FILED
United States Court of Appeals
Tenth Circuit

May 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RESORT CENTER ASSOCIATES, LLC, a Utah limited liability company,

Plaintiff - Appellant,

v.

MICHAEL S. REGAN, in his official capacity as Administrator of the United States Environmental Protection Agency; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; SCOTT BAIRD, in his official capacity as Executive Director of the Utah Department of Environmental Quality; UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY; SUMMIT COUNTY, a body politic and corporate of the State of Utah; UNITED PARK CITY MINES, a Delaware corporation,

Defendants - Appellees.

No. 21-4150
(D.C. No. 2:21-CV-00078-BSJ)
(D. Utah)

ORDER AND JUDGMENT*

Before **BACHARACH**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

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* This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for its persuasive value if otherwise appropriate. Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

This appeal arose out of an agreement to develop property into a residential area. The agreement allowed Resort Center Associates to develop the property in two phases. These phases were specified in a site plan, which located and configured new lots and roads.

But as Resort Center began to develop the property, the Environmental Protection Agency ordered a study of possible contamination of the soil. This order led Summit County to adopt an ordinance requiring developers to show that the area wasn't contaminated. *See* pp. 25–26, below. Given this ordinance, Resort Center waited for the EPA to conduct its study.

As the EPA's study lingered, Resort Center changed its plans for the second phase and submitted a new plat proposal, modifying the lots and roads.[1] Summit County rejected the new proposal, preventing construction of the second phase. Resort Center challenged the rejection by suing the EPA and the county.[2] The district court dismissed Resort Center's claims.

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[1] A *plat* is a map or representation of a subdivision. 3 E.C. Yokley, Zoning Law and Practice § 17-2 (rev. Douglas Scott MacGregor 2022).

[2] Resort Center also asserted claims against the former owner of the property, government officials, a Utah environmental agency, and unnamed parties; but these claims aren't at issue in the appeal. *See* note 12, below.

For the claim against the EPA, Resort Center denied that the area was contaminated and alleged that the study was taking too long. These claims are not subject to judicial review because the EPA's study is ongoing.

Resort Center also sued the county and sought leave to allege breach of the development agreement, attributing the breach to the county's rejection of a new plat proposal. In our view, however, the development agreement didn't require the county to approve the new proposal. So the proposed allegations wouldn't have constituted a breach of the development agreement.

I. The claims against the EPA are not subject to judicial review.

Resort Center alleged in part that the EPA's lengthy study had impeded development of the property. The EPA defended its actions, arguing that preliminary evidence of soil contamination justified closer study under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Resort Center disagreed and sought an injunction requiring the EPA to (1) remove Resort Center's property from the area being studied or (2) complete the environmental cleanup activities. Appellant's App'x vol. 1, at 30, 32.

The district court dismissed the claims against the EPA for lack of jurisdiction, and we conduct de novo review. *Trackwell v. US Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007). Through that review, we conclude that

- the EPA had authority under CERCLA to conduct its study and

- CERLCA stripped the federal district court of jurisdiction over Resort Center's challenges to the EPA's environmental study.

So we affirm the dismissal of Resort Center's claims against the EPA.

A. The EPA has statutory authority to conduct a removal action in the area covering Resort Center's property.

CERCLA authorizes the EPA to study the possibility of contamination when there's "reason to believe that a release [of hazardous substances] has occurred." 42 U.S.C. § 9604(b)(1). Despite this statutory authorization, Resort Center denies any evidence of contamination. But evidence of contamination does exist.

The EPA sampled the soil and water and found contamination from hazardous substances and heavy metals. Appellee Summit County's Supp. App'x vol. 1, at 178. Resort Center disagreed with these findings and obtained its own samples. But these samples also showed excess levels of arsenic and lead in the soil.[3] Appellee Summit County's Supp. App'x vol. 3, at 575–78, 580; Appellee Summit County's Supp. App'x vol. 1, at 179; *see also* Appellant's App'x vol. 2, at 466 (acknowledging that five samples exceeded the allowable levels for lead). The presence of contaminants

[3] In its reply brief, Resort Center argues that its samples showed a level of arsenic lower than the site-specific limit. But those were only preliminary results. Appellant's App'x vol. 2, at 446.

supplied the EPA with reason to believe that a hazardous substance had been released into the soil.

But even if Resort Center's samples had shown no actual contamination, CERCLA would empower the EPA—not the property owners—to assess potential contamination. *See* 42 U.S.C. §§ 9604(a)(1), (b)(1) (vesting power in the President); Exec. Order No. 12,580, 52 Fed. Reg. 2,923, 2,925 § 2(g) (Jan. 23, 1987) (delegating this authority to the EPA).

Despite the preliminary results showing contamination, Resort Center alleges that the EPA failed to act "properly" and "promptly." Appellant's Opening Br. at 25. For this allegation, Resort Center relies on 42 U.S.C. § 9604(a).

Resort Center has misinterpreted this section. It addresses the EPA's discretion to allow an owner or operator to investigate, respond, or remediate. 24 U.S.C. § 9604(a)(1).[4] When this discretion is exercised, the EPA must ensure prompt action. But the section doesn't apply here because

[4] Section 9604(a)(1) provides: "When the President determines that such [investigation, remediation, or response measure] will be done properly and promptly by the owner or operator of the facility . . . or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study . . . ."

the EPA itself is acting rather than delegating responsibilities to Resort Center.

Resort Center also argues that even if an investigation were appropriate, the EPA has taken too long. But the EPA has shown legitimate reasons for its deliberate pace. The EPA initially focused on the most contaminated residential areas, then turned to the area covering Resort Center's property. In 2009 and 2014, the EPA entered administrative consent orders for the former owner of the property to investigate the contamination. But the former owner failed to do so, and the EPA stated that it plans to complete the study later this year. Under these circumstances, the EPA's alleged delay doesn't trigger judicial review.

B. CERCLA stripped the federal district court of jurisdiction over the claims against the EPA.

CERCLA contains a provision that generally strips federal courts of jurisdiction over challenges to the EPA's ongoing "removal or remedial action[s]." 42 U.S.C. § 9613(h). We have regarded this provision as a "blunt withdrawal of federal jurisdiction." *Cannon v. Gates*, 538 F.3d 1328, 1333 (10th Cir. 2008) (quoting *APWU v. Potter*, 343 F.3d 619, 624 (2d Cir. 2003)).

Given the statutory withdrawal of jurisdiction, we must decide whether the EPA's study constitutes an "ongoing removal action." *Id.* at

1334.[5] If we answer *yes*, CERCLA would generally bar a challenge in federal court. 42 U.S.C. § 9613(h); *Cannon*, 538 F.3d at 1333.

This bar would apply if the requested relief would impact the removal action. *Cannon*, 538 F.3d at 1335. An action involves "removal" when the agency is monitoring, assessing, or evaluating "the release of hazardous substances." 42 U.S.C. § 9601(23). The EPA is assessing the release of hazardous substances, and that assessment is ongoing. So the EPA's environmental study constitutes an ongoing removal action. *See Cannon*, 538 F.3d at 1333–34 (concluding that the government's study of potential contamination constituted an ongoing removal action).

Given the existence of an ongoing removal action, we must consider the potential impact of Resort Center's requested relief. Resort Center has asked for orders

- modifying the area to be studied and
- requiring the EPA to finish the remaining cleanup actions.

Appellant's App'x vol. 1, at 37. We concluded in *Cannon v. Gates* that similar requests for injunctive relief constituted challenges to a removal

[5] For this argument, the EPA raised a factual challenge to the district court's jurisdiction. So we can look beyond the complaint and consider documentary and testimonial evidence. *Paper, Allied-Industrial, Chem. & Energy Workers Intern. Union v. Cont'l Carbon Co.*, 428 F.3d 1285, 1291 (10th Cir. 2005).

action. 538 F.3d at 1336. We have no basis to draw a different conclusion here. Given *Cannon*, we conclude that

- CERCLA bars a federal district court from issuing relief that impacts a removal action and
- relief to Resort Center would impact the EPA's ongoing removal action.

42 U.S.C. § 9613(h).

Resort Center asserts that the EPA has no ongoing efforts at the site. But Resort Center provides no support for this assertion. The EPA presented the district court with a declaration, stating that the investigation into possible contamination was ongoing. Based on this declaration, the district court found that the EPA was analyzing the site. Resort Center has not overcome that finding. So this suit constitutes a challenge to an ongoing removal action, and *Cannon* and CERCLA prevent jurisdiction.

C. The district court lacked jurisdiction to enforce a nondiscretionary duty.

Resort Center also urges the existence of jurisdiction under 42 U.S.C. § 9659(a), which allows judicial review when the EPA has failed to perform a nondiscretionary duty. 42 U.S.C. § 9613(h), § 9659(a)(2). To obtain review under § 9659(a), Resort Center needed to identify a nondiscretionary duty. *See Mountain States Legal Found. v. Costle*, 630 F.2d 754, 766 (10th Cir. 1980) (discussing the requirements of the identical provision in the Clean Air Act). That duty must be "readily

ascertainable" from the statute itself. *WildEarth Guardians v. McCarthy*, 772 F.3d 1179, 1182 (9th Cir. 2014).

Here the statutory language is permissive, not mandatory. For example, CERCLA states that federal authorities

- "*may* allow" third parties to carry out remediation actions "properly and promptly," 42 U.S.C. § 9604(a)(1)(B) (emphasis added),
- are "*authorized* to act" when there "is a release or substantial threat of release" of contaminants, *id.* (emphasis added), and
- "*may* undertake such investigations, monitoring, surveys, testing, and other information gathering as [] *may* [be] deem[ed] necessary or appropriate." 42 U.S.C. § 9604(b)(1) (emphasis added).

This language doesn't create a mandatory duty. *See Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1540 (10th Cir. 1992) (concluding that CERCLA's general authorization for response actions does not contain "specific and mandatory directives").

Despite this discretionary language, CERCLA contains five exceptions that would allow judicial review. 42 U.S.C. § 9613(h)(1)–(5). Resort Center doesn't show why any of these exceptions would apply.

Resort Center does mention the exception in 42 U.S.C. § 9613(h)(4), but doesn't develop an argument based on that exception. Appellant's

Opening Br. at 1.[6] A single passing reference to a statutory subsection is not enough to develop an argument, so Resort Center has waived reliance on § 9613(h)(4). *See Iliev v. Holder*, 613 F.3d 1019, 1026 n.4 (10th Cir. 2010) (stating that the appellant's failure to sufficiently develop an argument constituted a waiver).

* * *

The environmental study constitutes an ongoing removal action, which lies within the EPA's statutory authority. CERCLA bars judicial review of challenges to ongoing removal actions, so we affirm the dismissal of Resort Center's claims against the EPA.

II. The district court properly denied Resort Center's motions for leave to amend the claims against Summit County.

In seeking leave to amend the complaint, Resort Center proposed to add allegations that Summit County had breached the development agreement and committed a regulatory taking of the property.

A. The development agreement expired, and Resort Center didn't complete the second phase.

The development agreement had a term of five years, and that period ended in 2011. But Resort Center had a vested right to develop the property in conformity with the agreement.

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[6] As discussed above, Resort Center argues that the EPA has a nondiscretionary duty to apply CERCLA only to contaminated properties. But Resort Center does not base that argument on § 9613(h)(4).

That agreement entailed two phases of the development. Resort Center completed the first phase, but not the second phase. For that phase, Resort Center proposed a new preliminary plat in 2018, but it differed markedly from the site plan approved in the development agreement. Those differences led the county to reject the 2018 plat proposal.

B. We conduct de novo review of the denial of leave to amend.

The district court dismissed the original complaint, and Resort Center moved twice for leave to amend. The district court disallowed an amendment, concluding that the new allegations would be futile.[7]

A district court may deny leave to amend when the amendment would be futile. *Duncan v. Manager, Dep't of Safety, City & Cnty. of Denver*, 397 F.3d 1300, 1315 (10th Cir. 2005). An amendment would be futile when the new complaint would be subject to dismissal. *Bradley v. Val-Mejias*, 379 F.3d 892, 901 (10th Cir. 2004). We conduct de novo review over

[7] In its appellate briefs, Resort Center does not challenge dismissal of the original complaint. In fact, Resort Center doesn't include the dismissal order in the appendix or as an attachment to the opening brief. *See* note 12, below. But Resort Center's statement of the issues includes consideration of the dismissal order. Based on Resort Center's failure to discuss the dismissal itself, Summit County "assume[s] [that Resort Center] sought to appeal the denial of those two motions [for leave to amend], but not the grant of Summit County's motion to dismiss." Summit County's Resp. Br. at 20–21. In its reply brief, Resort Center does not expressly dispute Summit County's assumption or present an argument to reverse the dismissal. We thus conclude that Resort Center has effectively appealed only the denial of the motions for leave to amend—not the grant of Summit County's motion to dismiss.

determinations of futility. *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1249 (10th Cir. 2009).

C. The proposed amendments didn't plausibly allege Summit County's breach of the development agreement.

Resort Center proposed amendments about the county's rejection of the 2018 plat proposal. Resort Center characterized that rejection as a breach of contract, and the district court properly rejected this characterization.

1. The development agreement had expired before Resort Center submitted the 2018 plat proposal.

The threshold issue is whether the development agreement had expired before Resort Center submitted the 2018 plat proposal. Summit County says that the agreement expired in 2011; Resort Center insists that the agreement never expired.

We agree with Summit County. The development agreement stated that it would start "March 15, 2006" and "extend for a period of five (5) years following the effective date . . . ." Appellant's App'x vol. 2, at 327. So the agreement expired in 2011.

Resort Center argues that the county's course of performance proves that the agreement has not expired. But under Utah law, course of performance is used only to determine the meaning of ambiguous or missing contract terms. *See Rossi v. Univ. of Utah*, 496 P.3d 105, 111 (Utah 2021) (stating that the court can ascertain the contract terms from

"express language *or* by implication from course of dealing or traditional practice" (emphasis added)).[8]

On appeal, Resort Center argues that the development agreement was ambiguous. But Resort Center didn't argue in district court that the agreement was ambiguous. So Resort Center forfeited this argument. *Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1238 (10th Cir. 2016). We could ordinarily consider this forfeited argument under the plain-error standard. *Id.* at 1239. But Resort Center hasn't requested plain-error review, so we consider the argument waived. *McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010).

Even without the waiver, we'd consider the expiration date unambiguous. The development agreement specifies a commencement date in 2006 and a duration of 5 years. So the agreement unambiguously states that it would expire in 2011.[9]

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[8] The development agreement states that Utah law governs matters of interpretation. Appellee Summit County's Supp. App. vol. 1, at 53.

[9] Resort Center also argues that "equity requires" enforcement of the entire agreement. But Resort Center cites no authority that would allow a court to use its equitable powers to disregard unambiguous contractual language.

2. Resort Center's 2018 plat proposal didn't conform to the development agreement.

Despite expiration of the agreement, Resort Center retained a vested right to carry out the second phase of the development. To carry out this phase, Resort Center had to submit a plat proposal that conformed to the previously approved site plan; Summit County had no duty to approve a nonconforming plat.

The development agreement provided Resort Center with a vested right to develop and construct the Silver Gate Ranches subdivision in accordance with "the uses, densities, configuration, massing, design guidelines and methods, development standards, *the site plan*, . . . [and] road placements . . . *as reflected in the Development Agreement*." Appellant's App'x vol. 2, at 321 (emphasis added). That right entailed the creation of lots, roads, and trails in the second phase.

But this right was limited. Under the development agreement, Resort Center had to

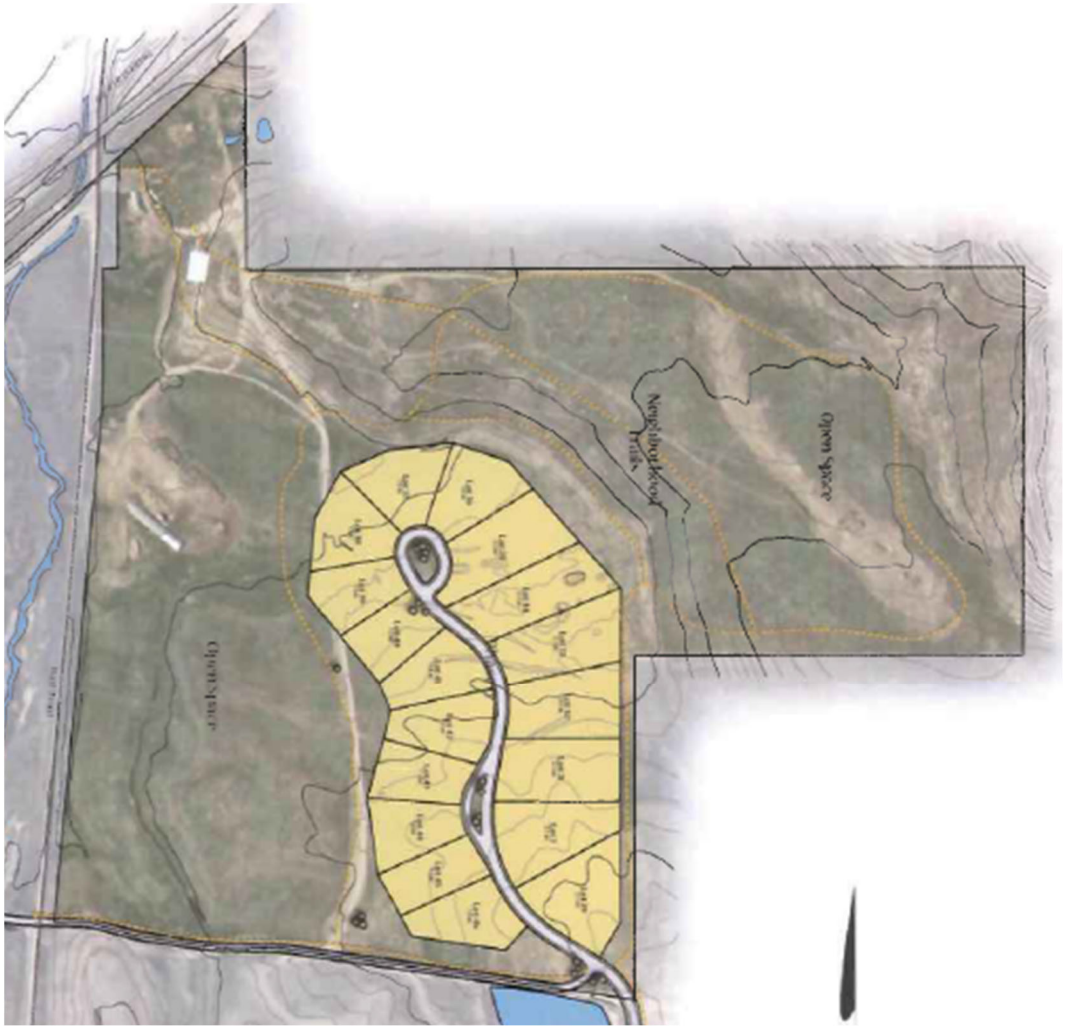
- configure the property as "shown in the Project Plan Book of Exhibits" and
- develop the property consistently with the "Specific Conditions and Guidelines described in the Project Plan Book of Exhibits."

Id. at 321–22. The Project Plan Book of Exhibits included a site plan that specified the lots, roads, and trails.

Resort Center submitted a new plat proposal in 2018, but this proposal differed substantially from the site plan contained in the Project Plan Book of Exhibits. Given these differences, Summit County had no contractual obligation to approve the 2018 proposal. *See Pac. W. Cmtys., Inc. v. Grantsville City*, 221 P.3d 280, 287 (Utah App. 2009) (upholding a city's denial of a phase-two development plan because it had constituted a "major adjustment to the approved development plan" and hadn't substantially conformed to the previously approved plan); *accord River Birch Assocs. v. City of Raleigh*, 388 S.E.2d 538, 546 (N.C. 1990) (stating that a city could refuse to approve a later stage of a development that hadn't "take[n] into account the prior development as proposed"); *HJS Dev., Inc., v. Pierce Cnty. ex rel. Dep't of Plan. and Land Servs.*, 61 P.3d 1141, 1157–59 (Wash. 2003) (concluding that land-use authorities could revoke approval of a preliminary plat because the developer had violated the conditions of the preliminary plat); *Parker v. Bd. of Cnty. Comm'rs of Dona Ana Cnty.*, 603 P.2d 1098, 1101 (N.M. 1979) ("Suspension or revocation of plat approval remain realities for the developer until he complies with the reasonable conditions imposed by the county within its authority.").

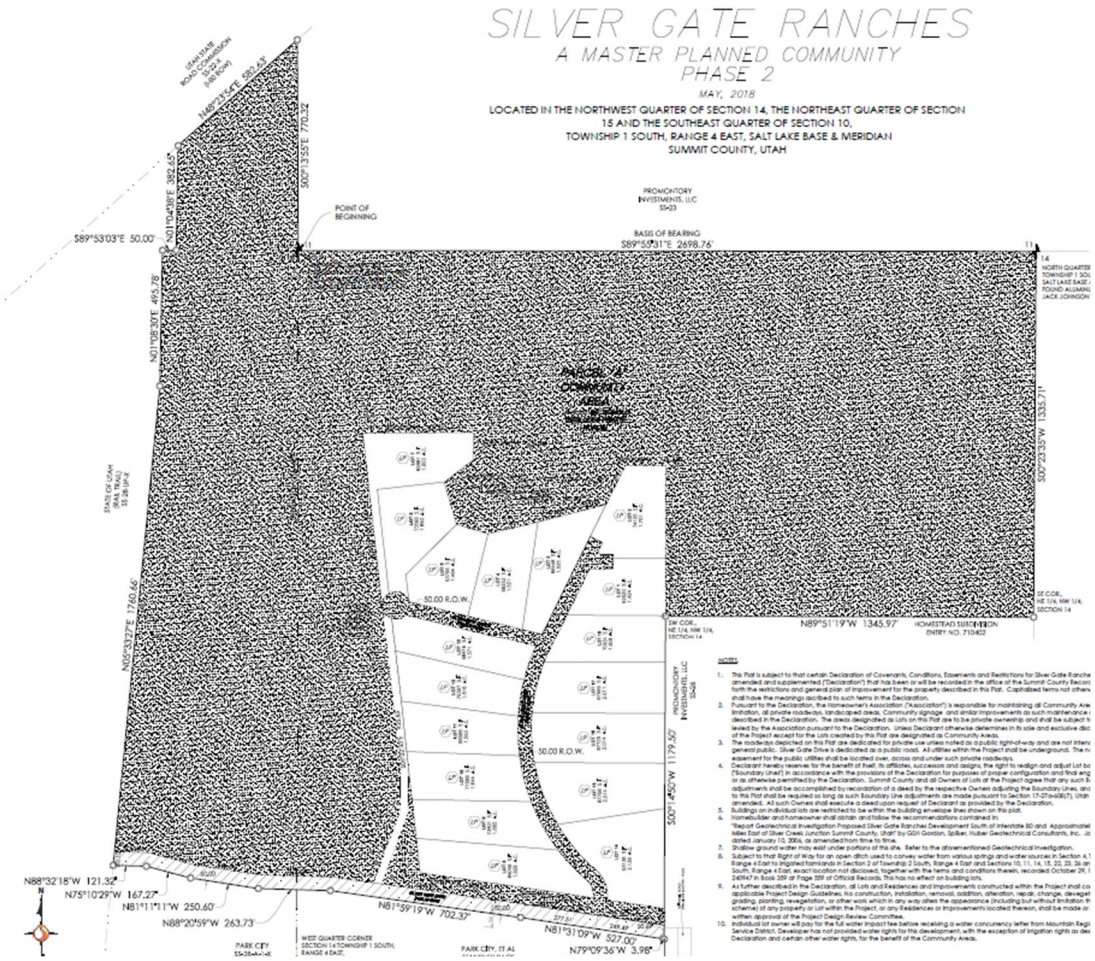
Resort Center downplays the deviation from the site plan contained in the Project Plan Book of Exhibits. But the changes aren't minor.

The changes include configuration of the lots. The previously approved site plan had configured the lots in a convex shape:



Appellee Summit County's Supp. App'x vol. 1, at 76 (resized and reoriented).

In contrast, the 2018 proposal configured the northernmost lots in a concave shape against the open land:

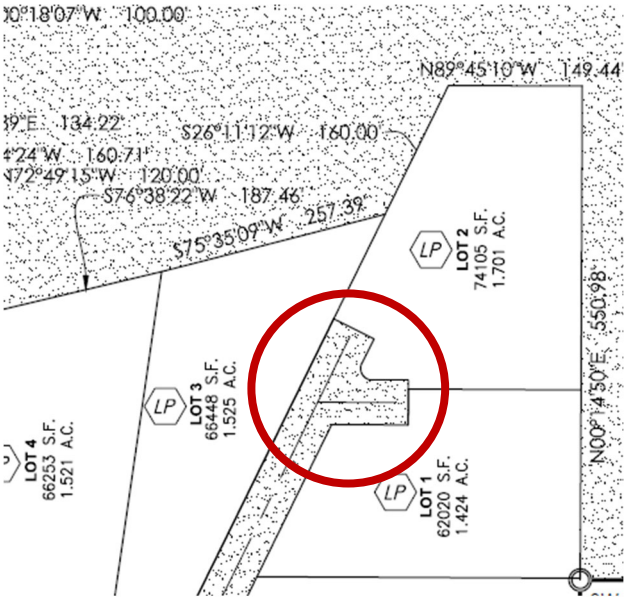


Appellant's App'x vol. 3, at 622 (resized).

Because of this reconfiguration, Resort Center changed a road and the turnaround. In the site plan appearing in the Project Plan Book of Exhibits, the development had a north-south road creating a cul-de-sac. In the 2018 proposal, Resort Center added a road, removed the cul-de-sac, and provided an alternative hammerhead turnaround.

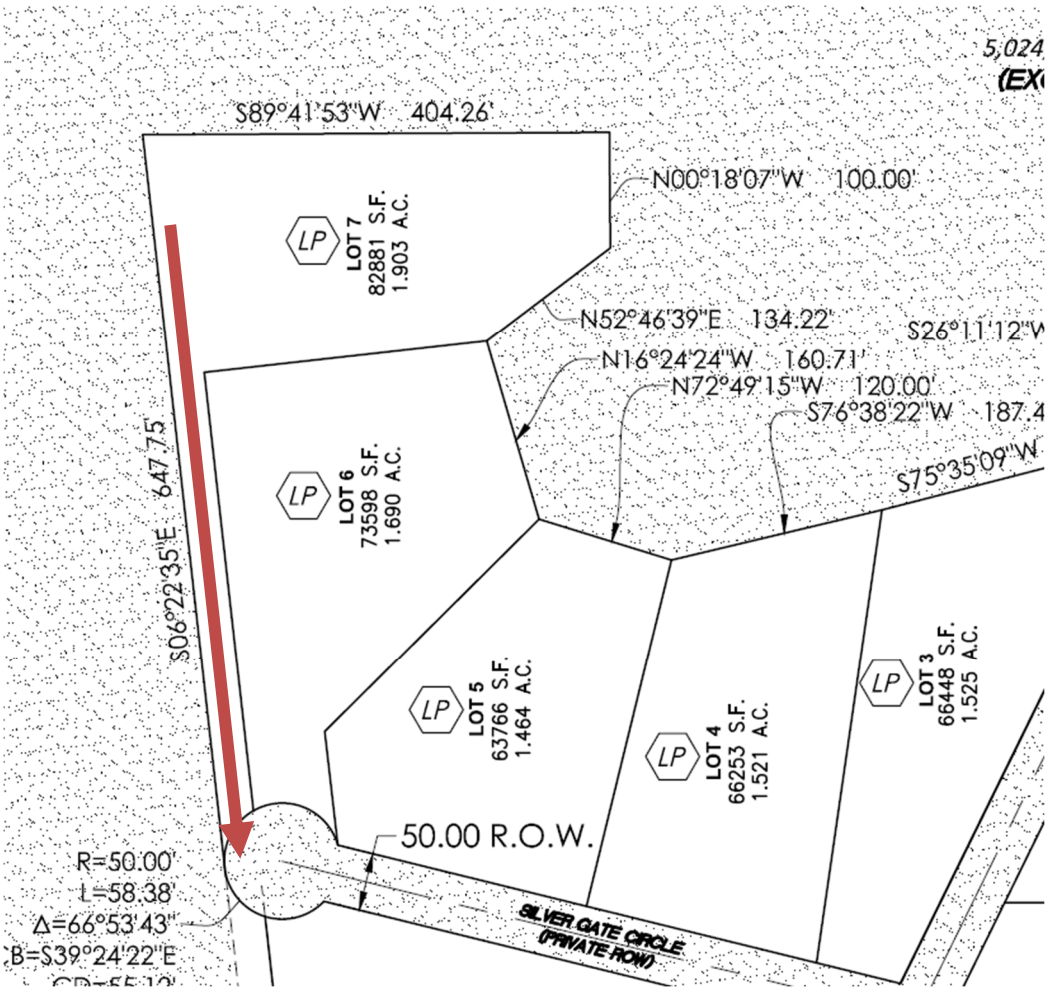
Development Agreement

2018 Plat Proposal



Appellee Summit County's Supp. App'x vol. 1, at 76 (resized and reoriented) (circle added for emphasis); Appellant's App'x vol. 3, at 622 (zoomed in) (circle added for emphasis).

And one of the newly configured lots, Lot 7, apparently required a private road for access:



Appellant's App'x vol. 3, at 622 (resized) (arrow added). In the previously approved site plan, all of the lots had directly connected to a single public road; none of the lots had required a private road for access.

The 2018 proposal also appeared to alter the area previously designated as open space. Summit County informed Resort Center of this alteration in a May 2021 letter. Appellant's App'x vol. 3, at 629. Resort Center responded, noting that the 2018 plat proposal hadn't changed the

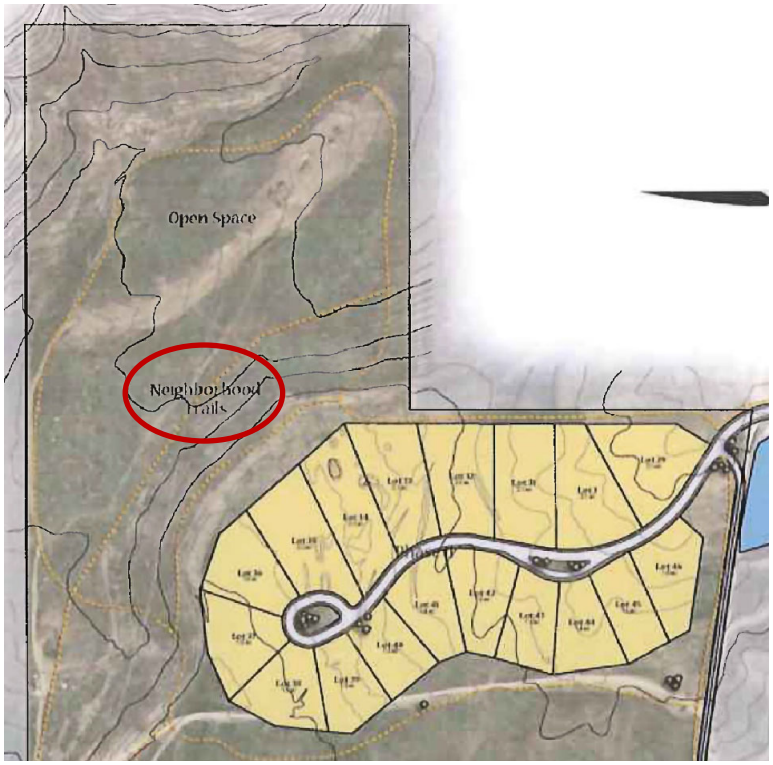
overall percentage of open space. *Id.* at 634. But Resort Center didn't deny changes in the location of the open space.

The county also informed Resort Center that

- the previously approved site plan had required a public trail system and
- the 2018 proposal had appeared to interfere with the trail system.

Id. at 629; *see* Appellant's App'x vol. 2, at 322 ("Developer shall provide a neighborhood trail system within the project . . . ."). Resort Center didn't respond to the county.

Here is how the previously approved site plan had shown the public trails:



Appellee Summit County's Supp. App'x vol. 1, at 76 (resized and reoriented) (circle added for emphasis). The 2018 proposal omitted any reference to the trail system.

Resort Center argues that Summit County "implicitly accepted" these changes by "suggesting" a similar layout. For this argument, Resort Center points to the county's response to an earlier plat proposal. In that response, Summit County's officials had shown a willingness to consider changes from the original site plan. But the county's willingness to consider a new proposal did not amount to "implicit" approval of Resort Center's 2018 proposal. At the time, Resort Center appeared to acknowledge the absence of an existing approval: Resort Center didn't suggest that the county had already approved the 2018 proposal; to the contrary, Resort Center asked Summit County for approval. This request would have been unnecessary if the county had already approved the 2018 proposal.

In any event, the development agreement does not contain a provision allowing "implicit" approvals. Provisions address

- how changes to the site plan in the Project Plan Book of Exhibits may be approved as substantial or administrative amendments and
- how a final plat submission may be approved.

Appellant's App'x vol. 2, at 324–25. But the development agreement does not allow "implicit" approvals. So Summit County could expressly require compliance with the previously approved site plan.

Finally, Resort Center argues that its satisfaction of the zoning requirements should have compelled approval of the 2018 proposal. But satisfaction of zoning requirements didn't require approval of a plat that deviated from the approved site plan. *See* 3 E.C. Yokley, Zoning Law and Practice § 17-5 (rev. Douglas Scott MacGregor 2022).

For this argument, Resort Center relies on *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980). There the Utah Supreme Court concluded that zoning changes don't generally apply retroactively. *Id.* at 396. But Summit County didn't rely on zoning changes to reject Resort Center's 2018 proposal. To the contrary, Summit County relied on Resort Center's deviation from the approved site plan incorporated into the development agreement. Satisfaction of zoning requirements didn't relieve Resort Center of the need to comply with the approved site plan.

* * *

The 2018 proposal didn't conform to the previously approved site plan, and Summit County had no contractual duty to approve a nonconforming plat proposal.

3. Summit County had no contractual duty to approve administrative amendments.

Resort Center argues that the 2018 proposal constituted an administrative amendment that the county had to approve. In response, Summit County contends that expiration of the development agreement prevented amendment. We need not decide if the county is correct. We instead assume for the sake of argument that the county could approve an amendment to the development agreement. Even with this assumption, the county would not have owed a contractual duty to approve an amendment.

The development agreement provided that the Summit County Community Development Director could approve non-substantial changes. Appellant's App'x vol. 2, at 318, 324–25. No other county official could approve these changes because the Development Director had the power "to make *all* final administrative amendment decisions." *Id.* at 325 (emphasis added).[10]

Resort Center points to an email sent by Sean Lewis, a Summit County Planner, stating that he proposed an administrative amendment to Resort Center. But Mr. Lewis was not the Development Director, so his

[10] Resort Center appears to suggest that the development agreement was ambiguous on the procedures for approval of administrative amendments. But Resort Center waived that argument by failing to present it in district court or to request appellate review under the plain-error standard. *See* p. 13, above.

email could not have constituted an administrative amendment. The development agreement

- requires a "permit" or a "specific, separate approval" from the Development Director for an administrative amendment, Appellant's App'x vol. 2, at 325, and
- states that "no officer, official or agent of the County has the power to amend, modify, or alter this Development Agreement or waive any of its conditions as to bind the County . . . ." *Id.* at 328.

So Mr. Lewis lacked authority to approve any changes.

Resort Center also argues that the county needed to respond to the 2018 plat proposal. For this argument, Resort Center points to the Utah Code, which requires land use authorities to approve or deny land use applications "with reasonable diligence." Utah Code § 17-27a-509.5(2)(a).

But this obligation is statutory, not contractual, and the statute provides a scheme for judicial review. That scheme allowed Resort Center to file an administrative appeal from Summit County's inaction within 30 days of the deadline for the county to respond. Utah Code § 17-27a-509.5(2)(e). But Resort Center didn't file an administrative appeal.

Resort Center sued three years after requesting a written decision. So any statutory cause of action would have been time-barred.[11]

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[11] Even if Resort Center had filed an administrative appeal, money damages would have been unavailable. Utah Code § 17-27a-509.5(5). ("There shall be no money damages arising from a claim under this section.").

Finally, Resort Center argues that Summit County breached the development agreement by creating new requirements for roadways and wetland mitigation plans. The district court rejected this argument, concluding that these requirements were consistent with the previously approved site plan and the municipal code. Resort Center doesn't address the district court's reasoning, and we uphold the ruling on this basis. *Starkey ex rel. A.B. v. Boulder Cnty. Soc. Servs.*, 569 F.3d 1244, 1252 (10th Cir. 2009).

* * *

Even though Resort Center had a vested right to carry out the second phase, Resort Center didn't submit a plat proposal that conformed to the approved site plan. And Summit County had no contractual duty to approve a nonconforming proposal. Given the absence of such a duty, Summit County didn't breach the development agreement by rejecting the 2018 proposal. The district court thus correctly determined that Resort Center's proposed amendments would have been futile.

4. Summit County has not issued a final decision, so the claim for a regulatory taking is unripe.

Resort Center also sought to amend the complaint by adding a claim for a regulatory taking. This claim would arise from Summit County's enactment of an ordinance (Ordinance 692). Through the ordinance, Summit County prohibited further development without the approval of the

EPA and Utah Environmental Quality Division. *See* Summit County Code § 4-7-2; *see also* p. 2, above.

A claim for a regulatory taking is not prudentially ripe until the governmental entity issues a "final decision." *Williamson Cnty. Reg'l Plan. Comm'n. v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), *overruled on other grounds by Knick v. Township of Scott, Penn.*, 139 S. Ct. 2162 (2019); *N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1224–25 (10th Cir. 2021). And Summit County has not applied the ordinance to Resort Center's property. So the district court concluded that a new claim for a regulatory taking would be prudentially unripe.

We agree with this ruling. A developer must submit a valid development proposal before a regulatory body can issue a final decision. *See N. Mill St., LLC*, 6 F.4th at 1229–30 (concluding that a developer's takings claim was prudentially unripe because the developer "ha[d] not yet submitted a development proposal for [the city government] to review"). Summit County could not apply the ordinance until Resort Center submitted a plat conforming to the approved site plan, and Resort Center has not submitted a plat conforming to that plan.

Resort Center argues that it has (1) exhausted administrative remedies and (2) requested a final decision from the county. These arguments don't bear on the finality of Summit County's decision. *See Williamson v. Cnty. Reg. Planning Comm'n v. Hamilton Bank of Johnson*

City, 473 U.S. 172, 192 (1985) ("The question whether administrative remedies must be exhausted is conceptually distinct from the question whether an administrative action must be final before it is judicially reviewable.").

Because Summit County has not applied the ordinance to Resort Center's property, any claim for a regulatory taking would be prudentially unripe. So we affirm the denial of leave to add a claim for a regulatory taking.

III. Conclusion

The district court properly

- dismissed Resort Center's claims against the EPA and
- denied Resort Center's motions for leave to amend the claims against Summit County.

We thus affirm.[12]

Entered for the Court

Robert E. Bacharach
Circuit Judge

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[12] Resort Center also named the former owner of the property, United Park City Mines, as a party to this appeal. But Resort Center presented no disagreement with the district court's dismissal of United Park. In its reply brief, Resort Center expressly disavow "appealing [United Park's] dismissal." Appellant's Reply Br. at 15. And Resort Center does not attach the order of dismissal to its opening brief or include the order of dismissal in the appendix. *See* note 7, above. Although Resort Center requests reversal of United Park's dismissal, we consider that request a mistake because Resort Center has not presented an argument to challenge the dismissal itself.