Advisory Opinion #203

Parties: HF Holdings, Inc.; Castle Valley
Issued: November 8, 2018

TOPIC CATEGORIES:

Entitlement to Application Approval
Complete Land Use Application
Review for Application Completeness
Substantive Review of Application

Utah law provides that an application is complete and entitled to subsequent, substantive review by the land use authority when the applicant has submitted an application "in a form that complies with the requirements of applicable ordinances and pays all applicable fees." UTAH CODE § 10-9a-509(1)(c). Simply stated, this means the application review occurs in two stages, a form review first, which if complete entitles the applicant to a substantive review. An application must be complete in form—but not necessarily in substance—to qualify as complete for purposes of vesting.

The applicant in this case submitted complete solar permit applications on June 1, 2017, when they provided the solar permit application forms along with documents required by that application. Accordingly, the Town must review the substance and content of the applications under the land use regulations in effect on June 1, 2017. Additionally, the Town is obligated to approve the applications once they comply with the substantive provisions of those regulations.

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ADVISORY OPINION

Advisory Opinion Requested By:	HF Holdings, Inc.
Local Government Entity:	Castle Valley Town
Applicant for Land Use Approval:	HF Holdings, Inc.
Type of Property:	Residential
Date of this Advisory Opinion:	November 8, 2018
Opinion Authored By:	Jordan S. Cullimore Office of the Property Rights Ombudsman

ISSUE

Did the Town of Castle Valley properly determine that the Hollings solar permit applications were incomplete and therefore not entitled to substantive review under the land use regulations in effect at the time of submission?

SUMMARY OF ADVISORY OPINION

Utah law provides that an application is complete and entitled to subsequent, substantive review by the land use authority when the applicant has submitted an application "in a form that complies with the requirements of applicable ordinances and pays all applicable fees." UTAH CODE § 10-9a-509(1)(c). Simply stated, this means the application review occurs in two stages, a form review first, which if complete entitles the applicant to a substantive review. An application must be complete in form—but not necessarily in substance—to qualify as complete for purposes of vesting.

In this case, the Hollings submitted complete solar permit applications on June 1, 2017, when they provided the solar permit application forms along with documents required by that application. Accordingly, the Town must review the substance and content of the applications under the land use regulations in effect on June 1, 2017. Additionally, the Town is obligated to approve the applications once they comply with the substantive provisions of those regulations

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 Clayton Preece, Attorney for HF Holdings, Inc., on February 201, 2018. A copy of that request was sent via certified mail to David Erley, Mayor of Castle Valley Town, at HC 64 Box 2705, Castle Valley, Utah.

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 Clayton H. Preece, Attorney for HF Holdings, Inc., on February 21, 2018.
2. Reply submitted by Christina R. Sloan, Attorney for Castle Valley, on March 23, 2018.
3. Response submitted by Clayton Preece, Attorney for HF Holdings, on April 20, 2018.
4. Response submitted by Christina Sloan, Attorney for Castle Valley, on May 10, 2018.
5. Response submitted by Clayton Preece, Attorney for HF Holdings, on May 25, 2018.
6. Email response sent by Christina Sloan, Attorney for Castle Valley, on May 31, 2018.

BACKGROUND

In June 2016, the Castle Valley Planning and Land Use Commission began discussing the idea of amending the Town's ordinance regulating the installation and use of solar panels, which, at the time, was relatively permissive. From June 2016 to March 2017 the Town periodically discussed the amendments, but little progress was made. On April 5, 2017 the Planning Commission again considered amending the ordinances regulating solar panels, and specifically considered proposed language "limiting the capacity of solar systems, in both footprint and kilowatts, and distinguishing between different procedures for approving a small routine system and a larger non-routine system." *Letter from Castle Valley Town*, dated March 23, 2018.

The Planning Commission further discussed proposed changes at its May 3, 2017 meeting and decided to schedule a public hearing on the matter for June 7, 2017. The Town published notice of the June 7, 2017 public hearing on June 1, 2017. Also on June 1, 2017, George and Debora Hollings on behalf of HF Holdings, Inc., submitted two solar permit applications to the Town. The first application requested approval of a 48-kilowatt system on a parcel known as Lot 54 in

the Town. The second application requested approval of a 75-kilowatt system on the adjacent parcel, Lot 55. The Hollings, through HF Holdings, Inc., own both the lots.

The Town reviewed the applications as "non-routine" applications under applicable regulations, which meant the Planning Commission would act as the land use authority to review the applications. While the review process for the solar permit applications was ongoing, the Planning Commission held the public hearing to consider the proposed amendments to solar requirements at its June 7, 2017 Planning Commission meeting. Further changes to the proposed ordinance were made as a result of that meeting, and on June 13, 2017, the Planning Commission held a special meeting to finalize and recommend approval of the draft amendments to the Town Council. The matter was then placed on the Town Council's June 21, 2017 agenda "for discussion and possible action."

On June 14, 2017 the Town sent a letter to the Hollings informing them that the solar permit applications were missing needed information. The letter "listed required items with particularity."

Specifically, the letter noted the following:

1. Measurements on drawings and plot plan must be drawn to a measureable scale as stated on Line a) of the Solar Permit Application and be clearly and legibly labeled.
2. All existing structures and their designated use must be included on plot plan as stated on Line a) 3. of the Solar Permit Application.
3. Measurements on the Solar Permit Application and the drawings and plat plan must be consistent and show accurate layout and dimensions of proposed panels that are drawn to a measurable scale.
4. Discrepancies in measurement must be corrected:
    a. Panel dimensions on application do not match dimensions form manufacturer's specifications, nor do they match dimensions of roof panels as noted on plat plan submitted by applicant.
    b. Panel dimensions on application do not accommodate 40 modules.
    c. Setback dimensions on application do not correspond to plot plan.
    d. Square footage of roof panels exceeds roof space.
5. Information stating "TBD" will not be accepted. Specific information must be submitted as requested on the Solar Permit Application form.
6. Three complete copies of the Grand County Building Permit application must be submitted as stated on the first line of the application.

The letter also posed additional questions and requested information in writing "as part of [the Town's] consideration for a non-routine permit." *Hollings' Letter Requesting Advisory Opinion*, Attachment D, dated February 21, 2018.

On June 21, 2017, the Hollings supplemented their solar permit applications with additional information in an attempt to address the Town's requests. According to the Town, the newly supplemented applications "still lacked material information required by the Town's land use regulations." The Town then notified Hollings on July 25, 2017 that the Town had formally

deemed the solar permit applications incomplete "with respect to a number of specific, objective, ordinance-based application requirements."

Also on June 21, 2017, the Town Council formally amended its ordinance to impose additional regulations on solar installations that would apparently prohibit the Hollings' proposed systems on lots 54 and 55. The Town has encouraged the Hollings to submit new applications with the understanding that the applications will be subject to the new, more restrictive regulations. The Hollings dispute the Town's conclusion that their original applications were incomplete.

In light of this sequence of events, the Town and the Hollings agreed to request an Advisory Opinion from the Ombudsman's Office regarding the Town's determination that the Hollings' applications were incomplete. The Hollings submitted a Request for Advisory Opinion to our Office on February 21, 2018 asking specifically whether the Town properly 1) determined the Solar Applications were incomplete, and 2) denied the Hollings substantive review of their applications.

ANALYSIS

The State Land Use Development and Management Act (LUDMA) provides that whenever a municipality receives a land use application, such as a solar permit, it must, in a timely manner, "determine whether [the] application is complete for…purposes of subsequent, substantive land use authority review." UTAH CODE § 10-9a-509.5(1)(a). The determination of when an application is complete is important because:

> An applicant who has submitted a complete land use application...including the payment of all application fees, is entitled to substantive review of the application under the land use regulations:
>
> A) in effect on the date that the application is complete; and
> B) applicable to the application or to the information shown on the application.

UTAH CODE § 10-9a-509(1)(a)(i). Once an applicant has submitted a complete application under the provision just cited, a municipality may not subsequently change the rules[1] that apply to that application.[2] Hence, the Hollings are entitled to substantive review of their applications under the regulations in effect on the date the applications became complete.

I. Whether a Land Use Application is Complete for Vesting Purposes Depends on Form, not Substance

The Utah Code plainly states that "[a] land use application is considered submitted and complete when the applicant provides the application *in a form* that complies with the requirements of

[1] *See Western Land Equities v. Logan City*, 617 P.2d 388, 396 (Utah 1980) ("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.")

[2] Certain exceptions apply. *See* UTAH CODE § 10-9a-509(1)(a)(ii)(A)-(B). Neither party has asserted that either of these exceptions applies. Accordingly, we will not consider them in this opinion.

applicable ordinances and pays all applicable fees. UTAH CODE § 10-9a-509(1)(c) (emphasis added). This provision identifies only two criteria an applicant must satisfy to submit a complete application: 1) the applicant must submit an application in a form that complies with the requirements of applicable local ordinances, and 2) the applicant must pay all applicable fees associated with the application submittal. *See id.*

Stated differently, the application, to be complete, does not have to necessarily contain all of the information (substance) necessary to perform a comprehensive review of the proposal. The application must simply include the documents (form[3]) initially required by "objective ordinance-based application criteria" in the applicable local ordinance. *See* UTAH CODE § 10-9a-509.5(1)(b). As discussed further below, the content of the initially required documents does not need to comply substantively in all respects at this point for the application to be complete. Once an applicant has submitted a complete application made a good-faith effort to provide the necessary information in the required documents, the application vests and is then entitled to substantive review under the land use regulations in effect at that time.

II. Completeness Review is One Stage of a Two-stage Application Review Process Contemplated by LUDMA

LUDMA lays out a two-stage application review process.[4] First, the local government must determine whether an application is complete in form.[5] Once the application contains the initially required documents, the municipality moves to the second stage of the review process—the substantive review stage.[6] In the substantive review stage, the land use authority reviews the information contained within the required documents under the land use regulations "in effect on the date [the] application is complete," and "applicable to the application or to the information shown on the application." UTAH CODE § 10-9a-509(1)(a)(i). The land use authority ensures the proposal complies with the local ordinance's substantive provisions, such as setbacks, maximum height requirements, etc. In the case of a solar panel system, the local government will also ensure the system meets technical requirements included in the local ordinance or applicable development standards and building codes.

It is typical for the municipality to conduct an initial substantive review, followed by a request for additional information and documentation from the applicant. The municipality may need such additional information or documentation to answer questions that arose in the initial review and to verify compliance with applicable rules and regulations. The municipality may also direct the applicant to correct mistakes or omissions in the initial submittal and resubmit updated plans.

The full substantive review of an application may include one "review/resubmittal" round or multiple rounds, depending on the complexity and technical nature of the application. After the

[3] *See Form*, Black's Law Dictionary (10th ed. 2014) (defining the term "form" as "[t]he outer shape, structure, or configuration of something, as distinguished from its substance or matter").
[4] These discrete stages illustrate there is a meaningful difference between review of the *form* of the application and review of the *substance* of the application.
[5] *See* UTAH CODE § 10-9a-509.5(1) (providing that a municipality must first determine whether an application is complete).
[6] *See* UTAH CODE § 10-9a-509.5(2) (indicating that once an application is complete, the municipality must then review the substance of the complete application for compliance).

municipality completes substantive review of the application and confirms that it complies with applicable regulations in effect at the time the applicant submitted a complete application, the applicant is entitled to approval of the compliant application.

The first stage of the review process, or the completeness review, is intended to be simple and straight-forward. The bulk of the review occurs in the substantive review, when the local government reviews the application for compliance.

III. The Hollings Submitted Complete Applications, Entitled to Substantive Review, on June 1, 2017

The Town decided the applications submitted by the Hollings on June 1, 2017, were incomplete and required additional information. The Hollings responded with supplemental information on June 21, 2017, then the Town determined the application were still deficient even after supplementation.

The Hollings, however, argue that "many of the deficiencies alleged by the Town do not relate to any criteria set forth in the Town's ordinances and adopted application forms in effect at the time the [a]pplications were filed and supplemented." The Hollings further assert that "[t]he information requested by the Town and used by the Town as the basis for its determination that the [a]pplications are incomplete goes beyond that set forth in the Town's adopted forms and ordinances…."

The Town claims that the applications, even after the June 21, 2017 supplementation, were incomplete and that the Town properly denied the applications at that time. Specifically, the Town argues that the applications were missing "crucial and required information," the most important of which included:

> 1) a description of the use of the garage on Lot 55, which information is both required and particularly relevant considering the commercial-sized capacity of the system; 2) the total elevation of the system, as mounted, which information is required to determine if the proposal conforms to the Town's building height limitations; 3) [Rocky Mountain Power's] review and approval of the proposed solar systems, which is required by both [Rocky Mountain Power] and the Town; and 4) information and clarity related to whether and how the system will be grid-tied, including the location of the transfer switch, which information is critical in protecting the integrity of the Town's grid system and the health and safety of its residents.

Letter from Town of Castle Valley, dated March 23, 2018.

A. The Castle Valley Town Ordinance Requires an Applicant to Submit Certain Documents to be Deemed Complete

The Town misapprehends what an application must include to become complete for vesting purposes. To determine whether the Hollings' applications were complete for purposes of

subsequent, substantive review, we look to the Town's applicable land use regulations to determine what the "objective ordinance-based application criteria" are for a solar permit application.

Town Ordinance 95-6 indicates the Town "will have a Castle Valley Building Permit Information Sheet which clearly specifies the submissions, forms, agreements and fees which the Town requires in order to gain Town Approval on a building permit application for submission to the County." CASTLE VALLEY TOWN ORDINANCE 95-6, § 1. The applicable Building Permit Information Sheet states that "[f]or…solar upgrades or installations only, a Castle Valley…Solar Permit must be obtained and zoning approval given on the Grand County Building Permit form." *Letter from Town of Castle Valley*, Town Attachment 1, dated March 23, 2018.

This information directs an applicant to fill out a Castle Valley Solar Permit application, and a Grand County Building Permit Form. Thus, once an applicant has filled out these two forms and included any additional documents required by those forms, the application will be complete for subsequent review of the content, or substance, of the submitted forms and documents. Requiring more than this would confuse reviewing an application for completeness, with substantive review of the application, which is a separate and distinct review under LUDMA. In this context, *complete* does not mean *compliant*.

The Town of Castle Valley Solar Permit Application requires the following:

> Applicant provides:
>
> a) Plot plan drawn to scale (3 copies: 1 for Town, 1 for County, 1 for your records)
>
> Plan Shall Include:
>
> 1. Lot #, names, addresses, phone #, signature of lot owners and contractor
> 2. Property lines, road easement lines and setbacks
> 3. Existing structures (designate use)
> 4. Proposed structures (designate use)
> 5. Location of solar installation
> 6. Dimensions locating all of the above on property
>
> b) Diagram of footprint for solar installation with measurements (show post locations)
> c) Elevation drawings with height measurements (include post dimensions)
> d) Grand County Building Permit Application
> e) $15 (check payable to the "Town of Castle Valley")

Letter from Town of Castle Valley, Town Attachment 2, dated March 23, 2018.

This list along with the statement on the Building Permit Information Sheet, and repeated in the Solar Permit Application form, requiring the applicant to also submit a Grand County Building Permit form with the application, provides the "objective ordinance-based criteria" an application must satisfy to be deemed complete *in a form* that complies with the requirements of applicable local ordinances.

B. The Hollings' June 1, 2017 Applications Included the Required Documents

The parties, in their submittals, focus heavily on the content of the submitted applications, and argue extensively over whether the applications contain all the information necessary to complete the review, and whether the information is accurate. These questions should be reserved primarily for the substantive review stage of the process. The primary question in the completeness review stage of the process, as indicated above, is whether the application includes the documents required by objective, ordinance-based criteria for the specific application.[7]

It is apparent from the parties' submissions that the Hollings submitted complete applications, albeit in bare-bones fashion, on June 1, 2017. These applications included plot plans that attempted to show the required and relevant information indicated on the solar application form. The plot plans also attempted to depict the solar installation footprints. The applications further included elevation drawings, and the Grand County Building Permit Application. The applicant filled out the remainder of the application forms, and neither party disputes that the applicant paid the $15 application fee. Thus, the Hollings included the documents required by the objective, ordinance-based criteria to begin the substantive review process. Accordingly, we conclude that the applications, for purposes of vesting, became complete on June 1, 2017 when the Hollings submitted their initial applications for review.

This conclusion is supported by the Town's June 14, 2017 letter to the Hollings. Nowhere in that letter does the town indicate that the applicant failed to submit a document required by the Town's Solar Permit Application. Instead, the Town explains that the applicant must make changes to the submitted documents, requests supplemental documentation and information, and indicates that additional *copies* of the application are still needed. In other words, the June 14, 2017 letter functionally amounts to an initial substantive review of the submitted applications.

To require an applicant to provide documentation and information in an initial application at the level of detail asserted by the Town to qualify as complete would render the distinction made in LUDMA between review for a complete application and substantive review meaningless. Furthermore, if a local government could disqualify an application as incomplete simply because it didn't initially comply substantively in every way with existing ordinances, situations could arise where a municipality could deny an application it didn't like under the pretense of incompleteness, in order to defeat vesting.

CONCLUSION

Utah law provides that an application is complete and entitled to subsequent, substantive review by the land use authority when the applicant has submitted an application "in a form that complies with the requirements of applicable ordinances and pays all applicable fees." UTAH

[7] This naturally presumes the applicant has made an honest, good faith effort to fill out and provide the required documents. If the applicant has done this, minor omissions should not disqualify the application as incomplete. The local government must allow the applicant to correct such substantive errors through the review process, without the application losing its vested status under a particular ordinance.

CODE § 10-9a-509(1)(c). Simply stated, this means the application must be complete not necessarily in substance but only in form to qualify as complete for purposes of vesting.

An applicant submits a complete application when he submits documents required by objective ordinance based application criteria. The content of the documents does not need to comply substantively in all respects at this point for the application to be complete. Once an applicant has submitted a complete application made a good-faith effort to provide the necessary information in the initially required documents, the application vests and is then entitled to substantive review under the land use regulations in effect at that time.

In this case, the Hollings submitted complete solar permit applications on June 1, 2017, when they provided the solar permit application forms along with documents required by that application. Accordingly, the Town must review the substance and content of the applications under the land use regulations in effect on June 1, 2017. Additionally, the Town is obligated to approve the applications once they comply with the substantive provisions of those regulations.

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.

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