Advisory Opinion #33

Parties: Danville Land Investments, LLC and Draper City

Issued: March 12, 2008

TOPIC CATEGORIES:

E: Entitlement to Application Approval (Vesting)
F: Complete Land Use Application
K: Compliance with Mandatory Land Use Ordinances
L: Review for Application Completeness

According to the Utah Code, an application will be deemed complete if the local government has not notified the applicant that it is deficient within 30 days of submission. A complete application is entitled to substantive review, along with approval if it complies with all applicable laws, ordinances, and standards in place at the time the application was complete.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Danville Land Investments, LLC by Kevin Anderson, Anderson Call, Counsel for Property Owners
Local Government Entity:	Draper City
Applicant for the Land Use Approval:	Danville Land Investments, LLC (Thane Smith)
Project:	Residential Subdivision
Date of this Advisory Opinion:	March 12, 2008
Opinion Authored By:	Brent N. Bateman, Lead Attorney, Office of the Property Rights Ombudsman

Issues

Is the property owner entitled to preliminary approval of a subdivision application under UTAH CODE § 10-9a-509, and does the City's requirement that the application be modified in order to facilitate access to an open space area amount to a compelling, countervailing public interest sufficient to justify denial of the application?

Summary of Advisory Opinion

By operation of UTAH CODE § 10-9a-509.5, Danville Land Investments, LLC's preliminary plat application is complete. Danville is therefore entitled to substantive review of and a decision regarding its Preliminary Plat Application. Moreover, Draper City has not established a compelling, countervailing public interest in relocating the road along the extreme westerly boundary of the Property and requiring that the road be single loaded. If the road configuration complies with the ordinances and standards in place at the time of application, the road must be approved as configured by Danville.

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 § 13-43-205 of the Utah

Code. The 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.

The request for this Advisory Opinion was received from Danville Land Investment, LLC ("Danville") on November 14, 2007. A letter with the request attached was sent via certified mail, return receipt requested, to Draper City Recorder Kathy Montoya, at 1020 E. Pioneer Road, Draper, Utah 84020. The return receipt was delivered and signed on November 20, 2007, indicating that the City had received it. A response was received from the Draper City Attorney on December 12, 2007. Sometime afterward, this Advisory Opinion was placed on temporary hold at the request of Kevin Anderson, attorney for Danville. The Author of this Advisory Opinion met with Kevin Anderson, on January 30, 2008, and this matter was renewed and discussed. The author also discussed this matter by telephone with Douglas Ahlstrom, Draper City Attorney, on February 6, 2008.

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 dated November 9, 2007 with the Office of the Property Rights Ombudsman by Danville Land Investments, LLC, including exhibits.
2. Response letter from Douglas J. Ahlstrom, Draper City Attorney, dated December 12, 2007.

Statutes and Ordinances

1. Sections 10-9a-509 – 509.5 and 10-9a-603-607 of the Utah Code

Background

Danville Land Investments LLC ("Danville") is the owner of a 144.65 acre parcel located in Draper City ("Draper"). The parcel located at approximately 12800 South & Galena Park Drive, west of the Union Pacific Railroad tracks, east of the Jordan River Parkway (the "Property"). The Property is zoned RA-2.

In June 2006, Danville submitted a Preliminary Plat application for development of the Property. The development, called the Draper Preserve Subdivision, exceeded the open space and minimum lot size requirements of the RA-2 zone. The development featured a collector street called Galena Park Boulevard located along the east edge of the Property with a bridge extending

easterly over the railroad. This preliminary plat application was later withdrawn at the recommendation of the City.

On September 1, 2006 Danville applied to modify and amend the zoning of the Property from RA-2 with conditions to RA-2 without conditions. This change would allow the required open space to be dispersed throughout the Property. The rezone application was approved on January 23, 2007. On September 8, 2006 a concept plan application was submitted to the City, which was approved with conditions on approximately May 22, 2007. According to the minutes of the Draper City Council Meeting dated May 15, 2007, in approving the Concept Plan, the Draper City Council found a compelling, countervailing public interest sufficient to require that the plan be changed so that the westernmost road on the development be single-loaded. The public interest reflected in the minutes was to "respect the vital interest the City has in maintaining a view perspective and improve public access to the Jordan River Parkway." On June 29, 2007 the preliminary plat application for the development of the Property as the Draper Preserve was submitted, and has since been revised. All required fees for the Preliminary Plat application were timely paid. The preliminary plat application does not show the road as single-loaded.

On July 20, 2007, Thane Smith, on behalf of Danville, sent a letter to Draper City requesting that the City determine that the Preliminary Plat Application was complete. Margaret Pahl, Senior Planner, replied on July 23, 2007, indicating that staff has been diligently evaluating the completeness of the application, and that Draper would respond by August 20. August 20, 2007 was more than thirty days after July 20, 2007, the date of the request. On August 24, 2007, the attorney for Danville sent a letter to the attorney for Draper City indicating that thirty days had passed without any indication of completeness from the City, and that therefore under UTAH CODE § 10-9a-509.5, the application was deemed complete. The City Council has not substantively reviewed or issued a decision regarding the preliminary plat application.

Analysis

A. The Application is Complete under UTAH CODE § 10-9a-509.5

Draper City argues that Danville's preliminary plat application remains incomplete.[1] Therefore, the City has not conducted a substantive review of Danville's application. Without regard to whether Danville's application actually remains deficient in any respect, and without regard to whether any requirement imposed by Draper City is legal or appropriate, the Application is deemed complete by operation of UTAH CODE § 10-9a-509.5(1)(d). Danville is entitled to substantive review of its application.

UTAH CODE § 10-9a-509.5 states

> (b) After a reasonable period of time to allow the municipality diligently to evaluate whether all objective ordinance-based application criteria have been met,

[1] Among the reasons that Draper believes the application to be incomplete is that it does not include an agreement with Union Pacific regarding a crossing of the railroad right-of-way. Issues regarding the railroad right-of-way are not examined herein, but are examined in a separate Advisory Opinion to be issued by the OPRO.

> if application fees have been paid, the applicant may in writing request that the municipality provide a written determination either that the application is:
>
> > (i) complete for the purposes of allowing subsequent, substantive land use authority review;
> >
> > . . . .
>
> (c) Within 30 days of receipt of an applicant's request under this section, the municipality shall either:
>
> > (i) mail a written notice to the applicant advising that the application is deficient . . .; or
> >
> > (ii) accept the application as complete for the purposes of further substantive processing by the land use authority.
>
> (d) If the notice required by Subsection (1)(c)(i) is not timely mailed, the application shall be considered complete, for purposes of further substantive land use authority review.

Danville submitted its Preliminary Plat application on June 29, 2007. Twenty-one days following that submission, Danville in writing requested a determination of application completeness.[2] This request in writing started the clock on a thirty-day time limit under UTAH CODE § 10-9a-509.5,[3] during which the City could either notify the property owner that the application was complete, or provide the specific respects in which the application was deficient.[4] Draper did not provide Danville with such notification.

The statute is clear and includes no provision for discretion on the part of the City: "If the notice required by Subsection (1)(c)(i) is not timely mailed, the application shall be considered complete, for purposes of further substantive land use authority review." Because the City did not notify Danville in writing that the Application was deficient, the application is deemed complete. Danville is now entitled to substantive review of its preliminary plat application, which the City must perform "with reasonable diligence." UTAH CODE § 10-9a-509.5(2)(a).[5]

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[2] This letter has not been provided to the OPRO. However, it is referenced in other documents.

[3] This section became effective on April 30, 2007. Although was then a new law, it was nevertheless fully effective.

[4] Utah Code § 10-9a-509.5 requires that such letter be submitted only after a reasonable time has passed. This Advisory Opinion expresses no opinion regarding whether 21 days is a "reasonable time" under the statute. Neither party has questioned whether the 21 days that elapsed between application and the demand letter was a reasonable time. More importantly, the City responded to Danville's demand letter, and acknowledged that it would provide a response regarding application completeness within thirty days of the demand letter. This indicates that the City considered that a reasonable time had passed after the application was submitted.

[5] It should be noted that deeming an application complete under Utah Code § 10-9a-509.5 does not effect a waiver of any properly and legally imposed conditions or requirements. Section 10-9a-509.5(3) states that "Subject to Section 10-9a-509, nothing in this section and no action or inaction of the land use authority relieves an applicant's duty to comply with all applicable substantive ordinances and regulations." Therefore, if the City's ordinances or regulations have imposed a legal requirement on a subdivision, and the application is deemed complete by operation of § 10-9a-509.5 despite that requirement not being met, the completeness of the application by operation of § 10-9a-509.5 is not a waiver of that requirement. The completeness of the application entitles the applicant to substantive review of the application. Properly imposed requirements, if any, can still be considered during the substantive review.

B. The Location of the Road is Not A Compelling, Countervailing Public Interest Sufficient to Deny the Preliminary Plat Application

At the May 15, 2007 meeting of the Draper City Council, the Council's approval of the concept plan included a requirement that the westernmost road in the development, shown on the developer's preliminary plan as a residential road with lots aligning both sides, be a single-loaded road, with no development on the west side of the road. This requirement arises because the Jordan River Parkway borders the development Property on the west. The City Council found that there was a compelling countervailing public interest in access to and a view of the Parkway open space.[6] Danville argues that no compelling countervailing public interest exists sufficient to allow Draper to deny their land use application for non-compliance with this requirement, and that the City does not have a right to dictate the alignment and configuration of the road in this way.

In Utah, a land use applicant is entitled to approval of a complete land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect.[7] UTAH CODE § 10-9a-509. This rule, sometimes known as the "early vesting rule," was adopted in Utah in 1980 in the case of *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 396 (Utah 1980), and later codified at UTAH CODE § 10-9a-509(1)(a)(i). The intent of the rule is to provide some reliability and predictability in land use regulation:

> It is intended to strike a reasonable balance between important, conflicting public and private interests in the area of land development. 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.

Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 396 (Utah 1980).

This rule dictates how a municipality can control the land use activities within its boundaries. If restrictions or guidelines on development are desired, the municipality must adopt ordinances to do so. Once enacted, those ordinances must be followed by land use applicants. Yet applicants also have an appropriate expectation that their application will not be denied midway through the process by unstated requirements. Development of property is a difficult and costly process, and the rule prevents a community from unfairly denying a compliant land use application after significant funds are spent. "The economic waste that occurs when a project is halted after

[6] The Minutes of the Council Meeting read as follows: "Council member Colbert moved to amend that in the area presently lot 83 south to Corner Canyon Creek needs to be a single loaded road to respect the vital interest the City has in maintaining a view perspective and improve public access to the Jordan River Parkway. With the addition of a finding that there is a compelling countervailing interesting the behalf of the City and that is the second most valuable open space in the City."

[7] Exceptions to this rule exist. One is relevant to this Advisory Opinion, and will be discussed below.

substantial costs have been incurred in its commencement is of no benefit either to the public or to landowners." *Id*.

One exception to this rule states that even if an application is complete and complies with all applicable laws and ordinances, a municipality may nevertheless deny it if a "compelling, countervailing public interest would be jeopardized" by approval of the application. *See* UTAH CODE § 10-9a-509(1)(a)(i). The term "compelling, countervailing public interest" is not defined in the Utah Code, nor has the exception been examined in recent case law. In the land use context, the phrase arose in the *Western Land Equities* case. In *Western Land Equities*, the court explained that this exception provides a safe harbor where communities can deny an application when important public interests come to light for the first time that have not been previously included in the community's ordinances:

> a rule which vests a right unconditionally at the time application for a permit is made affords no protection for important public interests that may legitimately require interference with planned private development. If a proposal met zoning requirements at the time of application but seriously threatens public health, safety, or welfare, the interests of the public should not be thwarted.

Western Land Equities, 617 P.2d at 395-6. The Court then expounds on the concept of the compelling, countervailing public interest:

> A city should not be unduly restricted in effectuating legitimate policy changes when they are grounded in recognized legislative police powers. There may be instances when an application would for the first time draw attention to a serious problem that calls for an immediate amendment to a zoning ordinance, and such an amendment would be entitled to valid retroactive effect.

Id. at 396.

Accordingly, a "compelling, countervailing public interest" inquiry requires a determination that the application raises an issue that "seriously threatens public health, safety, or welfare" to the point where it "calls for an immediate amendment to a zoning ordinance." *Id*. Moreover, "because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995).

Factors that may bear upon whether a public interest is compelling and countervailing include the legitimacy of the public interest itself, how the application impacts that interest, and the means by which the City proposes to protect those interests. In *Western Land Equities*, the City raised fire protection concerns as justification for denial of a land use application. However, this public interest was held to not be a compelling countervailing public interest sufficient to deny

the application because an unarguably permitted use would not have yielded a different result. Also, inadequate sidewalks were held to not be a compelling countervailing public interest because the sidewalk problem could be addressed through other means without denying the application. *See id.*

Preserving access of the public to open space areas is a legitimate public interest. Preserving the view perspective of open space areas may also be a legitimate public interest. No reasons are apparent that would prevent a municipality from enacting ordinances to protect and enhance those interests. However, there is no indication that access to the Jordan River Parkway open space is presently inconvenient or difficult. A single-loaded road may increase the convenience of access to the park, but since access to the Jordan River Parkway already appears to be easy and convenient from other avenues, it cannot be said that double-loading the road endangers access to the open space to the point that it "*seriously* threatens public health, safety, or welfare." *Western Land Equities*, 617 P.2d at 395-6 (emphasis added). The City's desire to single-load the road appears to be a decision of convenience or enhancement. If the City requires that the access to the Jordan River Parkway be improved, less burdensome means by which that may be accomplished certainly exist, short of causing the developer to redesign its plan and possibly lose the economic benefit of several otherwise-compliant lots.

With regard to the City's stated compelling interest in "maintaining the view perspective" into the open space, it is unclear how single-loading the road will accomplish that interest. A single-loaded road along an open space will obstruct a view of the open space to essentially the same degree as a double-loaded road along the open space to all members of the public except users of that road. It is unclear how a slightly more obstructed view of open space *seriously* threatens public health, safety or welfare to the point that immediate amendment of the zoning ordinance is necessary.

Moreover, *Western Land Equities* states that a compelling countervailing public interest is one where the application brings attention to the problem for the first time: "an application would *for the first time* draw attention to a serious problem that calls for an immediate amendment to a zoning ordinance." *Id*. Where a problem that seriously threatens the public health, safety, or welfare is well-known before the application is submitted, then the City should pass an ordinance to address it.[8] The developer would therefore be bound to follow that ordinance in his application. In this case, the Jordan River Parkway has existed for many years, along with the public's interest in access to and a view of the Parkway. These interests cannot be said to have arisen for the first time as a result of Danville's land use application.

[8] Utah Code § 10-9a-509(1)(a)(ii) further supports this reasoning. This subsection provides an exception to the vesting rule where "the municipality has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted." This statue reflects an understanding that issues requiring changes of zoning ordinances occasionally arise, but amending zoning ordinances takes time. When a compelling interest arises, a municipality only needs to initiate proceedings to amend that ordinance, and applications received will be subject thereto.

The City may demand that Danville comply with existing ordinances and officially adopted standards. To the extent that those ordinances and standards permit the City to dictate the location, configuration, and construction of roads within the development, the City may so dictate. Conversely, the early vesting rule in UTAH CODE § 10-9a-509(1)(a),[9] the prohibition against unexpressed requirements in UTAH CODE § 10-9a-509(1)(e),[10] and the principle that "provisions permitting property uses should be liberally construed in favor of the property owner," indicate that the property owner has great discretion in designing the development, as long as the development complies with City ordinances and regulations. Because no compelling countervailing public interest exists in access to or a view of the open space sufficient to require single-loading the road, the City cannot deny the application on that basis.

C. The Question Regarding Whether Danville is Entitled to Approval of its Application is Not Ripe

In its Request for Advisory Opinion, Danville has asked that the OPRO determine whether Danville is entitled to approval of its Preliminary Plat Application because the land use application conforms with the requirements of Draper's land use maps, zoning map, and applicable land use ordinance in effect. The City of Draper has not substantively reviewed nor issued any decision regarding the application. Because of this, the OPRO cannot make a determination that the application is entitled to approval because the question is not ripe.

A determination that a land use application conforms with the requirements of Draper's land use maps, zoning map, and applicable land use ordinance would require that the OPRO exercise discretion regarding the interpretation of Draper's ordinances. That discretion belongs to the City. *Carrier v. Salt Lake County*, 2004 UT 98, ¶28, 104 P.3d 1208, 1216.

A better course would be to permit the City to apply its expertise and discretion to the substantive examination of the application. The application could be approved, making further examination unnecessary. In the event the application is denied, the City is obligated to indicate the reasons for denial of the application. § 10-9a-509.5(2)(d). The OPRO could then use its authority to examine the propriety or legality of the denial.[11] Until the City has had an opportunity to rule on the matter, the determination is premature.

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[9] "An applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect when a complete application is submitted and all fees have been paid . . ." UTAH CODE § 10-9a-509(1)(a).

[10] "A municipality may not impose on a holder of an issued land use permit a requirement that is not expressed: (i) in the land use permit or in documents on which the land use permit is based; or (ii) in this chapter or the municipality's ordinances." UTAH CODE § 10-9a-509(1)(e).

[11] This is not to say that where denial appears inevitable, the OPRO must wait until the denial is actually issued in order to examine the question. Rather it is to say that the OPRO should and can examine specific reasons for denial, rather than examining applications and ordinances *de novo* and dictating to the land use authority how it is to rule.

Conclusion

Danville is entitled to substantive review of and a decision regarding its Preliminary Plat Application, because under UTAH CODE § 10-9a-509.5, the preliminary plat application is complete. Draper must perform substantive review of Danville's preliminary plat application with reasonable diligence. In addition, no compelling, countervailing public interest exists in access and view of the Jordan River Parkway. Therefore, Draper may not deny Danville's otherwise compliance preliminary plat application because the road along the extreme westerly boundary of the development Property is double-loaded.

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

NOTE:

This is an advisory opinion as defined in UTAH CODE § 13-43-205. 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

U.C.A. §13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. §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:

Kathy Montoya
City Recorder
1020 E Pioneer Road
Draper, UT 84020

On this _____ Day of March, 2008, 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