Advisory Opinion 254

Parties: Ivins City

Issued: April 14, 2022

TOPIC CATEGORIES:

Entitlement to Application Approval (Vested Rights)

Subdivision Plat Approval

Vested rights apply to regulations applicable to a land use application or to the information shown on the submitted application. A subdivision approval creates developable lots. Typically, and assuming there isn't a binding development agreement detailing otherwise, particular structures for those lots are subsequently reviewed for approval in separate building permit applications, which are pursued on their own timeline—up to even years later.

Design standards applicable to a particular structure vest at the time of a building permit application, not the underlying subdivision approval, except as otherwise provided by agreement or state law. Additionally, unless otherwise directed by local ordinances or development agreement, building permit approval is subject only to the city's applicable land use ordinances, and not to any conflicting CC&R's that may separately govern the development of property by private agreement.

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ADVISORY OPINION

Advisory Opinion Requested By:	Dale T. Coulam, City Attorney
Type of Property at Issue:	Residential
Date of this Advisory Opinion:	April 13, 2022
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUE

How is the City to apply its design standards to current requests for building permits on the remaining undeveloped lots of a subdivision that was approved under prior ordinances?

SUMMARY OF ADVISORY OPINION

Vested rights apply to regulations applicable to a land use application or to the information shown on the submitted application. A subdivision approval creates developable lots. Typically, and assuming there isn't a binding development agreement detailing otherwise, particular structures for those lots are subsequently reviewed for approval in separate building permit applications, which are pursued on their own timeline—up to even years later.

Design standards applicable to a particular structure vest at the time of a building permit application, not the underlying subdivision approval, except as otherwise provided by agreement or state law. Additionally, unless otherwise directed by local ordinances or development agreement, building permit approval is subject only to the city's applicable land use ordinances, and not to any conflicting CC&R's that may separately govern the development of property by private agreement.

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 Dale T. Coulam on April 27, 2021.

EVIDENCE

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

1. Request for an Advisory Opinion, submitted by Dale T. Coulam, City Attorney, received on April 27, 2021.

BACKGROUND

The Heritage Estates Subdivision is five-phase subdivision in the City of Ivins that was initially approved in 1995, while the final Phase 5 was approved in 2004. CC&R's were recorded on lots within Phases 1-4, but not on lots in Phase 5. While mostly built out, some few lots remained undeveloped.

Since the initial subdivision approval in 1995, the City has adopted certain design standards by ordinance, regulating exterior building color based on the Light Reflective Value (LRV) scale. For many years, when lots within the subdivision sought approvals for building permits, the City's former building official had treated the lots as vested to the ordinances then in effect at the time of subdivision approval.

Recently, the subdivision community's architectural committee approved a color for the last remaining lots that is lighter than the current design standards, and a dispute arose when these remaining lots sought approvals from the City for building permits as to whether the lots were to be considered vested to the ordinance standards in place at the time of subdivision, or whether these lots are subject to the city's current building color ordinance.

Since submitting the Request for an Advisory Opinion, the particular dispute underlying the request was resolved, but the City has nevertheless asked us for an opinion on the substantive issues.

ANALYSIS

I. Exterior Building Regulation

The immediate issue at the time of the request appears to have been how to enforce the City's design guidelines, including regulations on the exterior color of dwellings. This issue has largely

been resolved by recent legislation. House Bill 1003, passed during the First Special Legislative Session in 2021, enacted Utah Code Section 10-9a-534, which now prohibits a municipality from "imposing a requirement for a building design element on a one to two family dwelling," which includes, among other things, "exterior color."

Section 534 provides a number of exceptions, including historic districts, FEMA areas, residential areas developed prior to 1950, etc. Other than this, this section would not entirely obfuscate the City's design guidelines, as they would still apply to any townhomes or other multi-unit development, but at least for single family and two-family dwellings, the City may no longer enforce any standard regulating exterior color.

II. Treatment of Vested Rights for Undeveloped, Subdivided Lots

The larger issue from the request, as our office sees it, however, is answering the disagreement between the approaches of the City's former and current building officials in how to treat vested rights where lots are subdivided but remain undeveloped until a time when the applicable zoning ordinances may have changed.

Utah Code Section 10-9a-509(1)(a) provides that an applicant obtains a vested right to existing ordinances when the applicant submits a complete application and pays all applicable fees; more importantly, the applicant vests as to the land use regulations "*applicable to the application or to the information shown on the application*." In other words, you vest as to what you have applied for. It is the experience of our Office that the scope of local subdivision ordinances typically creates developable lots, whereas approval for a proposed structure is obtained in a separate application for a building permit—and on its own timeline, even years after subdivision approval.[1] Vested rights should be independently considered for these subsequent applications in regards to the structures being proposed.

Had the City's building design standards been incorporated into the subdivision ordinance and substantively reviewed by the City at the time of subdivision approval, then it is possible that they would vest at the time of subdivision. However, this does not appear to be the case; rather, as the standards pertain to the design of a particular structure, the intention of the City's ordinances would have these standards substantively reviewed at the time of reviewing an application for a building permit. Therefore, the design standards that should be applied are those in effect at the time an application for a building permit is received.

We note, however, that there is an important exception to keep in mind for any subdivision approved within the last year, specifically, between May 5th, 2021 and continuing through May 4th of this year, 2022. Last year during the 2021 General Legislative Session, the legislature passed HB409, which amended Section 509 to provide that "for a period of 10 years after the day on which a subdivision plat is recorded, a municipality may not impose on a building permit applicant for a single-family dwelling located within the subdivision any land use regulation that is enacted within 10 years after the day on which the subdivision plat is recorded."

[1] A development agreement, entered into willingly between the local government and the applicant for subdivision approval, may modify this general rule.

However, this provision of state law was short lived, as the legislature completely reversed course this year during the 2022 General Legislative Session with HB303, which completely removed that provision. This bill was just signed into law, and will have an effective date of May 4, 2022.

This means that any new subdivision approved up to May 4th will still have that 10-year vesting protection. Other than those subdivisions approved within this short window, current requests for building permits for previously existing subdivisions should still be reviewed under the City's current ordinances. However, for any subdivisions approved between May 5, 2021 and May 4, 2022, the City should maintain a copy of its land use ordinances at that time, as they are the standards that will apply to any permit for the subsequent 10 years following subdivision approval.

III. Effect of Recorded Restrictive Covenants in Land Use Approval Process

Finally, we noted that one aspect of the dispute in the submitted request was the idea that restrictive covenants, or CC&R's, may have been recorded on certain phases but not others, and may have conflicted with the City's ordinances.

Generally, a land use approval by the City does not take any private restrictions into account, unless its ordinances otherwise direct it to. Recording CC&R's does not supplant or supplement the City's land use ordinances. Rather, the City should look only to the plain language of its land use ordinances in approving a land use application. Normally, we would expect that CC&R's may be generally more restrictive than local land use ordinances. However, in the case that an application complies with applicable ordinances, but is in violation of private restrictive covenants, if the owner insists on obtaining development approval, the land use authority should nevertheless approve it, and the homeowner's association may privately enforce the CC&R's as applicable.

CONCLUSION

Due to recent changes in state law, the City may no longer regulate certain design standards, including exterior color, on one or two-family dwellings. Additionally, whereas subdivided lots are not vested as to changes in land use regulations applicable at the time of subsequent building permit applications, recent state legislation has provided a one-year window of exception for approved subdivisions against subsequent changes to land use regulations for a period of 10 years.

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

NOTE:

This is an advisory opinion as defined in Section 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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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 and civil penalty provisions, found in Section 13-43-206 of the Utah Code, 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.