Advisory Opinion #126

Parties: George Mount and Summit County

Issued: July 22, 2013

TOPIC CATEGORIES:

E: Entitlement to Application Approval (Vesting)

A property owner may claim vested rights to development based on "zoning estoppel." If the owner incurs substantial expenses towards property development, because of reliance on representations made by a local government, the owner may claim the right to develop land based on the representations. The amount of expenses that can be deemed "substantial" depends upon the circumstances. Physical construction on the property is necessary, but any expenses related towards developing or marketing the property may be included as well.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	George Mount
Local Government Entity:	Summit County
Applicant for the Land Use Approval:	George Mount
Type of Property:	Commercial Development
Date of this Advisory Opinion:	July 22, 2013
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

May a property owner claim vested development rights by incurring substantial expense through reliance on a local government's representations regarding allowable uses?

Summary of Advisory Opinion

Although the rule announced in *Western Land Equities* establishes vested rights when an application which complies with zoning ordinances is submitted, a land owner may also claim vested rights through zoning estoppel. If a property owner incurs substantial expenses through reliance on representations made by a government entity, the owner may claim the right to develop land based on those representations. The amount of expenses needed to be "substantial" depends upon the circumstances of each case, and may include expenses related to acquiring and marketing the property, as long as the property owner also undertakes physical construction as well.

In this case, the property owner incurred expenses of approximately $50,000, including construction costs. His objective was to develop or market the lots in question for commercial development, relying upon the County's official policy recognizing some commercial uses for the area including his property. There is no question that the County adopted and pursued this policy, and that the property owner relied upon it. Under the circumstances, $50,000 is a significant expense, which included physical construction and improvements on all four lots.

Therefore, the owner may claim the right to develop according to the County's representation, which allowed commercial development.

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 George Mount on February 14, 2013. A copy of that request was sent via certified mail to Bob Jasper, County Manager for Summit County, at 60 North Main, Coalville, Utah 84017. The return receipt was signed and delivered on February 20, 2013, indicating it had been received by the County.

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 George Mount, received by the Office of the Property Rights Ombudsman, February 14, 2013.
2. Additional material submitted by George Mount, received February 22, 2013.
3. Reply submitted from Summit County, by Jami R. Brackin, Deputy County Attorney, received April 29, 2013.

Background

George Mount owns four contiguous lots in Silver Creek Estates, a subdivision located at Silver Creek Junction in Summit County.[1] The subdivision was created in 1965, and was originally intended to be a type of planned development, mixing residential, commercial and light industrial uses. When the subdivision was created, the County did not have a comprehensive zoning ordinance, although it approved the subdivision plat. In the absence of zoning ordinances, the property owners adopted declarations which governed uses, densities, heights, set backs, and other development criteria for the subdivision. Based on this Declaration, the lots owned by Mr. Mount were to be used for residential, commercial, and light industrial uses. Mr.

[1] Silver Creek Junction is at the intersection of Interstate 80 and U.S. Highway 40. Mr. Mount owns Lots 42, 43, 44, and 45, all located on the north side of "Earl Street." Lot 45 is on the corner of Earl Street and Silver Creek Road.

Mount purchased the lots in 1994, and has attempted to either sell or develop them for many years.

Several years after the subdivision was created, the County adopted and implemented a comprehensive zoning ordinance. Under the County's current ordinances, Mr. Mount's lots are in an area that is zoned "rural residential," which allows residential uses only. Despite this zoning, the County's official policy was to recognize the Declaration as governing development of Silver Creek Estates Unit I, as long as the Declaration was not expanded beyond its express terms. Thus, commercial and light industrial uses specifically listed in the Declaration were allowable, even though the zoning for the area is residential. The County maintained that the Declaration created "vested" rights in the plat, and it treated the Declaration as analogous to a nonconforming, or "grandfathered" use.

In December of 2011, the Office of the Property Rights Ombudsman issued an Opinion (requested by Mr. Mount) that concluded that the County's policy of honoring the Declaration as granting "nonconforming" uses was unsupportable. The 2011 Opinion explained that the County's zoning authority superseded the Declaration, and that the County could change the zoning and add any of the uses listed in the Declaration. The Opinion also concluded that the County did not have authority over the Declaration, which could be changed by the property owners in the Silver Creek Subdivision. The last section of the Opinion discussed the zoning estoppel doctrine, mentioning that the theory may apply to some of the properties in Silver Creek. Following that Opinion, the County changed its official policy, and no longer considers the uses listed in the Declaration as "grandfathered."

Development at Silver Creek Junction has been slow, but activity has picked up recently. Several homes have been built, along with some commercial office buildings. In April of 2013, the County rezoned a portion of the Silver Creek Estates, permitting more commercial development. Significantly, however, the County's zoning changes excluded the portion where Mr. Mount's lots are located.[2]

Mr. Mount's parcels are undeveloped, and he has sought opportunity to consolidate the lots to develop them for commercial uses allowed under the Declaration. He has contacted potential buyers, promoting the property for commercial development. Mr. Mount claims that potential buyers have been discouraged when they discuss zoning and development regulations with the County.[3] He also claims that he purchased the property anticipating commercial development, but his plans and his investment have been stymied by the County's planning staff, although he states that he has consulted with the County about possible commercial development, and was told that the County recognized the uses listed in the 1965 Declaration. Mr. Mount claims that the staff told the potential buyers that commercial development of the property was not permitted. The County denies this claim.

[2] The boundary of the zoning change is Silver Creek Road. Commercial development is allowed on lots to the east of the road, but the parcels to the west, including Mr. Mount's lots, remain zoned as rural residential.

[3] Mr. Mount states that more than one potential buyer has backed away from purchasing the property after speaking to the County. Mr. Mount also states that he confronted the County about these disparaging representations, and was assured that commercial uses listed in the Declaration were allowed, under the former County policy.

Mr. Mount has attempted to sell or develop his lots for several years. He has also undertaken work to improve the lots, mostly in the form of grading and installation of drain culverts. This work has also included grading on Earl Street (which is unpaved). In 1998, Mr. Mount obtained a "404 Permit" from the US Army Corps of Engineers. This permit authorized grading work on the lots, and was necessary due to the presence of wetlands. Mr. Mount submitted bills showing that the excavation and grading work were performed. In addition, he submitted documents showing expenditures of approximately $50,000.00, which include the grading and excavating, and expenses tied to sales efforts, such as advertising, professional services, phone calls to prospective buyers, etc. Mr. Mount states that he incurred these expenses in his efforts to develop or sell the property, and that he relied upon the County's policy that commercial uses listed in the 1965 Declaration were allowed.

Summit County has implemented an administrative process to resolve disputes over vested rights and property takings. Under this procedure, a person asserting that a vested right to develop property has been denied may apply for a review by the County.[4] Applications are reviewed by the County's Planning Commission, which recommends either approval or denial to the County Council, which makes the final decision.[5]

Following the 2011 Advisory Opinion, Mr. Mount asserted the right to commercial development on his lots, based on a zoning estoppel theory. Mr. Mount's application was styled as an appeal from a County ordinance interpretation. The County informed Mr. Mount that he could convert the appeal into an application to determine vested rights. As of the date of this Opinion, Mr. Mount has not taken that step. [6]

In its response, the County acknowledges that its policy was to allow commercial uses listed in the 1965 Declaration, and that policy constitutes a representation by the County. In addition, the County acknowledges that Mr. Mount relied upon that policy as guiding development on his lots. The County acknowledges that Mr. Mount has vested rights for commercial development on Lot 45, but not the other three lots. Instead, the County argues that Mr. Mount did not make a substantial change in position or incur extensive expenses, and thus cannot claim vested rights through zoning estoppel on Lots 42, 43, or 44. Finally, the County disputes that Mr. Mount consulted with them on allowable uses, and argues that Mr. Mount's failure to do so invalidates any claim for zoning estoppel.

[4] SUMMIT COUNTY CODE, § 10-9-16 ("Determination of Vested Rights and Other Disputes").
[5] *Id.*, § 10-9-16(B). The County Council performs a sort of preliminary review of the application, and sends it to the Planning Commission if "the application warrants further consideration." *Id.*, § 10-9-16(B)(1). In addition to confirming that a property owner has the right to develop, the County Council may also negotiate a "consent agreement," a type of development agreement. *Id.*, § 10-9-16(B)(7).
[6] Mr. Mount received an excavation permit for Lot 45, so the County acknowledges vested rights on that lot.

Analysis

Development Activity or Substantial Expense Incurred in Reliance on a Zoning Ordinance Establishes Vested Rights.

A. Vested Rights May Be Created Through Reliance on Representations Made by Local Governments.

In Utah, the right to develop according to a particular zoning ordinance vests when an application which complies with current zoning regulations is submitted. *See* UTAH CODE ANN. § 17-27a-508(1); *see also Western Land Equities v. City of Logan*, 617 P.2d 388, 396 (Utah 1980). Once the right to develop vests, the application is entitled to approval according to the ordinances in place when the application is submitted, and the local government may not change the zoning regulations, except in limited circumstances. "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 midstream." *Western Land Equities*, 617 P.2d at 396.

In *Western Land Equities*, the court hoped to establish a "particular point" at which development rights may be considered vested. In its analysis, the Utah Supreme Court considered various "substantial reliance" tests, which established development rights when a property owner incurred expenses or made a change in position due to reliance on zoning ordinances. *Id.*, 617 P.2d at 392. The court discussed these approaches, but rejected them as unpredictable or impractical in favor of a clear rule that vested development rights are created upon submission of an application.

Although the *Western Land Equities* vested rights rule is not based on estoppel or substantial reliance, it did not reject such approaches outright. "In rejecting the zoning estoppel approach in this matter, we are not prepared to state that it would never be relevant to a determination of the validity of the retroactive application of a zoning ordinance." *Id*, 617 P.2d at 392. *Western Land Equities*, in other words, leaves open the possibility that vested rights may be established because of reliance on representations made by a local government, or "zoning estoppel."

The Utah Supreme Court elaborated on the zoning estoppel theory in *Utah County v. Young*, 615 P.2d 1265 (Utah 1980):

> To invoke the doctrine [of zoning estoppel,] the county must have committed and act or omission upon which the developer could rely in good faith in making substantial changes in position or incurring extensive expenses. The action upon which the developer claims reliance must be of a clear, definite and affirmative nature. . . . Silence or inaction will not operate to work an estoppel. Finally, and perhaps most importantly, the landowner has a duty to inquire and confer with the local zoning authority regarding the uses of the property that would be permitted.

Id., 615 P.2d at 1267-68.[7]

The amount of expense needed to establish vested rights from reliance on an ordinance depends upon the circumstances of each case. *Western Land Equities* also indicates that physical construction on the property would be necessary.

B. Mr. Mount May Claim Vested Rights, Because of his Reliance on the County's Policy.

In this matter, Summit County's express policy was to honor commercial uses listed in the 1965 Declaration, even though the zoning for the Silver Creek Estates was officially residential. The County acknowledges that this was its policy until 2011, when it was discontinued after the Advisory Opinion requested by Mr. Mount criticized it. The County's policy was stated through official channels, meaning that it was more than simply a representation from a staff member.[8] Therefore, Mr. Mount's right to a commercial development could vest if, due to reliance upon that policy, he incurred substantial expenses and initiated construction on the lots. The County also acknowledges that Mr. Mount relied on its policy. The County disputes, however, that Mr. Mount incurred "extensive expenses" or made a "substantial change in position" due to its policy.

Mr. Mount claims approximately $50,000 in expenses, including excavation work and installation of culverts on at least two lots to improve drainage, and improvements to Earl Street, to improve access. The "Section 404" permit from the Army Corps of Engineers covered all four lots, and anticipated installation of the drainage culverts.[9] The County acknowledges the work done by Mr. Mount pursuant to a grading or excavation permit, although the County limits this activity to Lot 45 only.[10] His expenses also include costs associated with his efforts to market and sell the property, such as advertising, postage, telephone calls, signage, etc., as well as legal fees tied to efforts to gain approval for development on his property.

Purchase or ownership of property, by itself, is not a sufficient expense to justify a vested right by estoppel. *See Stucker v. Summit County*, 870 P.2d 283, 290 (Utah Ct. App. 1994). It stands to reason, then, that expenses associated with marketing property, standing alone, are also

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[7] *See also Utah County v, Baxter*, 635 P.2d 61 (Utah 1981); *Salt Lake County v. Kartchner*, 552 P.2d 136 (Utah 1976); *Stucker v. Summit County*, 870 P.2d 283 (Utah Ct. App. 1994); *Town of Alta v. Ben Hame Corp*., 836 P.2d 797 (Utah Ct. App. 1992).

[8] The Office of the Property Rights Ombudsman has not changed its position from the Advisory Opinion issued on December 6, 2011 (Requested by Mr. Mount). That Opinion criticized the County for adopting a zoning ordinance, but also allowing uses listed in the 1965 Declaration as being "grandfathered." The criticism was not based on the type of uses, but on the County's approach of using the 1965 Declaration and not an ordinance duly enacted by the County's legislative body. Even though the previous Opinion concluded that the County's approach was wrong, it would be unfair and inequitable to not recognize a property owner's rights established through reliance on that policy when it was officially adopted by the County.

[9] Mr. Mount submitted billing from Craig Kitterman, an architect who helped draw up plans associated with the wetland work. The bill states that the work was for Lots 41-45 of Silver Creek Estates.

[10] The County agrees that Mr. Mount should have vested rights to commercial development on Lot 45, but not the other Lots.

inadequate to establish reliance.[11] However, it also stands to reason that ownership and marketing expenses may be combined with construction and other expenses to warrant reliance, especially in this type of circumstance, where the property is being marketed as commercial, and the owner's stated preference is to sell the land rather than develop it.[12] It would be unfair to exclude marketing expenses when the owner has also incurred construction costs. It would be appropriate, however, when determining whether the expenses have been sufficiently high enough to warrant reliance, to delineate amongst the different types of expenses, rather than considering them all to be of equal importance.

Taking all factors into consideration, this Opinion concludes that Mr. Mount may claim the right to develop all four lots as commercial, based on the County's recognition of the 1965 Declaration. Mr. Mount relied upon the County's policy recognizing uses from that declaration, and has undertaken substantial expenses for construction on all four lots. The expenses include marketing the lots for commercial development, incurred because the County's policy allowed commercial development. Finally, the County itself acknowledges that Mr. Mount relied upon the policy, and may claim a vested development right on at least one lot, due to excavation permits. However, the excavation work extended to all four lots (and the public street in front of the lots), so Mr. Mount may claim a vested right to the other three lots as well.

The County correctly points out a final requirement for zoning estoppel, the property owner's duty to inquire about permissible uses. *See Utah County v. Young*, 615 P.2d at 1268. The inquiry requirement imposes a duty on the property owner, who cannot claim zoning estoppel without showing at least a reasonable attempt to determine what property uses would be allowed. The intent is to avoid frivolous claims by requiring a showing that the landowner understood what is and isn't allowed under a zoning ordinance. Mr. Mount states that he consulted with the County's staff, and discussed possible development on his property. It is clear that he understood the County's policy recognizing the uses listed in the 1965 Declaration. In short, despite the County's objection Mr. Mount met the inquiry requirement and also satisfied the intent of the inquiry requirement, and so could claim rights under the zoning estoppel theory.[13]

Conclusion

A property owner may claim vested development rights by incurring substantial expenses through reliance on representations made by a local government, and undertaking physical construction on a property. Mr. Mount has established the vested right to the type of commercial development provided in the 1965 Declaration on all of his four lots located at the Silver Creek Junction. He understandably relied upon the County's official policy which recognized the 1965 Declaration, and allowed the property uses listed therein. He also incurred substantial expenses in his efforts to develop and market the lot, including expenses for physical construction on the

[11] The discussion in *Western Land Equities* indicates that physical construction on the property would also be required.
[12] Mr. Mount has indicated that he has always hoped to sell the property to a developer.
[13] Even if Mr. Mount had not consulted with the County as he states that he did, the County's official policy would have remained the same. There is no dispute that commercial uses were allowed under the County's policy recognizing the 1965 Declaration.

lots. His total expenses may include those related to marketing the property, along with those related to construction or development. The County itself acknowledges that Mr. Mount should have vested rights, because of permits that were granted by the County. In addition, Mr. Mount obtained a "404 Permit" from the Army Corps of Engineers, and undertook construction activity authorized by that permit. Since this construction activity involved all four lots, his rights extend to all four lots.

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:

Bob Jasper, County Manager
Summit County
60 North Main
Coalville, UT 84017

On this _____ Day of July, 2013, 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