Advisory Opinion #40

Parties: Providence City and Paramount Development, Inc.

Issued: April 29, 2008

TOPIC CATEGORIES:
E: Entitlement to Application Approval (Vesting)
F: Complete Land Use Application

A land use applicant is entitled to approval if an application conforms to the requirements of a land use ordinance in effect when a complete application is submitted. The application did conform to subsequently enacted zone changes, and so was entitled to approval as of the effective date of those changes. Since the developer had the vested right to develop under the newly enacted zoning regulations, the subdivision was not required to comply with subsequent zoning changes.

The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Providence City by Craig M. Call, Anderson Call, Counsel for the City
Property Owner / Developer:	Paramount Development, Inc.
Applicant for the Land Use Approval:	Paramount Development, Inc.
Project:	Hillcrest Subdivision
Date of this Advisory Opinion:	April 29, 2008
Opinion Authored By:	Brent N. Bateman, Lead Attorney, Office of the Property Rights Ombudsman

Issues

Is the Developer entitled to approval of its land use application for the Hillcrest Subdivision under a zoning designation enacted by the City on March 2006, or is the application subject to a subsequently enacted zoning designation?

Summary of Advisory Opinion

Paramount Development, Inc. is entitled to approval of its application. On March 14, 2006, the City Council changed the zoning of the property to Single Family Traditional. As of that date, Paramount's land use conformed to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect. No other relevant ordinance was pending at that time. Paramount thereby became entitled to approval of its application by operation of UTAH CODE ANN. § 10-9a-509(1)(a)(i) on March 14, 2006. Submitting a new application following the March 14, 2006 zone change was not necessary.

The District Court rejected the challenges to the City's action on March 14, 2006, and indicated that the rezone on that date was effective. Therefore, the Developer vested as of the day the application became compliant with the land use ordinances in effect. A subsequent act by the City to rezone the property, although valid, does not defeat Paramount's vested rights.

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 Providence City on February 26, 2008. A letter with the request attached was sent via certified mail, return receipt requested, to Paramount Development, Inc., c/o Laura S. Scott, Parsons, Behle, & Latimer, at 201 S. Main St. Suite 1800, Salt Lake City, Utah 84145. The return receipt was signed and was received on March 6, 2007, indicating that Paramount Development had received it. A response was received from the Attorney for Paramount Development on March 12, 2008. A letter dated March 19, 2008, was sent and received via email from Craig Call, Attorney for Providence City, responding to Ms. Scott's letter. On March 27, 2008, Ms. Scott sent an email to the Office of the Property Rights Ombudsman containing a brief response to Mr. Call's March 19, 2008 letter. Mr. Call responded via email on March 27, 2008 indicating that no further response was necessary.

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 received February 26, 2008 at the Office of the Property Rights Ombudsman by Providence City, including exhibits.
2. Response letter from Laura Scott, Attorney for Paramount Development, Inc., received March 12, 2008.
3. Response letter from Craig M. Call, Anderson Call, P.C. dated March 19, 2008.
4. Email from Laura Scott received March 27, 2008.
5. Order on Plaintiffs', Defendant's, and Intervenor's Respective Motions for Summary Judgment, Case #'s 060100835 & 060101226, Judge Clint S. Judkins, entered December 7, 2007.

Assumed Facts

For the purposes of the Opinion, it is assumed that there are no objections to approving the subdivision other than the issues addressed herein. No objections have been identified by either party.

Background

Paramount Development, Inc., ("Developer" or "Paramount") is the owner of 20.07 acres of real property ("Parcel") in Providence City, Utah. Until March 2006, the Parcel was within an Agricultural zone. At some point, Paramount expressed its desire to Providence City ("City") that the Parcel be rezoned and subdivided. Providence City indicated its preference to initiate the subdivision approval process before considering the rezone application. In early 2005, Paramount submitted separate applications to rezone the Parcel to the Single Family Traditional designation and to subdivide the Parcel in compliance with the requirements of the Single Family Traditional zone ("Subdivision"). Over the next several months, Paramount and the City furthered both applications, working together to develop concept plans preliminary plats for the Subdivision.

In May 2005, prior to the City's consideration of the zoning change application, the City granted "concept plan" approval for the Subdivision. On October 18, 2005, the City Planning Commission recommended that the City Council give preliminary plat approval to the Subdivision, with some conditions. Then, on December 20, 2005, prior to the City Council's vote on the preliminary plat application, the City Planning Commission issued Findings of Fact and Conclusions of Law regarding Paramount's rezoning application. In its Conclusions of Law, the Planning Commission determined that Paramount met the requirements of the City's ordinances, and that the acreage of the proposed Subdivision "fits the general lot size of lots in Single Family Traditional zones." On January 17, 2006, the Planning Commission recommended to the City Council approval of the rezone of the Parcel from Agricultural to Single Family Traditional.

On March 14, 2006, the Providence City Council adopted Ordinance 003-2006, rezoning the Parcel was from Agricultural to Single Family Traditional. On April 13, 2006, third party petitioners filed a lawsuit against the City challenging the legality of Ordinance 003-2006 on the grounds that Providence City failed to provide adequate notice of various public meetings. On April 25, 2006, the Providence City Council adopted Resolution 06-034 approving the design elements of the Subdivision. On April 28, 2006, the same third parties who filed the previous lawsuit filed a referenda petition with the City to place Ordinance 003-2006 on the ballot. On May 23, 2006, the City Clerk announced in a public meeting that the referendum would not be placed upon the ballot based on the finding that the ordinance was not subject to referenda. On June 2, 2006, the same third party petitioners filed a lawsuit against the City challenging the decision to deny the referendum petitions. The lawsuit challenging the March 14, 2006 meeting and the lawsuit challenging denial of the referenda were consolidated on October 31, 2006.

On October 24, 2006, the Providence City Council approved the amended Preliminary Plat for the Hillcrest Subdivision. Thereafter, the City commenced proceedings to re-rezone the Parcel. According to the documents provided, this redo was undertaken in order to moot the lawsuits by correcting any possible problems or deficiencies in the City's previous actions. The record indicates an intention to "ratify" the previous decision of the City Council, and nothing received by this Office indicates a contrary intent. On December 13, 2006, the Providence City Planning

Commission recommended that the Parcel be again rezoned to Single Family Traditional. However, on January 23, 2007, the City Council rezoned the Parcel from Agricultural to Single Family Estate. Paramount's pending development does not comply with that zoning designation.

On December 7, 2007, the District Court issued an order granting the City's and Paramount's Motions for Summary Judgment in the consolidated lawsuit. In the order the Court found, in relevant part, that

> 6. The zoning changes for the parcels at issue in this case ("Rezones") fall within the general purpose and policy of the City's master plan and there was no material variance from the master plan when the City rezoned the parcels. Accordingly, for these reasons the Court finds that the Rezones were administrative decisions on the part of the City and as such, were not subject to referendum.
> . . . .
> 9. With respect to the Plaintiffs' challenge to the notice given for the March 14, 2006 public meeting, the Court finds that the Plaintiffs had actual notice of that public meeting. . . . Plaintiffs' claim that they were prejudiced by the City's alleged failure to post notice for the March 14, 2006 public meeting fails because Plaintiffs had actual notice of the meeting.

The City has requested this Advisory Opinion to examine the legal status of Paramount's land use application. The City maintains that Paramount has no vested rights in its development application, and the development of the Parcel is subject to the Single Family Estate zoning designation. Paramount argues that its development rights have vested under the Single Family Traditional zoning designation, and that its application is not subject to the current zoning.

Analysis

I. Paramount's Application Vested on March 14, 2006

A. The Vesting Rule under UTAH CODE ANN. § 10-9a-509

In Utah, a land use applicant is entitled to approval 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 ANN. § 10-9a-509(1)(a).[1] This rule, sometimes known as the "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. According to *Western Land Equities*, 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

[1] Statutory exceptions to this rule exist. One, commonly known as the Pending Ordinance Doctrine, UTAH CODE ANN. § 10-9a-509(1)(a)(ii), is relevant to this Advisory Opinion and will be discussed later.

> 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.

Id. at 396. 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 may adopt ordinances to do so. Once properly 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 rules. *Western Land Equities* further instructs that the primary policy consideration behind the rule is one of zoning estoppel. *Id*. at 391:

> That principle estops a government entity from exercising its zoning powers to prohibit a proposed land use when a property owner, relying reasonably and in good faith on some governmental act or omission, has made a substantial change in position or incurred such extensive obligations or expenses that it would be highly inequitable to deprive the owner of his right to complete his proposed development.

Id. Development of property is a difficult and costly process, and this 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 substantial costs have been incurred in its commencement is of no benefit either to the public or to landowners." *Id*. Therefore, when a land use application complies with the municipality's ordinances in effect, the application becomes entitled to approval, or "vests," under those ordinances. The applicant can continue to prosecute the application in reliance upon the ordinances in effect, not subject to subsequent ordinance changes.

B. The Application Remained Active and Viable Through the Zoning Change

In the present matter, the Developer desired that the Parcel's zoning be changed in order to accommodate the contemplated development. Nevertheless, at the City's request, the Developer submitted the development application before the zone change was in place,[2] and applied for the zone change concurrently. According to a plain reading of the vesting rule, UTAH CODE ANN. § 10-9a-509(1)(a), if a land use application complies with the ordinances when it is submitted, it is entitled to approval. The opposite, therefore, must also be true: when a land use application does *not* comply with the current zoning at the property when submitted, the land use applicant is *not* entitled to approval. Because Paramount's development application did not comply with the zoning of the Parcel at the time it was submitted, the application was not entitled to approval at the time that it was submitted.

[2] It in unknown whether the City's request that the developer submit its subdivision application concurrently with zoning change application is authorized or required by Providence City ordinance, or whether this is the usual practice of Providence City. However, this practice has not been challenged, and is not unheard of throughout the State of Utah. In addition, this approach has some merit. An understanding of the contemplated development plan may greatly assist the municipality when considering a zone change request on a specific parcel.

However, finding that a land use application is not entitled to approval does not necessitate a finding that the land use application must be denied or deemed invalid. UTAH CODE ANN. § 10-9a-509 states that a land use application that complies with the current ordinances is *entitled to approval*. There is no reason to read into the statute an intention by the legislature that a land use application that is not entitled to approval must be denied or is void. Should the municipality choose to do so, a municipality may deny such an application. Likewise, a municipality may take steps, or allow the applicant to take steps, either through amendment of the application or modification of the zoning, to bring the application into compliance with its ordinances. In such an event, the applicant continues to rely on the validity of an unvested application at its own risk, as the municipality may be free to deny an unvested application at any time.[3] However, no reason can be found to mandate a finding that an application cannot be pursued simply because it is not entitled to approval on the day it was submitted.[4]

Paramount's application was not entitled to approval on the day it was submitted. Accordingly, the City was entitled to deny the application. The City did not do so. Instead, the City chose to proceed with the application, work with the developer, permit the developer to incur expenses in reliance on the continued viability of the application, and even provide approvals to the application,[5] all before the zone change was in place. Because of Providence's own actions with respect to the continued viability of the application, Providence should be estopped from claiming that the application was invalid or of no effect after the day it was submitted because it did not comply with the zoning requirements on that day. Although Paramount was not entitled to approval on the day of submission, the application remained viable thereafter through the action of the parties.

C. The Application Vested on the Date of the Zone Change

These principles, considered along with the policies underlying the Vesting Rule, indicate that a viable land use application can become entitled to approval at such time that the application conforms to the municipality's ordinance requirements. Once a viable application complies with "the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect," that application becomes entitled to approval. As discussed above, "when a property owner, relying reasonably and in good faith on some governmental act or omission, has made a substantial change in position or incurred such extensive obligations or expenses[,] it would be highly inequitable to deprive the owner of his right to complete his proposed development." *Western Land Equities* at 396. This would particularly be true where a municipality, by an affirmative action, ratifies the fact that the application is entitled to approval by actually granting an approval.

---

[3] The more a City indicates its intention to proceed with an unvested application, and the more an applicant relies upon the continued viability of the application, the more likely zoning estoppel principles would apply. Under such circumstances, the City would be less free to deny an application at any time.

[4] Were the opposite true, Providence's scheme of considering the zoning request and the subdivision application concurrently would be invalid.

[5] Providence City rezoned the Parcel from Agricultural to Single Family Traditional on March 14, 2006. Prior to the rezone, in May 2005, the City granted "concept plan" approval for the Hillcrest Subdivision.

As discussed above, Providence and Paramount both continued to pursue the application, despite the fact that it was not entitled to approval when it was submitted. On March 14, 2006, Providence adopted Ordinance 003-2006, changing the zoning of the Parcel to Single Family Traditional. This designation brought Paramount's application into compliance with the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect. Assuming that Ordinance 003-2006 was validly enacted, Paramount's application for land use approval became entitled to approval on March 14, 2006. Providence apparently shared this conclusion, because on October 24, 2006, after the zone change had taken place, Providence granted preliminary approval to the Developer's plat application. Therefore, the Developer's application vested on March 14, 2006.

II. The Application is Not Subject to the Subsequently Adopted Zoning Designation

A. The City's March 14, 2006 Rezone of the Parcel was Valid

The inquiry, however, ends not. Subsequent events call into question the adoption of Ordinance 003-2006. Third parties challenged the March 14, 2006 meeting on the basis of inadequate notice. The same third parties also attempted to force a referendum on the zone change, and filed a legal challenge when the referendum application was denied. Prior to the resolution of these legal challenges, the City repeated the zone change process, and rezoned the property to a different designation. Paramount's application does not comply with the requirements of the new zone. Therefore, if the action taken at the March 14, 2006 meeting is invalid, then the application never became entitled to approval.

The two lawsuits filed by the third parties, one challenging the sufficiency of the notice for the March 14, 2006 meeting, and the other challenging the denial of the request to refer the zone change to a public vote, were consolidated into a single case. Judge Clint S. Judkins of the First Judicial District Court granted summary judgment in the consolidated lawsuit by an order filed December 7, 2007. Judge Judkins ruled against all of the third parties' claims. With regard to the challenge of the third parties to the validity of the March 14, 2006 meeting for inadequate notice, the court held that "Plaintiffs' claim that they were prejudiced by the City's alleged failure to post notice for the March 14, 2006 public meeting fails because Plaintiffs had actual notice of the meeting." Therefore, the challenge to the March 14, 2006 meeting was defeated. Moreover, since no challenge to the meeting was upheld, the actions taken at that meeting must be deemed valid.

The District Court also rejected the third parties challenge to the denial of the request to refer the zone change to the voters. The Court found that the Ordinances were not subject to referendum:

> The zoning changes for the parcels at issue in this case ("Rezones") fall within the general purpose and policy of the City's master plan and there was no material variance from the master plan when the City rezoned the parcels. Accordingly, for these reasons the Court finds that the Rezones were administrative decisions on the part of the City and as such, were not subject to referendum.

Accordingly, since the actions of the City Council on March 14, 2006 were not subject to referendum, then the City Clerk rightfully refused to place the issues on the ballot.[6] The Court ruling gives validity to the City's actions. Because the Court ruled against the challenges to the March 14, 2006 meeting, the actions taken at that meeting were effective.[7]

B. The Application was Fully Vested when the City Rezoned the Property

The only indication in the record that the City may have ever considered the action taken on March 14, 2006 ineffective is the fact that the City, months later, decided to redo the process. No documents or records, including the City's meeting minutes or the court pleadings, contain any statement to the effect that the City considered the March 14, 2006 actions to be anything but fully effective. The record indicates that the redo was not due to invalidity of the previous rezone, but at attempt to moot the third party lawsuits by correcting any perceived problems. In the City's Motion for Summary Judgment in the third party case, the City argues, quite strenuously, that the March 14, 2006 rezone was valid, and states that the City's intention in redoing the process is to *ratify* the previous decision. Additionally, the clear implication from the record is that the City intended to come to an identical result as before; rezone the property to Single Family Traditional.

On January 23, 2007, when the City Council re-rezoned the Parcel to Single Family Estate, they did so without warning. The first mention in the City's planning commission minutes of an intention to rezone the property to anything other than Single Family Traditional was the motion to rezone to Single Family Estate.[8] There was no indication from the City that a different ordinance or zoning classification was under consideration.

In order for a subsequently passed ordinance to prevent vesting of an application, the ordinance must be pending at the time that the application becomes entitled to approval: "in the manner provided by local ordinance and before the application is submitted, the municipality has

[6] *Mouty v. Sandy City Recorder*, 2005 UT 41, instructs that the exercise of the right to referendum prevents referable laws from taking effect, and therefore vesting in those new zoning ordinances cannot occur during the referendum process. However *Mouty* differs from the present matter in one crucial respect. In *Mouty*, the ordinances were found to be subject to the referendum. In the present matter, the Court found that the ordinances were never referable. Therefore, the referendum process ended when the decision was made by the clerk to deny the referral. When the referendum right is determined never to have existed, equity mandates that vesting occur as of the date of ordinance passage. Finding otherwise would all but obliterate the vesting concept. Unpopular land use decisions could easily be delayed, perhaps for years, through a legal challenge to an unsuccessful and invalid referenda attempt. Facing the potential of such litigation, a municipality would be highly motivated to do just as Providence attempted to do in this case, attempt to win dismissal of a lawsuit by revising its previous decision during the lawsuit's pendency, without regard to UTAH CODE ANN. § 10-9a-509, or the applicant's reliance on the ordinances in place, or even upon previously granted approvals.

[7] The pendedcy of the lawsuit itself did not prevent the application from vesting. Rather, the lawsuit determined whether or not the actions of the City on March 14, 2006 were valid. If valid, vesting occurred. If invalid, vesting did not occur. Therefore, at the very least, as of December 7, 2007 (the day that the Summary Judgment Order was entered by the Court), the applicant vested in rights that were effective on March 14, 2006.

[8] The record indicates that the City Planning Commission recommended that the City Council adopt the Single Family Traditional zone, as they had done in the March 14, 2006 meeting.

formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted." This does not apply to the January 23, 2007 rezone of the property. The re-rezone was not considered until months after the first rezone occurred.

Despite the multiple challenges, the March 14, 2006 rezoning of the property was held to be valid. Therefore, Paramount's application was fully vested as of that date. The subsequent re-rezone of the property did not invalidate that vesting. The subsequent zoning change of the property to Single Family Estates may also be effective, but because Paramount has vested in the Single Family Traditional zoning under UTAH CODE ANN. § 10-9a-509 as of March 14, 2006. The subsequent zone change is inapplicable to Paramount's development.

Conclusion

A land use application becomes entitled to approval when it 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. An application not entitled to approval may nevertheless remain viable if it is not denied by the municipality, and the actions of the municipality indicate an intention to proceed with the application, and the applicant does proceed in reliance thereof. In such an event, at whatever time that the application and the land use maps, zoning map, and applicable land use ordinances become effective, the applicant then becomes entitled to approval.

Paramount became entitled to approval under Utah law on March 14, 2006, the day that the zoning at the property was changed to Single Family Traditional. The Utah District Court has found that that meeting was valid, that the question was not subject to referendum. A subsequent change in zoning of the Parcel, although it may have been valid, does not invalidate the developer's vested status. Paramount has vested in its right to approval of its development under the Single Family Traditional zone.

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

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, §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:

Alma Leonhardt
40 South 100 East
Providence, Utah 84332

On this _____ Day of April, 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