. *Outfront Media, LLC v. Salt Lake City Corp.*, 2017 UT 74, ¶ 12 n.13, 416 P.3d 389, 394 (noting that the court’s past practice of affording some level of “non-binding deference” to a local agency’s interpretation could not stand in view of subsequent developments in precedent).

Ordinance interpretation begins with an analysis of the plain language of the ordinance. *Carrier* 2004 UT 98 ¶ 30, 104 P.3d 1208. The primary goal of interpretation is “to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the [ordinance] was meant to achieve.” *Foutz*, 2004 UT 75, ¶ 11, 100 P.3d 1171 (emphasis added). In doing so, it is presumed that the legislative body used each word advisedly. *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804. “When the plain meaning of the [ordinance] can be discerned from its language, no other interpretive tools are needed.” *Id.*

The plain language of City Code Section 21-8-2 states that mixed-use developments are a conditional use in the CN – Neighborhood Commercial zone. Therefore, it is the substantive provision of the CN – Neighborhood Commercial Zone, and the elements of “mixed-use development,” as defined, which govern a mixed-use proposal in that zone. The definitions section provides a definition of “mixed-use development” as “a development project that (1) includes residential and one or more of the following land uses: retail . . . and which (2) vertically or horizontally integrates critical massing of physical and functional components into a coherent plan that (3) promotes walkability through uninterrupted pedestrian connections, and reduces traffic and parking impacts.” (numeric emphasis added for clarity).

Therefore, mixed-use development as a *land use* in the CN – Neighborhood Commercial zone must include (1) residential and one other use, the (2) uses must be integrated (3) in a way that promotes walkability and reduces traffic and parking impacts.

The Project (1) includes 200 residential units, 7 live/work units, and 14,000 square feet of retail and office use, is (2) vertically integrated and (3) laid out to promote walkability throughout with uninterrupted pedestrian trails and sidewalks. Furthermore, the Application includes traffic and parking studies which conclude that the proximity of residential and office uses is anticipated to reduce traffic and parking in the area as compared to a single-use at the same location. The components of the Project therefor satisfy all three aspects of the “mixed-use development” *use* definition.

In contrast, the City used the standards set forth in the MU – Mixed-use zone *district* to determine that the Project was not a compliant mixed-use development. The staff report analyzing this issue for the planning commission states that the “code requirements for a mixed-use development are applied to the property similar to an overlay zone.” Sandy City Staff Report Memorandum dated April 20, 2023 re: Interpretation of the term “Mixed-use Development.”

However, there is a notable lack of language in the Code which would impose the requirements of the MU – Mixed-use zone to the CN – Neighborhood Commercial zone “similar to an overlay zone.”<sup>4</sup> Rather, there is several instances of language in the Code that suggests the opposite—that the MU – Mixed-use zone is a defined geographic zoning district, and not an overlay. Regardless, the staff report then goes on to mistakenly analyze the Code requirements for the MU – Mixed-use zoning *district* to this proposed mixed-use *land use* in the CN zone and finds that the proposal does not meet the standards for the Mixed-use zoning *district*.

The City Code provides that the “locations and boundaries of the zone districts are established as they are shown on the map entitled ‘Zoning Map, Sandy City, Utah.’” The City’s Zoning Map depicts several defined portions of the city that are zoned “MU” or “Mixed-use,” apart from other areas zoned in various shades as “Commercial.”<sup>5</sup> The City’s interactive zoning map provides further detail that the property in question is zoned specifically as “Neighborhood Commercial.”<sup>6</sup>

The City Code also provides for various kinds of Overlay Districts, which are listed together in Section 21-4-8. However, the Code’s list of overlay districts does not include the MU – Mixed-use Zone. *See id.* Moreover, none of zones identified as “Overlay Districts” in City Code are reflected on the City’s geographic Zoning Map. Instead, each of these overlay zones contain provisions stating the nature of these zones as either a “floating zone,”<sup>7</sup> or else tying the overlay to some other defined “underlying zone,”<sup>8</sup> or otherwise providing its own, separate, overlay map.<sup>9</sup> Notably, the MU – Mixed-use District contains no similar provisions. When interpreting the

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<sup>4</sup> The City Code includes several overlay zones – Historic Sandy Development Overlay Zone, Residential Conservation Overlay Zone, Storefront Conservation Overlay Zone, Sensitive Area Overlay Zone, Floodplain Overlay Zone, Drinking Water Source Protection Overlay Zone, and the Historic Resources Overlay Zone. The City may amend the City Code such that the development standards stipulated in the MU – Mixed-use Zone apply to any mixed-use development in any zone, similar to an overlay zone. However, the current language does not have that effect.

<sup>5</sup> Zoning Map, Sandy City, Utah, *available at* <https://content.civicplus.com/api/assets/b0d143aa-a6a4-4050-9b4f-4e67c704ef9b>.

<sup>6</sup> Interactive Zoning Map, then go to “Legend,” *available at* <https://content.civicplus.com/api/assets/b0d143aa-a6a4-4050-9b4f-4e67c704ef9b> (last accessed Dec. 12, 2023).

<sup>7</sup> CITY CODE § 21-12-1 (Historic Sandy Development Overlay Zone).

<sup>8</sup> *See, e.g., id.* § 21-13-3 (Residential Conservation Overlay Zone “RCO” is applicable to underlying residential zones).

<sup>9</sup> *See, e.g., id.* § 21-15-2 (areas subject to the Sensitive Area Overlay Zone are designated on the map entitled “Sandy City Sensitive Overlay Zone Map”).

meaning of an ordinance, courts presume that the expression of one should be interpreted as the exclusion of another, and give effect to any omission in the ordinance language by presuming that the omission is purposeful. *Carrier*, 2004 UT 98, at ¶ 30 (internal citations omitted).

The City’s treatment of the MU – Mixed-use District as an overlay applicable anywhere in the City is therefore a misapplication of the language of the Code. The standards set forth in the MU – Mixed-use zone apply only to property within that geographic zoning district. The Code states that “the following [development standards] are to be considered as applying specifically to development in the Mixed-use (MU) District . . .” CITY CODE CHAPTER 21-23-24(e). The requirements of the MU – Mixed-use zoning district therefore apply only to property within this zone, and not to uses within the CN – Neighborhood Commercial zone. Moreover, while “mixed-use development” as a land use is provided in the City’s land use matrix as a conditional use in the CN – Neighborhood Commercial zone, this land use is separately listed as a *permitted use* in the MU – Mixed-use zone.

We find the plain language of the Code clear, but note that any ambiguity in the Code is interpreted in favor of allowing the proposed use because ordinances are in derogation of an owner’s use of land. *See Carrier* 2004 UT 98 ¶ 31, 104 P.3d 1208.

In summary, the components of the Project satisfy all three applicable aspects of the “mixed-use development” as a defined *land use*, listed as an allowable conditional use in the CN – Neighborhood Commercial zone district. The Project includes (1) residential and one other use, and the (2) uses are integrated (3) in a way that promotes walkability and reduces traffic and parking impacts as indicated by a traffic study. Any requirements contained in City Code Chapter 21-23-24 governing the MU – Mixed-use zone district do not apply.

**II. The Conditional Use Application is entitled to be processed and have the permit issued unless the reasonably anticipated detrimental impacts cannot be substantially mitigated by reasonable conditions.**

The next question is a procedural one. The Developer has asked whether the conditional use permit Application for the Project is entitled to be processed and approved.

In the record, the parties agree that if the proposed Project meets the definition of “mixed-use development” that it is a permitted conditional use and the City shall process the submitted conditional use application accordingly. *See* CITY CODE §§ 21-8-2 (designating “mixed-use development” as a conditional use in the CN –Neighborhood Commercial zone), and § 21-33-2 (detailing the application and review process, including planning commission review).

Therefore, because by the plain language of the City Code, the Project meets the applicable definition of “mixed-use development,” the conditional use Application should be processed.

The planning commission’s determination to approve or deny a conditional use permit is an administrative action. State law provides that “a land use authority shall approve a conditional use 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.” UTAH CODE § 07-9a-507(2)(a)(i). Therefore, the planning commission must approve the conditional use

application unless the commission finds, on the record and supported by substantial evidence, that there are reasonably anticipated detrimental effects associated with the use, and that those effects cannot be substantially mitigated by imposing reasonable conditions in accordance with standards specified in the City Code.

In conclusion, because the Project proposes a “mixed-use development,” as defined, in the CN – Neighborhood Commercial district, the conditional use permit application submitted by the Developer is entitled to be processed, including review by the planning commission.

### **Conclusion**

The components of the proposed development satisfy all three applicable aspects of the “mixed-use development” *use* definition. The project includes (1) residential and one other use, and the (2) uses are integrated (3) in a way that promotes walkability and reduces traffic and parking impacts as indicated by a traffic study. Because the project proposes a “mixed-use development,” as defined, and is allowable in the CN – Neighborhood Commercial district as a conditional use, the conditional use permit application submitted by the developer must be processed, including review by the planning commission.

The City Code provisions governing the MU – Mixed-use zone does not apply to this property because the property is zoned CN – Neighborhood Commercial.



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**NOTE:**

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**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.**

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