Advisory Opinion #141

Parties: Michael Thayne and Syracuse City

Issued: June 10, 2014

TOPIC CATEGORIES:

Entitlement to Application Approval (Vested Rights)
Subdivision Plat Approval
Interpretation of Ordinances

An applicant's right to develop vests when the applicant submits an application that complies with the ordinances in place. When the application is approved, the application is deemed to fully comply with the applicable ordinances, and the applicant is entitled to proceed with respect to all matters addressed in that application.

The City cites several ordinances that could be interpreted to render the development noncompliant. Each of those arguments arises out of the layout and design of the development. However, the layout and design of this development has been shown on previous applications, and the issues raised have been discussed at length. By approving the previous applications, the City has interpreted those ordinances and deemed that the subdivision complies. The development has vested. The vesting rule prohibits the City from revisiting those matters, and entitles the applicant to approval of the development application.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Michael J. Thayne
Local Government Entity:	Syracuse City
Applicant for the Land Use Approval:	Irben Development LLC
Type of Property:	Residential Development
Date of this Advisory Opinion:	June 10, 2014
Opinion Authored By:	Brent N. Bateman, Lead Attorney Office of the Property Rights Ombudsman

Issues

Can a City deny final plat approval to a development that has previously received sketch plan approval and preliminary plat approval?

Summary of Advisory Opinion

An applicant's right to develop vests when the applicant submits an application that complies with the ordinances in place. When the application is approved, the application is deemed to fully comply with the applicable ordinances, and the applicant is entitled to proceed with respect to all matters addressed in that application.

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Review

A Request for an Advisory Opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Michael J. Thayne, on behalf of Irben Development LLC on April 15, 2014. A copy of that request was sent via certified mail to Rodger S. Worthen, City Administrator of Syracuse City, at 1979 West 1900 South, Syracuse, Utah. 84075. The City received that copy on April 17, 2014.

Evidence

The following documents and information with relevance to the issue involved in this Advisory Opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, with attachments, submitted by Michael Thayne, received April 15, 2014.
2. Response from Syracuse City, with attachments, submitted by City Attorney Clinton R. Drake, received May 21, 2014, including past Syracuse City Ordinances, provided by the City in its response, applicable to the development.
3. Various current Syracuse City Ordinances and Planning Commission Minutes, available on the Syracuse City website.

Background

Under Syracuse City ordinances, subdivision development involves a three-step process. An applicant first must obtain sketch plan approval, then preliminary plat approval, and lastly final plat approval. If a development is also a cluster subdivision as defined in the City Code, the developer must obtain a conditional use approval as well. According to the City Code, the Syracuse City Planning Commission is the land use authority responsible to provide sketch plan approval, preliminary plat approval, and conditional use permit approval. For final plat approval, the Planning Commission and the City Council share the duties of land use authority, and the approval of both parties is required.

Irben Development LLC is the developer of the Still Water Lake Estates, a cluster subdivision in Syracuse City. This proposed subdivision consists of approximately 30 large custom home lots bounding and abutting two lakes, as well as approximately 165 homes on smaller lots placed some distance away from the lakes. While the 30 larger lots give their owners full access and use

of the lakes, the 165 smaller homes are separated from the lakes by a canal. Neither the 165 homes, nor the public in general, will have direct legal access to the lakes.

On June 8, 2012, the developer applied for initial sketch plan approval of Still Water Lake Estates. The Syracuse Planning Commission held a public hearing for the sketch plan on July 17, but the application was tabled. On May 21, 2013, the developer submitted an amended sketch plan application, and after public hearing and review by the planning commission, sketch plan approval was granted on August 6, 2013. On January 21, 2014, the Developer submitted an application for Preliminary Plat Approval, and on March 2, 2014, the Planning Commission granted that approval. Further, on May 6, 2014, the Planning Commission granted approval of the cluster subdivision conditional use permit. It appears that none of these approvals have been appealed by any party.

On April 8, 2014, the developer submitted an application for final plat approval. That application is currently under review, and the land use authority has taken no final action. In its submission for this Advisory Opinion, Syracuse City has raised four issues that it believes may justify denial of the final plat application. Each of those issues center around the separation between the larger lake homes and the smaller homes, and the lack of direct access to the lake by the smaller homes. Specifically, the City argues that: (a) the layout of the development creates two distinct specific user groups, thus violating Syracuse City Code § 10-16-010, which states that one of the purposes of the cluster subdivision is to "allow the developer to more closely tailor a development project to a specific user group;" (b) Syracuse City Code § 10-16-010 states that the purpose of the cluster subdivision ordinance is to "encourage good neighborhood design, and preserve open space while ensuring substantial compliance with the intent of the Subdivision and Land Use Ordinances," but the lack of connectivity or direct access between the larger homes and the smaller homes does not provide good neighborhood design; (c) Syracuse City Code § 10-16-040 states that "Property designated as open space on the landscaping plan shall be for the use and enjoyment of the residents or community," but lake access will be limited to the larger lots that abut the lakes; and (d) Syracuse City Code § 10-16-050 requires that the homes in the development have a common building theme which "shall show detail in the unification of exterior architectural style, color, and size of each unit," but the disproportionate lot sizes do not demonstrate a unified architectural style.

Analysis

I. The Vested Rights Doctrine Prohibits the City from Revisiting Previous Approvals

A. The Vested Rights Doctrine.

Utah's vested rights doctrine exists to provide consistency and predictability in the land development process. Simply stated, when a land use application conforms to the zoning ordinance in effect, the applicant is entitled to approval of that application. "[A]n applicant for subdivision approval . . . is entitled to favorable action if the application conforms to the zoning ordinance in effect at the time of the application . . ." *Western Land Equities v. City of Logan*, 617 P.2d 388, 391 (Utah 1980).

The Utah Supreme Court discussed the policies behind this doctrine at length in *Western Land Equities*:

> 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. . . . Governmental powers should be exercised in a manner that is reasonable and, to the extent possible, predictable.
> . . . .
> 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, 617 P.2d at 395-6. The vesting doctrine is well established in Utah. The Utah Legislature adopted this doctrine into the Utah Code at § 10-9a-509(1)(a):

> 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, a municipal specification for public improvements applicable to a subdivision or development, and an applicable land use ordinance in effect when a complete application is submitted and all application fees have been paid.

The rule in Utah is unequivocal. "Stated simply, [a] [c]ity cannot change the rules halfway through the game." *Springville Citizens for a Better Community v. City of Springville*, 1999 UT 25, ¶ 30. Thus, once a developer submits an application that complies with the requirements for that application, that person is entitled to approval of that application. For example, if an applicant makes concept plan application, and that application complies with the requirements for concept plan approval, the concept plan must be approved. Once the developer receives that approval, the developer is entitled to rely upon it. Thus the developer can expend further costs and time moving to the next step with confidence that his efforts will not result in economic waste.

B. A City Cannot Revisit or Undo Previously Granted Approvals

In corollary to the above, once approval is given to an application, the application is deemed to fully comply with local ordinances. Even if different local officials at a different time may feel that an application may not comply with applicable ordinances, a developer is entitled to rely upon the approval given as the final decision of the City. The application is vested, and the developer can proceed with confidence and the protection of the law.

The Utah Supreme Court held that

> [i]t is incumbent upon a city . . . to act in good faith and not to reject an application because the application itself triggers zoning reconsiderations that

> result in a substitution of the judgment of current city officials for that of their predecessors.

Western Land Equities, 617 P.2d at 396. Vested development rights arise because an application complies with zoning ordinances. A City Council or Planning Commission cannot change its mind and revoke vested rights. The City does not have such authority. To hold otherwise would counter the foundations of the vesting doctrine. Not only should a developer be entitled to rely on the ordinances in place at the time of application, but a developer must be able to rely on the City's interpretation and application of its ordinances.

As with all laws, land use ordinances may be interpreted differently by different individuals. Some may believe that a law should be applied one way, some another. However, the time for debate on such matters comes before the development rights vest. Once a duly designated land use authority votes on a matter, the vote becomes the interpretation of the City, without regard to whether the tally for that vote was 5-0 or 3-2 or whether another group of individuals in the same city would have reached a different decision. The developer is entitled to rely upon the official decision received. "A property owner should be able to plan for developing . . . property in a manner permitted by existing zoning regulations with some degree of assurance that that the basic ground rules will not be changed in midstream." *Western Land Equities*, 617 P.2d at 396. This principle provides security for further expenditures of funds, time, and efforts, because the Developer now enjoys the protections of the law.

There may be circumstances where previously granted approvals can be revisited, such as a misrepresentation by the developer, a serious material mistake in fact by both parties, or emergence of a compelling, countervailing public interest. *See* UTAH CODE § 10-9a-509. But such event would be rare and exceptional. "Buyer's remorse" over previous approvals does not constitute a compelling, countervailing public interest. Once vested, a developer is entitled to rely on the vested right. The City cannot revisit previous approvals and take away a vested right.

II. The City Has Not Justified Denying the Final Plat

A. Final Plat Approval Involves only Those Matters Relating to the Final Plat.

In light of the vested right doctrine, a final plat application should not be viewed as one last opportunity for the City to reject an application. As with all land use applications, once any application in the development process vests, any matters addressed in that application are deemed vested. Matters addressed and vested in previous applications are no longer subject to review in subsequent applications. Instead, subsequent applications in the same development process provide the City an opportunity to review for compliance and approve more detailed and specific aspects of a plan that have not been previously shown on earlier applications.

Accordingly, final plat application will include details of final plat that were not previously needed and not previously shown on a prior application. The final plat approval process then is a review of the development for compliance with the final details and final plat requirements contained in the local ordinance. A final plat application could be denied, for example, if the

developer refused to obtain certain signatures required for final plat or show on the plat certain information that the ordinances mandate. However, final plat approval is not an additional bite upon a previously eaten apple.

B. The City Has Previously Approved the Layout and Design of the Development.

The objections raised by the City for this Opinion all relate to the basic layout and design of the development – the locations of the lots, the relative locations of the lakes, and the restrictions upon access to the lakes. These matters of layout and design are certainly not matters that would appear for the first time in the final plat application. They are basic matters which certainly would have been addressed at preliminary plat and conditional use application, and perhaps even at sketch plan. When those applications were approved, the layout and design of the development were approved and vested.

In addition, planning commission minutes reviewed for this Opinion contain multiple indications that the layout and design of the development, including the issue of access to the lakes, were discussed extensively in previous meetings. Approval was nonetheless given. The developer is entitled to rely, and indeed has relied, upon those approvals. Now, at final plat, the City's review is limited only to those aspects not shown in previous approvals and final plat requirements contained in the ordinance.

We further note that the issues raised by the City to show potential violations of ordinance are subjective and subject to interpretation. None clearly show that the development violates the law, nor that an interpretation that the development does not violate the law is unreasonable. The ordinance sections cited are either vague statements of intent ("a specific user group"), subjective preferences without enforceable standards ("good neighborhood design", "common building theme"), or of questionable applicability and legality ("landscaping open space is for the use of residents"). The best that can be said of any of these is that they *can be* interpreted the way the City has done (to varying degrees of reasonableness). However, each of these ordinances could reasonably be interpreted in multiple ways. Although the City has well-argued its position, this Office could find nothing here to compel a finding that the subdivision violated any ordinance.

Because zoning laws "are in derogation of a property owner's use of land . . . any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use." *Carrier v. Salt Lake County*, 104 P.3d 1208, 1217 (Utah 2004). Thus, interpreting the ordinances cited by the City in favor of the development, as the City is deemed to have done by granting previous approvals, is not only reasonable but is supported by the law and the rules of ordinance interpretation.

Nothing could be found in this case to justify revoking the previously granted approvals. Each of those matters could have been interpreted by a planning commission in multiple ways. Nevertheless, even if those provisions strongly indicated noncompliance with the code, even to the point where to find otherwise would be unreasonable, the City, by approving the applications, has deemed them to comply. The development is vested. Final plat cannot be denied for the reasons raised.

Conclusion

Because of concerns regarding the layout of the subdivision and access to the lake areas, the City is considering denying the final plat approval. However, nothing has been shown to justify the City doing so. Matters of layout and configuration of the development have been addressed previously in the application process, and the land use authority has granted the City's formal approval of those matters. The development has therefore vested, and the developer is entitled to proceed in reliance upon those approvals. The simple fact that the ordinances could be interpreted differently, and would be interpreted differently by some, does not permit the City to revisit approvals previously given.

Brent N. Bateman, 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.

MAILING CERTIFICATE

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

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

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

Rodger S. Worthen
City Administrator
City of Syracuse
1787 South 2000 West
Syracuse, Utah 84075

On this _____ day of June, 2014, 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