

Advisory Opinion #130

Parties: Harris J. Creveling and Park City

Issued: September 27, 2013

TOPIC CATEGORIES:

E: Entitlement to Application Approval (Vesting)
Other Topics (viii)

Vested rights arise only when an application conforms to local zoning ordinances. The Vested Rights Rule does not grant substantive rights to a property owner, and does not constitute “automatic” approval of an application. Any additional approvals must be obtained in order to complete the development. If an appeal involves a material fact that affects whether an application conforms to local zoning ordinances, vested rights could not be claimed unless the outcome of the appeal caused the application to conform.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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



GARY R. HERBERT
Governor

GREG BELL
Lieutenant Governor

State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Harris J. Creveling
Local Government Entity: Park City
Applicant for the Land Use Approval: Harris J. Creveling
Type of Property: Residential Building Lot
Date of this Advisory Opinion: September 27, 2013
Opinion Authored By: Elliot R. Lawrence
Office of the Property Rights Ombudsman

Issues

May an applicant for development approval claim vested rights when issues material to the application are the subject of an appeal?

Summary of Advisory Opinion

In Utah, vested rights to land development are established when a complete and conforming application is submitted. If the application does not conform to the zoning ordinances in effect, no vested rights may be established. If a material fact that would impact the application's conformity is the subject of an appeal or other legal action, vested rights in the development would still not be established unless the outcome of the appeal caused the application to become conforming. If vested rights are not established, development is subject to changes in zoning ordinances as if no application had been submitted.

The Vested Rights Rule does not grant substantive rights to a developer, and does not constitute "automatic" authorization to complete development. Any additional approvals required by local ordinance must be obtained, such as conditional use permits, etc. A decision on whether an application conforms to local zoning ordinances is a land use decision that is subject to the same appeal provisions as any other land use decision. An applicant must exhaust all administrative remedies before seeking review in the district court.

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 Harris J. Creveling on April 2, 2013. A copy of that request was sent via certified mail to Janet Scott, Park City Recorder, at 445 Marsac Ave., Park City, Utah 84060. The return information indicates that the City received the Request on April 5, 2013.

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 Harris J. Creveling, received by the Office of the Property Rights Ombudsman, April 3, 2013.
2. Response submitted on behalf of Park City by Polly Samuels McLean, Assistant City Attorney, received April 29, 2013. Additional materials from the City were received on April 30, 2013.
3. Reply submitted by Mr. Creveling, received July 1, 2013.

Background

Harris J. Creveling owns a lot located at 129 Main Street in Park City, which has been vacant for the past several years. The Lot is typical for the older part of Park City, and the immediate area dates back to the City's mining past. It is a small property, consisting of only 1,200 square feet, and is part of the City's historical district.¹ The Lot has a steep slope, but other nearby properties have small homes, despite similar slope issues.

For the past several years, Mr. Creveling (and previous owners) attempted to build a home on the Lot.² Because of its size, slope issues, and location within the historic district, there are unique challenges to designing a building for the Lot. The maximum "footprint" allowed on the lot is

¹ Properties located within a historic district are subject to additional regulation and any development requires approval from the Historic Preservation Board.

² The material submitted for this Opinion indicates that a previous owner had sought approval for a home (or some type of construction) on the Lot beginning in 2005. Mr. Creveling's direct involvement began in 2007.

565 square feet, and the maximum height is 27 feet.³ In addition, conditional use approval is required for construction on (or disturbance of) the slope. Even though any development on the Lot would be new, it would still require review under the Historic District Guidelines. The City indicated that it may consider modern materials for new construction, as long as the design was consistent with other historic homes in the area.

In July of 2007, the City's Board of Adjustment granted variances reducing the required setbacks on the front, rear, and south side.⁴ In November of 2007, Mr. Creveling submitted an application for Historic District Design Review. On December 7, 2007, the City informed Mr. Creveling that his application did not satisfy the City's requirements, because 1) the proposed building footprint was too large (619 s.f. rather than 565), 2) the proposed building height exceeded the allowed maximum of 27 feet, and 3) the design for the home's front steps was higher than what was allowed under the City's Land Management Code.⁵

Mr. Creveling states that the City's Board of Adjustment scheduled a hearing or discussion pertaining to his property on December 18, 2007, before he requested a variance on the building footprint and the special exception to the staircase height. Evidently, that Board meeting was to formally adopt the findings from the board's July 2007 meeting which granted the setback variances. Since the Board did not have a quorum at its December meeting, the matter was postponed to January.

On January 15, 2008, the Board met and approved the findings from the July 2007 meeting. Mr. Creveling was present at that meeting, and objected to the final language. Specifically, he argued that the variances granted the previous July included approval of an enlarged building footprint. Despite this objection, the Board approved the findings which granted a variance of the setbacks only. Mr. Creveling did not appeal this action.

On January 16, 2008, Mr. Creveling applied for a variance to enlarge the building footprint. He also requested a special exception to the stairway height regulations, to allow his proposed stairway.⁶ On March 18, the City's Board of Adjustment denied both requests. Mr. Creveling appealed the denials to the Third District Court.⁷

In August of 2011, the District Court issued a written decision upholding the Board of Adjustment's denial of the building footprint variance. However, the Court overturned the denial of the special exception to the staircase height requirement, meaning Mr. Creveling could

³ The building "footprint" is defined as the total area of the foundation of the structure, or the furthest extending wall, not including stairs, patios, or decks. *See* PARK CITY LAND MANAGEMENT CODE, § 15-15-1.31.

⁴ That decision was not appealed and still stands as of the date of this Opinion.

⁵ The City also noted that garbage storage was not allowed in a front-yard setback.

⁶ On December 28, 2007 Mr. Creveling applied for a conditional use permit to construct on a slope greater than 30%. This application was separate from the variance and special exception applications he submitted. No additional information pertaining to that application was submitted for this Opinion.

⁷ Two other plaintiffs were listed on the appeal: Donald Barber and Cindy Barber. Evidently, they are not part of this requested Opinion.

construct the staircase to the greater height.⁸ The decision from the Third District Court was not appealed.

On September 27, 2011, just over thirty days from the district court's decision, the City informed Mr. Creveling that his application from December of 2007 was denied, due to lack of compliance with the City's Land Management Code. The City considered the application closed. The letter to Mr. Creveling noted that the setback variances and the staircase height exception were still in effect, and could be used in a new application for a building on the lot.

After meeting with Mr. Creveling in April of 2012, the City's Senior Planner explained that the City closed the 2007 application because the proposed home exceeded the allowable building footprint, and because of other issues that were left unresolved; namely, conditional use approval to build on a steep slope, and historic district design review. The City also explained that the "Development of Steep Slopes" applicable to his Lot had been amended in 2009. The changes adopted in 2009 may have eliminated the need for conditional use approval, depending on the specific measurements of the Lot.⁹

Mr. Creveling objects to the denial of his 2007 application, and claims that he has the vested right to approval based on that application. The City explains that the 2007 application did not conform to the requirements of the City's Land Management Code, and so was not eligible to receive vested status. The City also argues that Mr. Creveling did not take the required steps to appeal the City's decision to deny the application, and so an appeal is no longer possible.

Analysis

I. An Application That is Not Complete and Conforming Cannot Create Vested Development Rights.

The right to develop under Utah's Vested Rights Rule is established by a complete application that conforms to local zoning ordinances. Neither an incomplete application, nor one which does not conform to zoning ordinances create vested development rights. The Vested Rights Rule provides that development may proceed according to the ordinances in place when a complete and conforming application is submitted. An appeal involving a material fact that impacts whether or not an application is conforming does not grant vested rights, unless the outcome of the appeal causes the application to conform to zoning ordinances.

A. Utah's Vested Rights Rule

Utah's Vested Rights Rule provides that a developer "is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use maps,

⁸ The Third District Court rejected the argument that earlier approval of the variances reducing the setbacks also included approval of a larger footprint. The building footprint was not part of the earlier variance action, and the court also noted that a smaller building could take advantage of the reduced setbacks.

⁹ The City mentioned this in a letter dated April 10, 2012, but did not commit to eliminating the need for a conditional use permit. In February of 2013, the City again explained why it had closed Mr. Creveling's application, and invited him to submit a new application.

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). The statute is a codification of the language used by the Utah Supreme Court in *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980). The Vested Rights Rule essentially means that a local government may not change ordinances after a land use application is submitted, except in limited circumstances.¹⁰ “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 396.

In order to claim the vested right to proceed with development, then, the property owner must show that the application conforms to the applicable land use ordinances. If the application does not conform, vested development rights cannot be claimed. “Allowing persons to obtain vested rights under a zoning ordinance merely by filing preliminary and incomplete papers would defeat the very purpose of zoning regulations.” *Scherbel v. Salt Lake City*, 758 P.2d 897, 901 (Utah Ct. App. 1988).¹¹

In the case presented for this Opinion, Mr. Creveling’s 2007 application did not conform to the City’s zoning ordinances, because 1) the building footprint was too large; 2) the building was too high, and 3) the staircase elevation was also too high. Through an appeal to the Third District Court, Mr. Creveling obtained a special exception that allowed a higher staircase, but the other two problems remained. Since the application still did not conform, no vested rights were created.

B. The Vested Rights Rule Does Not Create Property Rights or an Entitlement to Develop.

The Vested Rights Rule provides that a development application will be processed according to the zoning ordinances in place when the application is submitted, except in certain circumstances.¹² The Utah Supreme Court stated that the Vested Rights Rule is based on preventing inequity because a developer relies upon the language of a zoning ordinance, and does not create property or other substantive rights.¹³ The Rule can only guarantee that the zoning ordinance will not be changed after a compliant application is submitted. *Western Land Equities*, 617 P.2d at 396.

This is illustrated by considering the factual situation that led to the *Western Land Equities* decision. The developer in that case had submitted an application for a residential subdivision on property that was zoned residential. After lengthy deliberations, the city’s planning commission

¹⁰ A local government may alter its ordinances, and impact a pending application, if there a “compelling, countervailing public interest” would be jeopardized if the application were approved; or, if proceedings to amend the ordinance had already begun when the application was submitted. UTAH CODE ANN. § 10-9a-509(1)(a)(i) and (ii).

¹¹ In *Scherbel*, the application for development did not conform to the city’s zoning ordinance. The Utah Court of Appeals therefore concluded that the applicant could not claim vested rights. *Scherbel*, 758 P.2d at 900-01.

¹² See note 10, *supra*.

¹³ In a later case, the Court explained that *Western Land Equities* “recognized the developer’s entitlement to approval based on the developer’s detrimental reliance on the original zoning ordinance, not because the developer was being deprived of a fundamental constitutional right.” *Patterson v. American Fork City*, 2003 UT 7, ¶27, 67 P.3d 466, 474 (citations omitted).

denied the application. While the developer pursued the appeal that would eventually be heard by the Utah Supreme Court, the city changed the zoning designation for the property to manufacturing, thus prohibiting residential development. The Court reversed the city's original denial, and in doing so created Utah's Vested Rights Rule. The rule was necessary to prevent inequity if a property owner relied upon the language of a zoning ordinance.

The Vested Rights Rule prevents retroactive changes to zoning ordinances that block legitimate applications. Thus, an application that conforms to local zoning ordinances is entitled to approval based on the ordinances in place when the application was submitted. As is often the case, multiple approvals are sometimes required in order for a development to receive final authorization. Mr. Creveling's application, for example, would have required a conditional use permit (for construction on a steep slope) and approval by the Historic Preservation Board. Neither of these additional approvals would have been guaranteed, even if Mr. Creveling's previous application was complete and compliant.

C. The Appeal Did Not Create Vested Rights in the 2007 Ordinances.

Mr. Creveling argues that after the decision from the Third District Court, he should have been able to proceed with his original application, presumably modifying it so that it would conform to the zoning requirements in effect in 2007. While the appeal was pending, the City amended its zoning ordinances. The new language evidently impacts development on Mr. Creveling's Lot.¹⁴ However, since he had no vested rights stemming from the application, he cannot claim the right to refer back to the 2007 ordinances. If the outcome of the appeal had made the 2007 application conforming, then Mr. Creveling may have claimed vested rights in the 2007 ordinances.¹⁵

An appeal involving material issues that would affect an application's conformity does not create vested rights in and of itself. Such an appeal could suspend action on an application, and require that it be held until the appeal was resolved. However, the appeal itself would not create vested rights, unless the final result caused the application to conform with the ordinances in effect when the application was submitted. Then—and only then—could the applicant claim vested rights in the ordinances which were in effect when the application was submitted. If the appeal does not cause the application to be conforming, there are no vested rights, and the applicant cannot refer back to the prior language of the ordinances. Vested rights are not created because of a dispute, but by conformity with existing ordinances.

¹⁴ It is not clear what the ordinance changes were, or how they would affect development of the Lot. The City noted that one change affects how the developable area of a lot with a steep slope is measured, which may impact Mr. Creveling's application.

¹⁵ For example, if the Court had ruled in Mr. Creveling's favor, and held that the City had granted a variance enlarging the footprint, then the application would have conformed (at least in that respect) and could possibly have created vested rights based on the 2007 ordinances. The building height issue was apparently not addressed through a variance application.

In this case, Mr. Creveling appealed the City's action, and the City held the application for nearly four years while the appeal was pending.¹⁶ The issues raised in the appeal materially impacted whether or not the application conformed to the City's zoning ordinances. After the decision from the Third District Court, Mr. Creveling's application still did not conform to the City's zoning ordinances, so the City informed him that the application was denied.¹⁷ Mr. Creveling had no vested right to develop according to the 2007 ordinances, because his application never fully conformed to those ordinances. Essentially, he is in the same position he would have been if he had waited four years to submit his application. He has no basis to claim that the 2007 ordinance applies instead of any subsequent zoning amendments.¹⁸

D. Because no Substantive or Property Rights Are Created by the Vested Rights Rule, Appeals of Application Denials Must Be Filed Within the Established Time Frame.

Because no substantive or property rights exist, the City's action closing the application should be subject to the same appeal provisions as any other land use decision. After the Third District Court's decision, which upheld the decision on the building footprint but granted the stair height exemption, the City informed Mr. Creveling that it was closing the application. According to the City, it also informed Mr. Creveling that he could appeal that action, by filing an appeal no later than ten days after the action was taken.¹⁹ The ten-day appeal period expired during the first half of October, 2011.²⁰

The Utah Code provides for a period of not less than ten days to file an administrative appeal for most land-use decisions. *See* UTAH CODE ANN. § 10-9a-704. The City adopted a ten day appeal period. *See* PARK CITY LAND MANAGEMENT CODE, § 15-15-101. Moreover, an appellant must exhaust all administrative remedies in order to pursue an appeal. UTAH CODE ANN. § 10-9a-801(1).²¹ Since the City's action closing Mr. Creveling's application was a land use decision, it is subject to the same appeal provisions as any other land use decision, meaning that he had ten days to file an appeal.

Mr. Creveling is in the same position as the plaintiffs in *Holladay Towne Center, LLC v. Holladay City*.²² In that case, a developer sought approval for a commercial development, but the city

¹⁶ There does not appear to be any reason why the application could have been closed while the appeal was pending. Had the outcome been in Mr. Creveling's favor, the application could have been revived and processed according to the ordinances in place in 2007.

¹⁷ The City waited until the 30-day period to appeal had passed. The district court's decision was not appealed, so it remains in effect for the property.

¹⁸ He is also in the same position he would have been if he had done nothing after the application was submitted in 2007. Vested rights arise when an application conforms, not simply because it has been filed. If nothing else had happened (and the City had allowed the application to remain open), no vested rights would have been created. The application would have to conform to the amended zoning ordinances.

¹⁹ Mr. Creveling states that he was not informed that an appeal had to be filed within 10 days, until well after the 10-day period had passed.

²⁰ It is not clear whether the time began to run from the date of the action, or the date when Mr. Creveling was notified of the action. Other than requesting this Opinion, Mr. Creveling apparently did not file an appeal.

²¹ This requirement means that administrative appeals must be heard before an action may be reviewed by a district court.

²² 2008 UT App 301, 192 P.3d 302.

determined that the application did not conform to the zoning ordinances in place. Rather than pursue an administrative appeal, the developer waited and then filed suit in district court. *Holladay Towne Center*, 2008 UT App 301, ¶¶1-4, 192 P.3d at 303-04. The Utah Court of Appeals held that the developer lost its right to appeal, because it failed to exhaust its administrative remedies. *Id.*, 2008 UT App 301, ¶6, 192 P.3d at 304

[I]nstead of following the statutorily mandated procedures for appealing the departmental denial, which would have allowed [the developer] the opportunity to refute the city’s determination and demonstrate the validity of its application, it “leap-frogged over the entire administrative process,” and circumvented the city’s “opportunity to correct any error it may have made” . . .

Id., 2008 UT App 301, ¶8, 192 P.3d at 305 (citations omitted). Like the developer in *Holladay Towne Center*, Mr. Creveling can no longer pursue an appeal of the City’s action. However, he may submit a new application and seek approval for a home on his Lot.

II. The Variances and Special Exception Remain in Effect on the Property

The City has acknowledged that the setback variances and the stairway height special exception remain in effect on the Lot, and that Mr. Creveling may rely upon those in a new application. The Utah Code provides that variances “run with the land,” meaning that once a variance is approved, it remains in effect, even if the property is sold. *See* UTAH CODE ANN. § 10-9a-702(4).²³ According to the City the special exception would also run with the land. Thus, Mr. Creveling may therefore rely upon the setback variance and the staircase height exception when planning future development. The City has indicated that residential development is still allowed on the Lot at 129 Main Street, and that it would consider a new application that conforms to its zoning ordinances.

Conclusion

The property owner could not claim the vested right to proceed with development, because the application did not conform to the City’s zoning ordinances in effect when the application was submitted. Unless vested rights are established, development of the property is subject to ordinance changes, as if no application had been submitted. Vested rights arise because an application is complete and conforming. If the application does not conform to the applicable zoning ordinances, the applicant cannot claim the right to develop according to those ordinances.

The Vested Rights Rule does not create any substantive rights, but merely a guarantee that zoning ordinances cannot be changed to block development that was allowed when an application was submitted. The Vested Rights Rule does not entitle an applicant to “automatic” development authorization if there are additional proceedings required for final approval.

If there is an appeal or other unresolved legal action that would affect whether or not the application conforms to local zoning ordinances, no vested rights are created unless the outcome

²³ A variance may be terminated by the property owner, or modified if necessary.

of the appeal results in the application's conformity. If the application becomes conforming due to the appeal or other legal action, the applicant may then claim vested rights, and the development approval may proceed according to the ordinances in effect when the application was submitted. At the discretion of the local government, an application may be held while an appeal is pending, and a final decision made after resolution of the appeal.

Because a determination of whether an application conforms to a zoning ordinance is a land use decision, the appeal provisions applicable to any land use decision apply. An applicant must comply with local appeal provisions, and must exhaust all administrative remedies before review may be sought in a district court.

Variations run with the land, and the City's special exceptions also run with the land. Therefore the variations and special exception granted remain in effect, and Mr. Creveling may rely upon them in future applications.

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:

Janet M. Scott, City Recorder
Park City
445 Marsac Avenue
Park City, UT 84060

On this _____ Day of September, 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