Advisory Opinion #227

Parties: Harrisville City and David Green

Issued: August 11, 2020

TOPIC CATEGORY:

Proceeding with Reasonable Diligence

The continued validity of an approval of a land use application is contingent upon the applicant proceeding after approval to implement the approval with reasonable diligence. The developer was approved for development of a commercial complex of buildings in 2005. Upon approval, the applicant secured one building permit and completed one structure of the development plan, but did not fully carry out the rest of the approved plan. The developer may not rely on these prior approvals for any further development because the approvals have expired. The developer maintains no vested rights to continue development because no evidence has been presented to indicate that he proceeded with reasonable diligence to complete his development as approved. In order to move forward with current development plans, the developer must resubmit a development application and ensure compliance with existing codes and standards.

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ADVISORY OPINION

Advisory Opinion Requested By:	Ronda Kippen, Harrisville City
Local Government Entity:	Harrisville City
Land Use Applicant:	David Green
Type of Property:	Residential/Commercial
Date of this Advisory Opinion:	August 11, 2020
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUE

Does a developer have a vested right to continue developing according to a site plan that was approved in, and partially implemented, in 2005, but has not progressed any further?

SUMMARY OF ADVISORY OPINION

The continued validity of an approval of a land use application is contingent upon the applicant proceeding after approval to implement the approval with reasonable diligence. The developer was approved for development of a commercial complex of buildings in 2005. Upon approval, the applicant secured one building permit and completed the principal structure of the development plan, but did not fully carry out the other structures and improvements anticipated by the approved plan due to a changing economy and financial constraints. The developer now wishes to move forward according to the prior approval.

Because the project was not approved as a stage development and no effort was made for an extension of time limitations mandated by local ordinance, the prior approvals have expired and the developer maintains no vested rights to continue development because no evidence has been presented to indicate that he proceeded with reasonable diligence to complete his development as approved. Consequently, if Mr. Green would like to move forward with his current development

plans, he must resubmit his development application and ensure compliance with existing codes and standards.

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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 Ronda Kippen, on behalf of Harrisville City on June 8, 2020. A copy of that request was sent via certified mail to David Green, 1185 North Washington Blvd., Harrisville, Utah 84404 on June 18, 2020.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion (and attachments), submitted by Ronda Kippen, Harrisville City Planner, on behalf of Harrisville City, received June 8, 2020, with attachments including:
    a. Harrisville City Ordinance 355, June 8, 1999.
    b. Letter from Jeff Pearce, potential adversely affected party (undated).
2. Emails from David Green, received June 22, 2020 and July 29, 2020, with following attachment:
    a. Mountain View Office & Storage, Phase 2 Site Plan, dated March 2020.
3. Telephone conversation with Ronda Kippen, July 28, 2020.
4. Telephone conversation with David Green, July 29, 2020.
5. Emails from Ronda Kippen, received July 27th through August 3rd, 2020, with attachments as follows:
    a. Harrisville City, Ordinance Number 255, November 26, 1991;
    b. Harrisville City, Ordinance No. 261, January 12, 1993;
    c. Harrisville City, Ordinance No. 335, June 8, 1999
    d. Harrisville City, Ordinance No. 357, June 8, 2004;
    e. Mountain View Office & Storage, LLC Site Plan, dated January 6, 2005.

BACKGROUND

David Green is the owner of property located on Washington Blvd in Harrisville, Utah. In 1999, Mr. Green submitted an application to rezone a portion of his and neighboring property from the

Residential RE-15 Zone to the Planned Commercial CP-2 Zone, together with a commercial subdivision application to convert an existing home into commercial office use with enclosed storage bays for tenant use. At the time he first applied, Mr. Green did not have set plans for commercial activity for the entire property behind the home that he asked to be rezoned, but wanted the property rezoned for future commercial use. Following several hearings, Mr. Green drafted and submitted a site plan for commercial use of the entire property. The City's Planning Commission gave positive recommendations, with conditions, for the rezone and subdivision, and approved a site plan for the proposed commercial activity on April 14, 1999. On April 27, 1999, the City Council approved the rezone and two-lot commercial subdivision subject to recommendations defined by the Planning Commission.

In the years that followed, Mr. Green remodeled the home for commercial use and purchased additional adjacent property and submitted applications to rezone the additional property from RE-15 to CP2. This received a positive recommendation from the Planning Commission on November 10, 2004 and was approved by the City Council on December 14, 2004. Mr. Green thereafter applied for a subdivision with site plan for an expansion of his commercial activity including a complex of additional structures, which received positive recommendations from the Planning Commission on January 12, 2005, and was granted preliminary and final approval by the City Council on January 25, 2005.

After having received the 2005 city approvals, Mr. Green does not appear to have carried out his development plans fully, with only one building being completed with the last building permit being issued in 2005. Mr. Green has explained that he was financially overextended following the building of the initial, principal building of the site plan, and also cited the economic downturn of 2008 as a limiting factor of his ability to continue his development. Mr. Green has recently decided to move forward with development plans by relying on the approvals given in 1999 and 2005. A neighboring citizen has raised concerns about relying on these approvals and argues that they were improperly granted, and that the site plan should be considered expired and the expansion of the site should cease.

Harrisville City has requested that this Office provide an Advisory Opinion as to whether Mr. Green has a vested right in the 2005 Mountain View Office and Storage Site Plan, allowing him to move forward with expansion of the site.

ANALYSIS

I. Challenge to the Validity of Mr. Green's Prior Approvals is Closed

Harrisville City has asked the Ombudsman's Office to provide an opinion on whether Mr. Green has vested development rights from prior land use approvals because the City has received a citizen complaint about Mr. Green's intentions to move forward with development activity that is reliant on these prior approvals. The complaint alleges that the approvals did not comply with several substantive or procedural requirements of the zoning ordinance in effect at the time. The relevant ordinances in effect at the time of Mr. Green's applications include Ordinance Number 255 "Uniform Zoning Ordinance of Harrisville, Utah" (1991)[1], as amended or added unto by

[1] Harrisville City, Utah, Ordinance 255 (Nov. 26, 1991).

certain provisions of later ordinances such as Ordinance 261 "Subdivision/Public Works Ordinance" (1993)[2] (amended and renumbered by Ordinance 357 (2004)[3], and Ordinance 335 "Site Plan Approval" ordinance (1999)[4]. The City concedes that Mr. Green's approvals did not meet certain procedural requirements of these ordinances.

This Office concurs, and finds that by and large, the prior sitting Planning Commissions and City Councils which heard Mr. Green's applications appear to have deviated from the zoning ordinance approval requirements and conflated the approvals of the preliminary and final site plans for both the rezone and subdivision applications. For example, the subdivision provisions required separate, consequential approvals including (1) planning commission approval of a preliminary plan and plat, (2) planning commission approval of a final plat, and (3) city council approval of the final plat and plan.[5] However, in both 1999 and 2005, the planning commission appears to have given a combined "preliminary/final recommendation" for approval that is then mirrored by the City Council as "preliminary and final approval" for the proposed subdivisions.

Additionally, Ordinance 255, the zoning ordinance in effect at the time of Mr. Green's 1999 rezone application that governed the Planned Commercial Zone provides that a rezoning petition for a Planned Commercial Zone must be submitted to the Planning Commission and accompanied by a preliminary development plan for the commercial use.[6] Upon recommendation from the Planning Commission, the City Council concurrently approves the petition and preliminary development plan.[7] *After* rezoning, a *final* development plan is submitted to the Planning Commission for approval prior to issuance of any building or land use permits. However, in Mr. Green's case, the planning commission motioned to "give preliminary *and* final approval of the commercial site plan" (emphasis added). Later, at the City Council, the site plan was only "reviewed", but no City Council action was taken in regards to the site plan.

Ordinance 255 provided that licenses and permits, "if issued in conflict with the provisions of this Zoning Ordinance shall be null and void."[8] The third party complaint has alleged a number of issues with the approval process for Mr. Green's development applications, some of which are conceded by the City. However, in order to maintain legal standing to challenge a local land use decision, a petition must be timely filed. At the time of the 1999 approval, Utah law provided that a challenge to a municipality's land use decision in district court must be made within 30 days after the local decision is rendered.[9] By the time of the 2005 approvals, the legislature had added that a petition is "barred unless it is filed within 30 days."[10] As no challenge was timely filed as to either of these approvals, there is no standing for a third party to now challenge the validity of the approvals. Ultimately, however, because this Opinion concludes that any development rights Mr. Green had been given by the prior approvals have since expired, the validity of the approvals when issued is not determinative.

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[2] Harrisville City, Utah, Ordinance 261 (Jan. 12, 1993).
[3] Harrisville City, Utah, Ordinance 357 (June 8, 2004).
[4] Harrisville City, Utah, Ordinance 355 (June 8, 1999).
[5] Ordinance 261, Sections 6-7 (1993); Ordinance 357, Sections 6-7 (2004).
[6] Ordinance 255, ch. 20-7.
[7] *Id.* at ch. 20-9.
[8] *Id.* at ch. 1-8 .
[9] UTAH CODE ANN. § 10-9-1001(2) (1999).
[10] UTAH CODE ANN. § 10-9a-801(6) (2005).

II. Prior Approved Site Plans Have Expired Under Zoning Ordinance Time Limits

Chapter 20-11 of Ordinance 255 contains a provision on time limitation, which states that when a CP-2 zone is established, a building permit "must be secured and construction begun in accordance with the approved final development plan within eighteen months from the effective date of the ordinance establishing such zone or other period of time as determined by the City Council."[11] Additionally, all construction authorized must be completed "within three years of the date construction has commenced."[12] However, a plan for stage development requiring more time than these limits "may be approved by the City Council, after recommendation by the Planning Commission."[13] In the event that construction is not commenced or completed in the time limits specified, the Planning Commission must review the development and, if necessary, "revoke the plan approval and initiate proceedings to rezone said property to its prior classification."[14]

When Mr. Green first came before the planning commission in February 1999, he had requested that the entire property be rezoned commercial, though he only presented plans to convert the residence to office use. A councilperson questioned him as to what commercial use was planned for the back property, stating it was not the City's practice to rezone property to the commercial zone without a plan. Mr. Green responded that he had no plans for it then but wanted it zoned commercial now for future commercial use. Based on this, the Planning Commission recommended a rezone of only the portion currently being used. Mr. Green came back in April and obtained Planning Commission approval of a revised site plan that included other proposed buildings on the back portion of the property. At the April 27, 1999 City Council Meeting, a councilperson asked Mr. Green when he planned to begin construction of the office complexes, to which Mr. Green responded that he had started remodeling the front home for an office and that "it will be a few years before construction of additional offices are started."

Despite that it was apparent that Mr. Green did not intend to fully carry out his development plans upon approval, neither the Planning Commission nor City Council considered or approved a plan for stage development that would have established different time limits than those provided in Chapter 20-11.

The City concedes that if the proper approval procedures were followed, Mr. Green's 1999 approvals are expired because of Chapter 20-11, Time Limitation. However, the City suggests that because the City Council did not follow procedural requirements, both the first site plan in 1999 and site plan in 2005 should be treated as a an "Application to Existing Commercial District" per Chapter 20-12, and that the Chapter 20-11 Time Limitation does not apply.

Chapter 20-12 of Ordinance 255 states as follows:

[11] Ordinance 255, ch. 20-11.
[12] *Id.* at ch. 20-11.3.
[13] *Id.*
[14] *Id.* at ch. 20-11.2, 20-11.4.

> In the case of existing Commercial Districts, the Planning Commission and City Council may proceed to rezone such districts to an equivalent Planned Commercial Zone without the requirements of a preliminary development plan and other necessary information; but, after being so zoned to a Planned Commercial Zone, a preliminary and final development plan of each development shall be submitted in accordance with the provisions of this Chapter prior to the issuance of building permits, provided however, that improvements already in existence at the time of rezoning shall not be affected.[15]

Regarding the 1999 approvals, the City states that because Ordinance 255 required the City Council to concurrently approve a preliminary site plan with the rezone petition, and because the City Council only approved the petition (because the planning commission had already given preliminary and final approval of the site plan), the 1999 site plan should be treated as "Application to Existing Commercial District" per Chapter 20-12. As for the 2005 approvals, the City states that as the zoning ordinance by then had been amended by Ordinance 335 to provide the planning commission with site plan approval,[16] and because the City Council thereby approved only the rezone petition, the 2005 site plan should also be similarly treated.

The City's conclusions are misguided. First, Chapter 20-12 does not appear to apply to Mr. Green's development. Chapter 20-12 is meant to rezone existing commercial uses to the CP-2 zone without the need to concurrently submit proposed development site plans. Mr. Green's proposed rezones, in either 1999 or 2005, were not existing commercial uses at the time of the rezone. Rather, they were residential properties being rezoned CP-2 for the purpose of commercial use and development. In 1999, he was rezoning to convert a house into office use. In 2005, he was rezoning only the additional adjacent land that he had purchased, which also had been residential.

Second, even if Chapter 20-12 applied, it does not eliminate the time limitations of Chapter 20-11. Rather, while 20-12 would allow a rezone without concurrent approval of a site plan, the chapter states that "after being so zoned . . . [such development plans] shall be submitted in accordance with the provisions of this chapter." Reading Chapter 20-11 in harmony, the requirement that building permits issue and construction commence "within eighteen months from the effective date of the ordinance establishing such zone or other period of time determined by the City Council" is not excused for existing commercial district rezones. In other words, even if Mr. Green's rezone was allowed to be approved without concurrent site plan approval, unless the City Council expressly stated otherwise, he would still only have 18 months in which to submit and obtain approved site plans, and commence construction according thereto.

Finally, as it relates to the 1999 approvals, because it is suggested that Chapter 20-12 is only applicable because the City failed to follow the proper approval procedure, Chapter 20-12 would effectively operate as a waiver of the ordinance's mandatory time limitation provisions. The ordinance's plain language does not support, nor would equity permit, that the City would not be bound by the terms and standards of applicable land use regulations because it failed to comply

[15] *Id.* at ch. 20-12.
[16] *See* Ordinance 335, Section 3.0 (enacted June 8, 1999).

with mandatory provisions of those regulations.[17] If anything, Ordinance 255 suggests that the failure to follow the approval procedure would make the site plan approval null and void.[18]

Following the 1999 approvals, and again following the 2005 approvals, Mr. Green did not fully carry out the development plans approved in his site plans within the time limitations provided in local ordinance. Because of this, each of those site plans is expired.

III. Vested Rights Require Developers to Proceed with Reasonable Diligence

Even if Harrisville's time limitation provisions did not apply to Mr. Green's approvals, Utah law affords him no vested right to resume a previously approved development that has been abandoned for over a decade.

The vested rights rule, while addressing land use issues, has a basis in zoning estoppel as a law of equity,[19] which is focused primarily on the conduct and interests of the property owner.[20] The rule was set forth by the Utah Supreme Court in 1980 in *Western Land Equities v. Logan* (1980), which held that "an applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application *and if he proceeds with reasonable diligence*, absent a compelling, countervailing public interest."[21]

Section 10-9a-509 of Utah's Municipal Land Use Development and Management Act (LUDMA), subsequently enacted in 2005,[22] codified the principles in *Western Land Equities* and established a clarified standard stating that the continued validity of an approval of a land use application is "conditioned upon the applicant proceeding after approval to implement the approval with reasonable diligence."[23]

In this matter, Ordinance 255 allowed for specific approval of stage development if a particular development could not proceed all at once, and allowed the City Council to affix a different time limitation to a development than the default timeline provided by ordinance, if necessary. It also allowed for certain extensions of time to be awarded. Because these options were available under city code, but were not requested by the applicant, nor employed by the Planning Commission and City Council in approving Mr. Green's development plans, Mr. Green's approvals anticipated that he had the ability to carry out the development as granted, and would do so in the time limitations provided. The last land use approval Mr. Green received for his proposed development was granted in 2005. Though Mr. Green partially acted on this approval by obtaining a building permit in 2005 to construct one building, the rest of the commercial complex approved in 2005 has not been built out in the last fifteen years. A 15-year delay does

[17] *But cf.* UTAH CODE ANN. § 10-9a-509(2) (which establishes the opposite, that municipalities are bound by and must comply with mandatory provisions of land use regulations).
[18] *See* Ordinance 255, ch. 1-8 (licenses and permits issued in conflict with the provisions of the zoning ordinance shall be null and void).
[19] *Patterson v. American Fork*, 2003 UT 7, ¶ 27, 67 P.3d 466.
[20] *Western Land Equities v. Logan*, 617 P.2d 388, 391 (Utah 1980).
[21] *Western Land Equities v. Logan*, 617 P.2d 388, 396 (Utah 1980) (emphasis added).
[22] Senate Bill 60, Chapter 254, Utah 56th Legislature, 2006 General Session.
[23] UTAH CODE ANN. § 10-9a-509(1)(e).

not appear to satisfy the reasonable diligence standard, and neither Mr. Green nor the City has provided any additional evidence to support a finding of reasonable diligence.

Because Mr. Green did not develop as anticipated, he does not possess a vested right to continue to develop according to his prior approvals because he did not proceed with reasonable diligence. Any current plan Mr. Green has for further development of his property will be subject to the City's existing land use regulations, including application of current development standards.

CONCLUSION

The continued validity of an approval of a land use application is contingent upon the applicant proceeding after approval to implement the approval with reasonable diligence. Because Mr. Green has paused development of his 2005 approved site plan for the past 15 years, he maintains no vested rights to continue development under that approval because he did not implement his development plan with reasonable diligence.

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

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.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in UTAH CODE § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

MAILING CERTIFICATE

On August 12, 2020, I caused the attached Advisory Opinion to be delivered via the United States Postal Service, postage prepaid, and certified mail, return receipt requested, and addressed to the person shown below.

David Green
1185 North Washington Blvd
Harrisville, Utah 84404

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Office of the Property Rights Ombudsman