

Advisory Opinion #118

Parties: Travis Taylor and City of North Logan

Issued: October 31, 2012

TOPIC CATEGORIES:

E: Entitlement to Application Approval (*i.e.*, Vesting)
F: Complete Land Use Application
K: Compliance with Mandatory Land Use Ordinances
Other Topics(v): Interpretation of Ordinances

In the absence of specific zoning standards in the locality's ordinance, the applicant's development rights vested when the concept plan is approved. The application was complete, and, by approving the concept plan, the government entity determined that the application complied with the local zoning ordinance. The locality's ordinance required compliance with a general plan, as well as an additional plan for a mixed use "city center." Because those plans were cited, the applicant could claim vested rights if the application complied with the ordinance.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Travis Taylor

Local Government Entity: City of North Logan

Applicant for the Land Use Approval: North Logan Townhomes, LLC

Type of Property: Residential Development

Date of this Advisory Opinion: October 31, 2012

Opinion Authored By: Elliot R. Lawrence
Office of the Property Rights Ombudsman

Issues

Does an applicant's right to develop vest when a Concept Plan is approved?

Summary of Advisory Opinion

The applicant's right to develop vested when the concept plan was approved. The application was considered complete, and was determined to comply with the zoning ordinances. The ordinance in question referred to a general plan and a specific "City Center" plan, which approved higher density development. Since those plans were made part of the ordinance, the applicant could claim vested rights if the application complied with the development standards already approved. Moreover, approval constituted a representation which the applicant could rely upon, and possibly claim the right to develop under the doctrine of zoning estoppel.

Review

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE ANN. § 13-43-205. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and

neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Travis Taylor, on behalf of North Logan Townhomes, LLC on July 25, 2012. A copy of that request was sent via certified mail to Jeff Jorgenson, City Administrator of North Logan, at 2076 North 1200 East, North Logan, Utah. 84341. The City received that copy on July 26, 2012.

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 an Advisory Opinion, with attachments, submitted by Travis Taylor, received July 25, 2012.
2. Copy of “Development Plan Approval Process” for The Cove@North Logan, submitted by the City of North Logan, received August 31, 2012.
3. Findings of Fact, North Logan City Council (August 15, 2012), submitted by Travis Taylor, received September 6, 2012.
4. Response from City, received September 26, 2012.
5. Reply from Travis Taylor, received October 9, 2012.

Background

North Logan Townhomes, LLC owns a 5.5 acre parcel, located at the corner of 400 East and 2000 North in North Logan. The parcel’s zoning is “MX-G” (Mixed Use General), which is intended to “facilitate the integration of diverse but compatible uses into a single development, with the goal of creating a community that offers ‘live, work, and play’ opportunities.” NORTH LOGAN CITY CODE, § 12C-1052. Residential units are allowed in the MX-G zone, if part of a “mixed use development plan” specifically approved by the City. *Id.*, § 12C-1001 (Permitted and Conditional Uses).¹ Development within the MX-G zone requires a Development Agreement, enabling the City to “tailor” each project. *Id.*, § 12C-1055. Uses listed in an approved Development Agreement are considered permitted uses in the MX-G zone. *Id.*, § 12-1057.

The North Logan Townhomes parcel is adjacent to or part of an area designated as the “city center.” The adjoining properties are mostly undeveloped, with a few single-family homes. It appears that the City hopes the city center will include a mix of residential and commercial development, and has adopted the MX-G zone as one means to guide development towards that

¹ Most allowed uses in the MX-G zone are either “M” (requiring an approved development plan), or “C” (conditional uses). Residential uses are listed as “M.”

goal. One aspect of the city center concept is higher density residential areas within walking distance of commercial uses.

North Logan Townhomes, LLC is owned and managed by Travis Taylor, who sought approval for “The Cove@North Logan,” a subdivision on the parcel with 64 town home units, divided among 15 buildings. After consulting with the City’s planning staff, Mr. Taylor submitted the application on January 10, 2012. The subdivision included a playground area, and other landscaped areas.

The City has a two-phase approval process for subdivisions, after initial review by the planning staff. An application is first presented to the City’s Planning Commission for a recommendation on “Concept Plan” of the proposed development. The Concept Plan is then considered by the City Council. After approval of the Concept Plan, a more detailed “Development Plan” is prepared, reviewed by the City’s staff, and presented to the Planning Commission for recommendation. The Development Plan is then considered by the City Council. *Id.*, §§ 12D-401 and -402.²

Concept Plan approval includes review of several aspects of the development, including how the project would “fit” into the neighborhood, the effect on neighboring properties, compliance with the City’s general plan, and how the project would impact future development. *Id.*, §§ 12D-115(2) and -401(2). In addition, proposed development in the MX-G zone must be evaluated according to the City’s general plan, the city center plan, sound planning practices, the purposes of mixed use zones, and surrounding land uses. *Id.*, § 12C-1053.

Development plan analysis focuses on the specifics of the project, including technical reports and specifications. The plan must include cross sections, street profiles, topography, detailed landscaping plans, set backs, and utility service. A plan must identify the zoning designation for the property, or any zoning changes required. *Id.*, § 12D-402. Significantly, a development plan does not require evaluation of how the proposed development complies with the general plan.

Mr. Taylor’s townhome application was reviewed by the City’s planning staff, who recommended approval. The staff concluded that the application satisfied the criteria listed in §§ 12D-115 and 12D-401, specifically stating that the proposed subdivision met the purposes and characteristics of a mixed-use zone. The development complied with the City’s general plan and plans for development of the city center, by placing higher density housing near potential businesses.³ On February 1, 2012, the Planning Commission favorably recommended the Concept Plan for The Cove, adopting the staff report.⁴

² It appears that a preliminary plat is approved simultaneously with a Development Plan. Final plat approval completes the process. NORTH LOGAN CITY CODE, § 12D-403

³ According to the planning staff, higher density housing is a necessary component of the planned City Center. Section 12C-1053 requires evaluation of all proposed developments within the MX-G zone according to the plan for the City Center.

⁴ The Planning Commission added a recommendation that the project include a sidewalk on its southern edge, to encourage pedestrian traffic.

The staff report for the City Council echoed the Planning Commission report. The staff specifically explained that the project's density of 11.6 units per acre was considered "medium density," and pedestrian-friendly, both of which are consistent with the mixed-use concept and the city center plan. One council member objected to the project, because it only had one use (*i.e.*, single-family residential) as opposed to a mixture of uses. Despite this objection, the City Council approved the Concept Plan on February 16, but added a traffic study to the requirements.

Following approval of the Concept Plan, Mr. Taylor consulted with the City's staff on preparing the Development Plan, including a Development Agreement. The proposed Development Plan was presented to the Planning Commission on May 3, 2012. The City's planning staff again recommended approval, stating that the proposed plan complied with the required provisions of the City Code.

Although the May 3 meeting was not scheduled to be a public hearing, the Planning Commission invited public comments. A number of neighboring property owners objected to the townhome development, citing the change in the community's nature, increased traffic, and other infrastructure concerns.⁵ Because of the questions raised, the Planning Commission tabled the application, and directed the planning staff to submit a new report addressing the concerns.

Consideration of the application continued on June 13, 2012. The City's planning staff again recommended approval of the Development Plan, stating that the townhome development complied with the City's ordinances and general plan. The staff also submitted materials explaining how the higher density supported development of the planned city center. In addition to public comments opposing the higher density townhome project, a member of the Planning Commission argued against approval, introducing his own analysis of the density levels from the surrounding area.⁶ This commissioner used this data to argue that the townhome project's density was too high, even though the Concept Plan had already approved the number of units. The Planning Commission did not recommend approval of the Development Plan.

On July 18 the Development Plan was considered by the City Council. The City's planning staff recommended approval, notwithstanding the unfavorable recommendation by the Planning Commission. Public comments objected to the density of the project, with neighbors arguing that there was no "transition" between the low-density areas and the townhome development.

The City Council also revisited the question of whether the proposed townhome project should be considered a "mixed use." At the staff's suggestion, Mr. Taylor proposed using one of the units for a daycare business, thus establishing a second use. The City Council rejected this proposal, and concluded that the development had a "single use," not a "mixed use." The Council also concluded that the density was too high, and so rejected the Development Plan.

⁵ Some public comments contended that the City's utility and public safety facilities would not be able to support the townhome development. The City's staff explained that the City's utility and public safety reviewed the concept plan, and determined that the proposed development could be adequately served.

⁶ The commissioner, Mark Hancey, based his analysis on the existing density in the area immediately surrounding the proposed townhome project.

In its Findings of Fact, the City Council acknowledged that it had previously approved the Concept Plan, which determined that the townhome development complied with the City's general plan, city center plan, and the MX-G zone. However, the City Council relied on a City ordinance which voided approvals granted in violation of the City Code. The Council determined that the density proposed by Mr. Taylor was too high and not sensitive to the adjacent residential uses. The Council also reversed its earlier decision, asserting that each development in a mixed use zone required a mixture of uses. In addition, the City Council expressly found that the Concept Plan approval did not grant vested rights to Mr. Taylor.

Analysis

I. Mr. Taylor May Claim Vested Rights in the Concept Plan Approval.

Because the City approved the Concept Plan, Mr. Taylor may claim vested rights in the aspects approved by the Concept Plan, including density and compliance with the zoning ordinances. Since Mr. Taylor may claim vested rights in the Concept Plan, the City cannot "undo" the approval that was granted.

A. *The Vested Rights Doctrine.*

Utah's vested rights doctrine establishes a definite date at which a property owner may rely on local ordinances. "[A]n applicant for subdivision approval . . . is entitled to favorable action if the application conforms to the zoning ordinance in effect at the time of the application . . ." *Western Land Equities v. City of Logan*, 617 P.2d 388, 391 (Utah 1980). The Utah Legislature codified the *Western Land* rule in § 10-9a-509(1)(a).⁷ The purpose of the vested rights doctrine was explained by the Utah Supreme Court:

A property owner should be able to plan for developing his property in a manner permitted by existing zoning regulations with some degree of assurance that the basic ground rules will not be changed in midstream. . . . An applicant for approval of a planned and permitted use should not be subject to shifting policies that do not reflect serious public concerns.

Western Land Equities, 617 P.2d at 396. "Stated simply, [a] [c]ity cannot change the rules halfway through the game." *Springville Citizens for a Better Community v. City of Springville*, 1999 UT 25, ¶ 30, 979 P.2d 332, 338. There are two exceptions which override an applicant's vested right to develop. First, if there is a "compelling, countervailing public interest," rejection of the application may be justified, bearing in mind that "[i]t is incumbent upon a city . . . to act in good faith and not to reject an application because the application itself triggers zoning reconsiderations that result in a substitution of the judgment of current city officials for that of their predecessors." *Western Land Equities*, 617 P.2d at 396. The second exception provides that

⁷ See also UTAH CODE ANN. § 17-27a-508(1)(a) (pertaining to counties). "An application for a land use approval is considered submitted and complete when the application is provided in a form that complies with the requirements of applicable ordinances and all applicable fees have been paid." *Id.*, §10-9a-509(1)(f).

an application may be denied if the local government has initiated proceedings to amend the zoning ordinance. *Id.*, see also UTAH CODE ANN. § 10-9a-509(1)(a).⁸

B. Vested Right in The Concept Plan.

The Mixed Use zoning ordinance itself provides no “traditional” standards to guide development. Instead, the ordinance is a means of “tailoring” development on a case-by-case basis, according to identified goals. The ordinance does not establish a minimum density or even a means to calculate allowable density. Nearly all uses are either conditional or require specific approval by the City.⁹

Instead of specific guidelines, the Mixed Use Ordinance requires compliance with the City's General Plan, the City Center Plan, the Purposes of the Mixed Use Zone, and Sound Planning Practices. Compliance with the General Plan and the City Center Plan is mandatory, because the City established them as the development guidelines for the Mixed Use Ordinance.¹⁰ Mr. Taylor is entitled to approval if his application complies with those guidelines, and the City is obligated to follow them. “The City . . . [may] not . . . disregard its mandatory ordinances.” *Springville Citizens*, 1999 UT 25, ¶ 30, 979 P.2d at 338. Since these plans are mandatory parts of the City's zoning ordinances, Mr. Taylor may rely upon them and claim vested rights based on compliance with them.¹¹

By approving the Concept Plan, the City determined that Mr. Taylor's application complied with the City's General Plan, City Center Plan, the purposes of the mixed use zone, and sound planning practices. With that approval, Mr. Taylor acquired the vested right to develop according to the Concept Plan. The City's planning staff, its Planning Commission, and the City Council all agreed that the application was complete, and conformed to the General Plan and City Center Plan, including acceptable density, uses, and layout.¹² The City cannot change the allowable density from what was previously approved in the General Plan and City Center Plan, because those plans are mandatory, not advisory. Since the City found that the Concept Plan satisfies the development criteria established in the Mixed Use Ordinance, Mr. Taylor has the right to approval based on that plan.

The City cannot change its rules “midstream,” by adopting a new—and unsupported—density measure. The vested rights rule allows rejection of an application if warranted by a “compelling, countervailing public interest.” However, “buyer's remorse” over previously-adopted plans does not constitute a compelling, countervailing public interest. “A property owner should be able to plan for developing . . . property in a manner permitted by existing zoning regulations with some

⁸ The City does not claim that an amendment was pending when Mr. Taylor submitted his application.

⁹ All residential uses require approval by the City Council.

¹⁰ See *id.*, § 10-9a-405 (General Plans are advisory, but the “impact” may be determined by a local ordinance).

¹¹ *Id.*, § 10-9a-509(1)(a).

¹² The City specifically concluded that the townhome development satisfied the concept of “mixed use,” agreeing that Mr. Taylor's application complies with the City's zoning ordinances. This Opinion does not address whether the City's interpretation of the term “mixed use” was appropriate. The interpretation must stand, because Mr. Taylor acquired the vested right to proceed with his development when the City concluded that his proposed development satisfied its criteria for a “mixed use.”

degree of assurance that that the basic ground rules will not be changed in midstream.” *Western Land Equities*, 617 P.2d at 396.

In addition, the City Council’s determination that the density approved in the Concept Plan was “too high” is not supported by the Mixed Use Ordinance. That ordinance refers to the General Plan and the City Center Plan to guide development. Those plans call for medium density in the area of 400 East and 2000 South—the proposed City Center. According to materials submitted to the City Council, the density of Mr. Taylor’s application falls within the “medium density” range.¹³

The City must follow the guidelines for density established in the ordinance, and not calculate density based on surrounding properties. In the first place, such a calculation is not supported by the language of the Mixed Use Ordinance. Secondly, the City has already determined that medium density is preferable in the City Center Area. That plan will not come to fruition unless the City allows development with medium density. Mr. Taylor’s plan is not subject to different rules simply because it is the first development in the City Center.

C. The City Cannot Revoke Vested Rights.

The City Council could not “revoke” Mr. Taylor’s vested rights, because the City does not have such authority. Vested rights arise because an application complies with zoning ordinances. Once the right to develop vests, it cannot be lost or taken away, except as provided by statute.¹⁴ The City’s planning staff, Planning Commission, and City Council all determined that Mr. Taylor’s application was complete, and that it complied with the City’s zoning ordinance. Mr. Taylor’s right to develop according to the Concept Plan vested when it was approved, and the City Council cannot revoke that right.¹⁵

II. The City May be Estopped From Denying Approval for Mr. Taylor’s Application.

Mr. Taylor could establish that he relied upon the City’s representations and incurred extensive expenses, thus claiming the right to develop under the zoning estoppel doctrine. “Zoning estoppel applies . . . when [a local government has] committed an act or omission upon which the developer could rely in good faith in making substantial changes in position or incurring extensive expenses.” *Stucker v. Summit County*, 870 P.2d 283, 290 (Utah Ct. App. 1994) (*quoting Utah County v. Young*, 615 P.2d 1265, 1267 (Utah 1980)).¹⁶ Approval of the Concept Plan is obviously an act on the part of the City. Mr. Taylor would need to show that he relied on that approval and incurred extensive expenses or made a substantial change in position because of

¹³ Mr. Taylor’s townhome development has a density of 11-12 units per acre, which is medium density according to materials submitted to the City Council.

¹⁴ If there is compelling, countervailing public interest or a pending ordinance change, the applicant’s development rights do not vest. Vested rights may be forfeited if an applicant does not proceed with diligence. *Id.*, § 10-9a-509(1)(g).

¹⁵ If Mr. Taylor’s application had been based on erroneous information that was material to the decision, the application would not be considered complete, and would be ineligible for the vested rights rule.

¹⁶ In addition, the developer needs to show “that it would be highly inequitable to deprive the owner of his right to complete [the] proposed development.” *Western Land Equities*, 617 P.2d at 391.

that representation.¹⁷ The materials submitted for this Opinion do not discuss the monetary investment Mr. Taylor made because the City approved the Concept Plan. It remains to be seen, therefore, if zoning estoppel provides Mr. Taylor with a claim to proceed with his development.

Conclusion

Approval of the Concept Plan granted Mr. Taylor vested rights to develop according to the plan and the City's zoning ordinances. The Mixed Use Ordinance refers to the City's General Plan and City Center Plan as guiding development. Those plans call for medium density housing, which was proposed by Mr. Taylor. The City's planning staff, Planning Commission, and City Council all approved the Concept Plan, and agreed that the proposed development complied with the City's zoning ordinances. Mr. Taylor's right to proceed with his proposed development thus vested in the approvals granted in the Concept Plan. The City cannot change those approvals, and vested rights cannot be revoked.

Mr. Taylor may possibly claim that it would inequitable for the City to deny him the right to develop, based on the zoning estoppel doctrine. Approving the Concept Plan constitutes a representation by the City. It is not known if Mr. Taylor has incurred extensive expenses or otherwise changed his position because of the City's approval, so it is not possible for this Opinion to determine whether zoning estoppel prevents the City from denying the application.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

¹⁷ "The concern underlying [zoning estoppel] is the economic hardship that would be imposed on a property owner whose development plans are thwarted." *Id.*, 617 P.2d at 391. In *Western Land Equities*, the Utah Supreme Court declined to fashion the vested rights rule on a zoning estoppel model, requiring reliance on the part of the developer. However, the court did not reject estoppel as a valid legal theory protecting the economic interests of property owners and developers. See *Utah County v. Young*, 615 P.2d 1265 (Utah 1980); *Stucker*, 870 P.2d at 290.

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

MAILING CERTIFICATE

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

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

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

Jeff Jorgensen, City Administrator
City of North Logan
2076 N. 1200 East
North Logan, UT 84341

On this _____ day of October, 2012, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

Office of the Property Rights Ombudsman