Advisory Opinion #22

Parties: John Diamond and the City of West Point

Issued: October 8, 2007

TOPIC CATEGORIES:
K: Compliance with Mandatory Land Use Ordinances
R(ii): Other Topics (Subdivision Plat Approval)

Cities are required to substantially comply with statutory annexation procedures. Although City ordinances regulate the placement of new feedlots near homes, they do not regulate the placement of new homes near feedlots. Past actions may be strong evidence that a similar action should be taken, but they do not control future cases.

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

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Annexation of Land Near Agricultural Protection Area

Advisory Opinion Requested by:	John Diamond
Local Government Entity:	West Point City
Project:	Annexation of Property Into West Point City and a Subdivision Proposed on the Annexed Parcel
Opinion Authored By:	Elliot R. Lawrence, Attorney Office of the Property Rights Ombudsman
Date of this Advisory Opinion:	October 8, 2007

Issues

I. Did West Point City follow proper procedures when it annexed a 25 acre parcel in September of 2006?

II. Is West Point City barred from approving a subdivision located near an existing agricultural and commercial hunting operation?

III. Is West Point City bound to impose conditions on the proposed subdivision which are similar to conditions imposed on a subdivision also located near a commercial hunting operation?

Summary of Advisory Opinion

The City followed proper procedures when it annexed a 25 acre parcel. Proper notice was given, and the City approved the petition as provided in Utah law. The City also properly rezoned the parcel at the time of the annexation.

Concerns about the proposed subdivision's impact on adjoining properties should be addressed through the approval process, or through agreements between property owners, and do not prohibit the subdivision from being approved. Furthermore, the subdivision is not a nonconforming use, nor is the agricultural/hunting operation a nonconforming use due to the

placement of the subdivision. Any issues related to wetlands should be resolved through the appropriate state and federal agencies.

Finally, the City's past practices and approvals do not bind it to any actions or approvals, even in similar situations. Every parcel is unique, and every application is unique. Past actions may be persuasive arguments in favor of the same action in a similar situation, but do not require any particular action or approval.

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 U.C.A. §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.

The request for this Advisory Opinion was received from John Diamond on July 30, 2007. As provided in statute, a letter with the request attached was sent via certified mail, return receipt requested, to Richard Davis, City Manager, West Point City, at 3200 W. 300 North, West Point, Utah 84015. The return receipt was signed and was received on August 15, 2007, indicating that it had been received by the City. A response from the City was received on August 22, 2007.

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, submitted John W. Diamond, and received by the Office of the Property Rights Ombudsman, July 30, 2007.
2. Response submitted on behalf of West Point City, received by the Office of the Property Rights Ombudsman, August 22, 2007.

Background

John Diamond owns approximately 200 acres of agricultural land near West Point City, in Davis County, Utah. His property is not within the boundaries of West Point. This property is designated as an agricultural protection area. Mr. Diamond uses the property for cattle grazing, a livestock feedlot, and a commercial hunting area. His property extends to the Great Salt Lake on

the west. There are federally-designated wetlands in the area near the lake. Mr. Diamond's property is outside of the City limits, and is subject to regulation by the Davis County Code.[1]

In 2006, the owner of a 25 acre parcel which bordered on Mr. Diamond's property submitted a petition to the City, asking that the parcel be annexed into the City's boundaries. This petition did not attempt to annex Mr. Diamond's property. On September 5, 2006, Mr. Diamond attended a meeting of the West Point City Council, and spoke against the annexation proposal. Mr. Diamond raised several issues, including the proximity of the cattle operation and hunting club, the presence of wetlands, and issues related to drainage of storm water. The City approved the annexation petition, and, as part of the approval, designated the parcel's zoning as "R-1." According to the City, the R-1 zone allows for single-family residences, and anticipates a maximum density of 2.2 units per acre.

Mr. Diamond states that the City did not notify him of the pending annexation, and that he found out from a neighbor. The City states that it published notice of the meeting in the *Standard Examiner* newspaper, and complied with the notice provisions of state law.

The owner of the annexed parcel proposed that the parcel be subdivided into 30 lots. A portion of the subdivision would be located within 300 feet of Mr. Diamond's property, and some lots would be located approximately 30 feet from Mr. Diamond's feedlot. Mr. Diamond has also expressed concern over drainage from residential areas onto his property, as well as the impact of that drainage on wetland areas near the Great Salt Lake.

In its response, the City submitted an agreement between Mr. Diamond and the property developer, signed in July of 2007. In this agreement, the developer agreed to construct a berm and fence between the homes and Mr. Diamond's property, and Mr. Diamond granted an easement to allow drainage through his property.

Analysis

I. West Point City Followed Correct Procedures When it Annexed and Rezoned the 25 Acre Parcel.

The City followed proper procedures when it annexed the 25 acre parcel. Annexation of territory into a municipality is governed by §§ 10-2-401 through -428 of the Utah Code. The annexation process usually begins by filing a petition with the municipality. The petition must be signed by persons representing a majority of the land owners within the area sought to be annexed, provided that the signatures also represent at least 1/3 of the land value within the area.[2] When a petition is filed, the municipal legislative body first decides to accept or reject the petition.[3] If

[1] There has been no allegation that Mr. Diamond's agricultural/hunting operation violates Davis County zoning regulations. His property is an Agricultural Protection Area, which was approved by the County.

[2] UTAH CODE ANN. § 10-2-403(3)(b).

[3] *Id.*, § 10-2-405(1). Acceptance at this point does not mean the annexation is approved. The legislative body simply determines whether or not it wants to pursue the proposal. In a "county of the first class," a notice of intent to annex is filed first. Copies of that notice must also be sent to neighboring property owners. Since Davis County

the petition is accepted, it is reviewed to determine compliance with state law. If it does, the municipality must publish notice of the proposal in a newspaper of general circulation, and mail the notice to certain "affected entities".[4]

Any affected entity may formally protest the annexation, by filing a protest with the county boundary commission within 30 days after receiving notice from the municipality.[5] If no protest is filed after the 30 day period, the municipality may proceed to a decision on the petition. If a protest is filed, the municipality may either reject the petition or wait for a decision from the county's boundary commission.[6]

If no protest is filed, the municipality must then schedule a public hearing on the matter. Notice of this hearing must be published in newspaper of general circulation. Notice to individual property owners is not required.[7] Following the public hearing, the municipal legislative body may accept or reject the petition. If the petition is accepted, the territory is annexed into the municipality.[8] The municipality may designate the zoning for territory that is annexed as part of the ordinance approving the annexation.[9]

West Point City properly followed the procedures established by the Utah Code when it annexed the 25 acre parcel. "A city satisfies the statutory requirements [for annexation] through 'substantial compliance' with the statute" *Szatkowski v. Bountiful City*, 906 P.2d 902, 904 (Ct. App. Utah 1995). The petition was submitted to the City by the property owner, Kip Cashmore. Since he owned all of the property, his signature was sufficient to initiate the process. The City notified all affected entities, which were given the opportunity to pursue a challenge to the Boundary Commission. There was no protest filed by any affected entity, so the City scheduled a public hearing on the proposal. Since Davis County is not a "county of the first class," there is no requirement that neighboring property owners be specifically notified of the proposed annexation.

On September 5, 2006, the City held a public hearing on the proposed annexation. Mr. Diamond was present, and expressed concerns about the proposal. Following the public hearing, the City Council unanimously approved the annexation. The ordinance designated the zoning for the annexed parcel as "R-1." There does not appear to be any irregularity with the annexation

---

is not a county of the first class (*See* UTAH CODE ANN. § 17-50-501), mailed notice to adjoining property owners was not required.

[4] *Id.*, § 10-2-406. "Affected entities" includes the county in which the property is located, school districts and any local districts whose service area includes the land proposed for annexation, and any other municipalities whose boundaries are located within ½ mile of the proposed annexation. *See id.*, § 10-2-401(1)(a). If there is no "newspaper of general circulation" available, notice may be posted in conspicuous areas.

[5] *Id.*, § 10-2-407. Each county is required to appoint a boundary commission.

[6] *Id.*, § 10-2-407(3)(a). The boundary commission conducts a public hearing, and may approve, disapprove, or modify a petition. *See id.*, § 10-2-416. If the petition is approved, the municipality may approve the petition without an additional public hearing. *Id.*, § 10-2-408.

[7] *Id.*, § 10-2-407(3)(b).

[8] *Id.*. § 10-2-425. The municipality must file documentation with the lieutenant governor's office to finalize the annexation.

[9] *Id.*, § 10-9a-506. If the zoning is not designated at the time of the annexation, the land use in the annexed territory "shall be compatible with surrounding uses." *Id.*, § 10-9a-506(b). After annexation, the zoning regulation of the annexed territory may also be changed by following the same procedure for any zone change within the municipality.

process, so the City substantially complied with the annexation statute. Furthermore,"the determination of municipal boundaries is a legislative function." *Kearns-Tribune Corp. v. Salt Lake County Comm'n*, 2001 UT 55, ¶ 21, 28 P.3d 686, 691. The City thus had broad discretion to make a decision on whether to annex the territory. *See Szatkowski*, 906 P.2d at 904.

II. City Ordinances Allow the Subdivision Proposed on the Annexed Parcel.

The ordinances of West Point City do not prohibit or restrict residential development on the annexed parcel, even near an agricultural operation and hunting club. John Diamond, who requested this Opinion, raised concerns about the new development being located close to his property. Although the concerns raised by Mr. Diamond ought to be considered in the subdivision approval process, there is nothing in the City's ordinances that prohibits the development.

A. Mr. Diamond's Existing Feedlot Does not Prohibit Construction of New Homes on the Annexed Parcel.

The City's ordinance regulating the placement of feedlots near residential neighborhoods does not prevent the subdivision. Section 17-15-3 of the West Point City Code requires that all feedlots be located at least 200 feet from any dwelling located on an adjacent lot. If the adjacent lots are vacant, the feedlot cannot be located less than 30 feet from the property line. That ordinance, however, regulates the placement of new feedlots, not the construction of new homes. An existing feedlot does not prohibit the placement of new homes on an adjoining parcel. In short, the feedlot on Mr. Diamond's property does not prevent construction of dwellings on the annexed parcel.

There remains the question as to whether Mr. Diamond would be allowed to expand or replace his existing feedlot. Since his property is not located in West Point City, its ordinance prohibiting a feedlot within 200 feet of a dwelling would not apply. Mr. Diamond's property is currently governed by the Davis County Code. Section 15.08.440 of that code requires that feedlots be located at least 100 feet from a dwelling. *See* Davis County Code, § 15-08-440(G). Since the exact placement of the new homes in relation to the feedlot is not known, this Opinion cannot express any conclusions about the ability of Mr. Diamond to expand or replace his feedlot.

B. Mr. Diamond's Agricultural and Commercial Hunting Operations do not Prohibit Residential Development on the Annexed Parcel.

Nothing can be found in state law, or in the ordinances of West Point City or Davis County, that restrict development of parcels adjoining agricultural activities or commercial hunting operations. While there may be concerns about the wisdom or viability of constructing residences near such activities, those concerns should be addressed through the approval process. Imposing a ban on new construction near agricultural or hunting operations would stymie development, and grant a handful of individual landowners undue power over land use. Mr. Diamond may have legitimate concerns about a new subdivision adjoining his property and impacting his operations, but there is no legal authority for an automatic ban on the new development. Such a decision is within the discretion of the City to make whatever land use decisions it feels are appropriate.

Mr. Diamond's property is an Agricultural Protection Area, and he is entitled to the protections granted such areas by §§ 17-41-101 through 406 of the Utah Code. Designating property as an Agricultural Protection Area does not bar development on adjoining parcels, but the Utah Code grants the property owner certain protections from nuisance lawsuits. In addition, the owner of any new subdivision development near an Agricultural Protection Area must include a notice on the subdivision plat that agricultural operations are being conducted in the vicinity.[10] The subdivision on the annexed territory, which adjoins Mr. Diamond's property, is subject to that notice requirement.

C. The Proposed Subdivision is Not a Nonconforming Use Because of the Agricultural Operation; and the Subdivision Does not Make the Agricultural Operation a Nonconforming Use.

Approval of the subdivision near Mr. Diamond's agricultural/hunting operation does not mean that the subdivision is a nonconforming use, nor does the subdivision make Mr. Diamond's operation a nonconforming use. Since both the subdivision and Mr. Diamond's operation are lawful uses, neither one is a nonconforming use.[11] There is no reason to conclude that any new development automatically causes adjoining land uses to become nonconforming. As was discussed above, however, the Davis County Code may restrict expansion or replacement of Mr. Diamond's feedlot because of dwellings in the vicinity.

D. Any Wetland Concerns Should be Addressed to the Appropriate State and Federal Agencies.

Mr. Diamond has also raised concerns that the new subdivision may result in alteration or filling of wetland areas near the Great Salt Lake. There appear to be federally-designated wetlands along the lake shore, however, the Request for Advisory Opinion does not identify any specific actions that might impact wetland areas. Any issues related to water drainage and wetlands

---

[10] *See* UTAH CODE ANN. § 17-41-403(3)(a). The statute requires that the notice be attached to the subdivision plat. There is no requirement that individual purchasers receive any further notice.

[11] A nonconforming use is a use of land that was lawful when it began, but no longer complies with zoning regulations, because of subsequent ordinance changes. *See* UTAH CODE ANN. § 10-9a-103(24) (municipalities); § 17-27a-103(27) (counties). Neither the subdivision nor Mr. Diamond's property meets that definition.

should be resolved through the appropriate state and federal agencies, and are beyond the scope of this Opinion.[12]

III. Previous Approvals or Actions do not Bind West Point City to Future Approvals or Actions.

Mr. Diamond suggests that since the City required a "buffer zone" between a subdivision built near another commercial hunting club, a similar buffer should be required between his property and the subdivision proposed for the annexed parcel. However, past approvals do not necessarily bind a City to similar actions in similar situations. Every parcel of property is unique, every development is unique, and zoning authorities must have discretion to adopt regulations that are deemed best to address each particular situation.

> It must be remembered that zoning is not a static thing which once established becomes set in concrete forever. . . . It is obvious that there must be some pliability so that in performing its function the [local government] may keep abreast of changing conditions as life courses onward and meet the varying needs of the growing [locality].

Naylor v. Salt Lake City Corp., 17 Utah 2d 300, 302, 410 P.2d 764, 766 (1966). Past actions taken in similar circumstances may be strong evidence that the same action should taken, but they do not force a local government to take the same action.[13] Furthermore, choosing a reasonable, but alternative means to address a similar situation is not necessarily prohibited.[14]

The argument that a local government is bound by its past approvals is an application of the "zoning estoppel" doctrine. Zoning estoppel prevents a local government from denying an application if the property owner has relied on a representation from the government.

> To invoke the doctrine [of zoning estoppel,] the [government entity] must have committed an 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.

Utah County v. Young, 615 P.2d 1265, 1267 (Utah 1980). Zoning estoppel requires that the governmental action be "clear, definite and affirmative," indicating an act that could be interpreted as an approval or agreement. Simply identifying a past action in a similar situation is not a "clear, definite and affirmative" approval of a proposed action. Thus, it cannot be said that

---

[12] Local governments may not designate any land as wetlands except for areas already designated by a federal agency. *See* UTAH CODE ANN. § 10-9a-521 (municipalities); § 17-27a-520 (counties).

[13] *See, e.g. Cottonwood Heights Citizens Ass'n v. Board of Commissioners of Salt Lake County*, 593 P.2d 138, 140 (Utah 1979) "The fact that a prior application has been denied should not preclude the Commission from granting a later application if there has been a material change in circumstances." (citations omitted).

[14] *Bradley v. Payson City Corp.* 2003 UT 16, ¶ 24, 70 P.3d 47, 54. "Though a municipality may have a myriad of competing choices before it, the selection of one method of solving [a] problem in preference to another is entirely within the discretion of the city; and does not, in and of itself evidence an abuse of discretion." (internal quotations omitted)

past actions bind or estop a local government to a similar action.[15] Past practices may be persuasive arguments in favor of a similar action, but are not sufficient to bind the government entity.

Conclusion

There does not appear to be any irregularity in the procedure followed when West Point annexed a 25 acre parcel. Proper notice was given, and the annexation petition was approved. The City also properly designated the zoning for the annexed territory when the petition was approved. In addition, the annexation was approved in September of 2006, so the time to file any appeal has passed.

Any concerns about developing a residential subdivision near an agricultural/hunting operation should be addressed through the approval process, and do not bar the subdivision. Legitimate concerns about the impact of the subdivision are best resolved through reasonable conditions on the development. It appears that Mr. Diamond and the developer of the subdivision have entered an agreement that addresses some of these concerns. Finally, any issues over wetlands and drainage from the subdivision should be resolved through the appropriate state and federal agencies.

Prior approvals in similar circumstances do not automatically force a local government to take similar actions. Every parcel is unique, and every application is unique. An action that is appropriate in one situation may not be appropriate in another. Past practices may be persuasive evidence in favor of a particular approval, but they do not bind a local government to take the same action.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

[15] *See e.g., Salt Lake County v. Kartchner*, 552 P.2d 136 (Utah 1976) (County not estopped from enforcing setback regulations, even though several properties in the same neighborhood violated the same regulation).

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, § 13-42-205. 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 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:

Richard L. Davis
City Manager
West Point City
3200 W. 300 North
West Point, UT 84015

On this _____ Day of October, 2007, 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