Advisory Opinion #65

Parties: Sevier Power Company, LLC and Sevier County

Issued: March 26, 2009

TOPIC CATEGORIES:
E: Entitlement to Application Approval (Vesting)
H: Compelling, Countervailing Public Interests
I: Pending Ordinances

An applicant is entitled to approval of a land use application if the application conforms to the requirements of the local government's land use ordinances in effect when a complete application is filed. An initiative to amend a zoning ordinance which began after the application was filed cannot be "pending" and impacting the vested rights of the applicant. Since an initiative is different than referendum on an ordinance change, and does not affect past acts implemented before the initiative became a pending ordinance change, it does not constitute a compelling, countervailing public interest sufficient to affect the vested rights of the applicant.

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

LAW OFFICES OF
NELSON CHRISTENSEN & HELSTEN
A PROFESSIONAL CORPORATION
68 SOUTH MAIN STREET, 6th FLOOR
SALT LAKE CITY, UTAH 84101
STEPHEN K. CHRISTENSEN
TELEPHONE (801) 531-8400
FACSIMILE
(801) 363-3614

ADVISORY OPINION

Advisory Opinion Requested By:	Sevier Power Company, LLC by Brian W. Burnett Callister Nebeker & McCullough
Property Owner/Developer:	Sevier Power Company, LLC
Applicant for the Land Use Approval:	Sevier Power Company, LLC
Project:	270 MW Power Plant in Sevier County, Utah
Date of this Advisory Opinion:	March 26, 2009
Opinion Authored By:	Stephen K. Christensen Nelson Christensen & Helsten Neutral Third Party

Issues

Is Sevier Power Company, LLC ("**SPC**") entitled to have its application for final approval, deemed complete on December 19, 2007, considered by the Sevier County Board of County Commissioners (the "**County Commission**") under the land use ordinances of Sevier County in effect at the time of application, without application of the subsequent modifications to land use ordinances occasioned by the passage of Proposition One?

Summary of Advisory Opinion

Based on the assumptions set forth below, this Advisory Opinion (this "**Opinion**") concludes that SPC has a vested right under Utah law to have its application considered by the County Commission under the ordinances of Sevier County in effect at the time the application was complete in December of 2007. The amendment to Sevier County's zoning ordinance accomplished by the successful passage of Proposition One has no effect on SPC's application for final approval. This Opinion does not consider the effects, if any, of the legal challenge filed by Sevier Citizens for Clean Air and Water, Inc. ("**SCCAW**") in the Sixth District Court, which apparently challenges the validity of the rezoning of the subject property completed in June of 2006.

Evidence

In considering the issues presented in this Opinion, in addition to pertinent Utah statutory and common law, all documents provided by the Office of the Property Rights Ombudsman were thoroughly reviewed. Such documents included submissions by SPC (by its counsel, Mr. Brian W. Burnett), Sevier County (by County Attorney Mr. Dale Eyre as well as outside counsel, Mr. Eric T. Johnson) (the "**County**"), SCCAW (by Mr. James O. Kennon), and the Right to Vote Committee ("**RTVC**") (by Ms. Elaine Bonavita). In considering the issues presented by this Opinion, no special deference or presumption of validity was given to the submissions or statements of any particular party.

Assumptions

This Opinion is specifically dependent on the truth of the following assumptions and expresses no opinion as to such matters:

1. The PUD Overlay zone is the proper zoning designation for SPC's proposed use of the subject property.

2. The County rezoned the Property from A5-25 to PUD Overlay in accordance with Sevier County's ordinances and applicable Utah law.

3. A timely and appropriate challenge to the County's rezoning decision was filed by SCCAW in the Sixth District Court in and for Sevier County on July 18, 2006.

4. On December 13, 2007, SPC filed its application for final approval, which application was certified as complete by the Sevier County Planning and Zoning Department in a letter dated December 19, 2007. The determination of completeness of SPC's application made by the County on December 19, 2007, was accurate and appropriate under Utah law.

5. A valid petition for initiative to amend the County's zoning ordinance was filed. Thereafter, the requisite number of signatures was collected and certified, and a valid election was held whereby the citizens of Sevier County amended the zoning ordinance via Proposition One.

Background

SPC is the owner of approximately 350 acres of real property (the "**Property**") situated in Sevier County, Utah. Prior to any of the events giving rise to the dispute, the Property was zoned for agricultural use (A5-25). On June 19, 2006, the County Commission approved a zoning change to apply a PUD overlay zone to the Property, allowing industrial uses. On July 18, 2006,

SCCAW filed a lawsuit in the Sixth District Court challenging the County Commission's decision to rezone the Property. As noted in the "Assumptions" section above, this Opinion assumes, without opining, that all proper procedures were followed, that all requisite notices were given, and that the decision to rezone the Property was valid.

After the Property was rezoned, SPC began the process of obtaining a permit for the construction and operation of a coal-fired power plant. Under Sevier County's ordinances, the process consisted of three steps: concept approval, preliminary approval, and final approval. Concept approval was granted by the Sevier County Planning Commission (the "**Planning Commission**") on July 12, 2006. The Planning Commission granted preliminary approval on December 12, 2007. On December 13, 2007, SPC filed its application for final approval, which application was certified as complete by the Sevier County Planning and Zoning Department in a letter dated December 19, 2007 (the "**Application**").[1] On January 23, 2008, the Planning Commission voted to recommend final approval of SPC's Application to the County Commission.

On March 18, 2008, a petition for a citizen's initiative was filed by RTVC. RTVC filed the completed initiative package, together with signatures, on May 2, 2008. The Sevier County Clerk then reviewed and certified the signatures gathered by the initiative's sponsors. On July 7, 2008, the County Commission determined the petition for initiative to be ready for inclusion on the November 4, 2008 ballot. Following fast-track litigation on the issue, the Utah Supreme Court upheld the petition for initiative. Accordingly, the initiative, known as "Proposition One," was put to the voters of Sevier County on November 4, 2008, and became part of the Sevier County ordinances by Proclamation dated November 21, 2008. Proposition One modified the requirements for conditional use permits for coal-fired power plants, requiring the same to receive the vote of a majority of the registered voters of Sevier County.

Opinion

Under Utah law, SPC has a vested right to have its Application considered by the County Commission under the ordinances of Sevier County in effect on the date that the Application was filed and all fees paid (which date was no later than December 19, 2007). Such ordinances include, but are not limited to Sevier County Ordinance Section 14.68.050 (pertaining to

[1] On July 11, 2007, SPC formally requested (pursuant to Utah Code Ann. § 17-27a-509.5) a determination that its application was complete. The County Commission informed SPC, by letter dated August 7, 2007, that the application was incomplete, resulting in SPC's submittal of additional materials, followed by the Planning Commission's grant of preliminary approval, and certification of completion by the Sevier County Planning and Zoning Department.

Approval Criteria) and Section 14.68.060 (pertaining to Modification — Revocation), as they existed prior to the amendments passed by the initiative known as Proposition One.[2]

Pursuant to the recognized "vested rights doctrine," first enunciated in *Western Land Equities v. Logan*, 617 P.2d 388 (Utah 1980) and now codified at Utah Code Ann. § 17-27a-508(1)(a) as part of Utah's County Land Use, Development, and Management Act, SPC is presumed entitled to have its Application considered by the County Commission. Under the doctrine of vested rights, "an applicant is entitled to approval of a land use application if the application conforms to the requirements of the county's land use maps, zoning map, and applicable land use ordinance in effect when a complete application is submitted and all fees have been paid." *Id.* SPC's Application requests approval for an industrial land use, which use is a contemplated use within the PUD overlay zone. According to the County, based on its determination of completeness issued on December 19, 2007, SPC has satisfied the requirements of the statute. SPC's rights to have its Application considered under the ordinances then in place likely vested on December 13, 2007, when the Application was complete and all fees had been paid. At the latest, vesting occurred on December 19, 2007, the date on which the County determined SPC's Application to be complete.

The fact that the County Commission has not yet taken final action, *i.e.*, approved or denied SPC's Application, is not relevant for vesting purposes. Rather, the relevant inquiry is whether SPC's Application was complete and all applicable fees paid prior to the date of any ordinance modification.

This Opinion acknowledges that the vesting presumption described above may be rebutted if (1) a contrary ordinance was pending before the Application was submitted, or (2) the land use authority finds "on the record" that a "compelling, countervailing public interest would be jeopardized by approving the application". See Utah Code Ann. §§ 17-27a-504 & 17-27a-508(1)(a)(i) & (ii). SPC's Application was complete and the Planning Commission's January 23, 2008 recommendation of final approval of SPC's Application to the County Commission was made well before the initiative process was begun on March 18, 2008. There is no evidence that any part of the Application was incomplete when the initiative was begun. Further, there has been no finding "on the record" by the County Commission that a compelling, countervailing public interest would be jeopardized by approval of SPC's Application, nor has the County enacted any temporary land use regulation that may have stayed the rezoning of the Property, pursuant to Utah Code Ann. § 17-27a-504, for up to six months.

[2] How, if at all, the ordinances, including the zone Change established in June 2006, may be ultimately affected by the SCCAW lawsuit filed in July of 2006, is not the subject of this Opinion. No conclusion or opinion is expressed with regard to the merits of SCCAW's claims or the possible impact of the lawsuit on SPC's vested rights. As long as the SCCAW lawsuit is pending, the validity of the June 2006 zone change remains unresolved. Any action by SPC with regard to the approval process or actual construction shall be done at SPC's risk, and remains subject to the final outcome of the lawsuit

The Utah Supreme Court has found that the exercise of the people's right of *referendum* presents a compelling, countervailing public interest which "defeats any operation of the vested rights doctrine" *Mouty v. Sandy City Recorder*, 122 P.3d 521, 526 (Utah 2005). However, the initiative in this situation does not have the same effect under Utah law. In *Mouty*, the court found that the citizens' efforts to pursue a referendum on an ordinance were well known at the time of the developer's application. As a result, pursuant to the Utah Constitution, which tolls the effectiveness of newly-enacted "law[s] or ordinance[s]" pending the exercise of the referendum right, the new zoning ordinance at issue in the case had not yet taken effect. *Id.* ¶ 14 (citing Utah Const. art. VI § 1(2)(b)(ii)). "Consequently, the development applications were not in conformity with the 'zoning requirements in existence at the time of . . . application.'" Id. (citing *Western Land Equities*, 617 P.2d at 396).

In contrast, during the pendency of an *initiative*—such as Proposition One—the effectiveness of the ordinance that the initiative seeks to amend is not tolled or stayed. *See* Utah Const. art. VI § 1(2)(b)(i). Whereas a referendum is an attack on, and attempt to overturn by popular vote, legislation *already passed* and currently being implemented, an initiative is an attempt *to implement* as law by popular vote newly drafted legislation. An initiative in this case has no impact on the past acts of the County Commission. In SPC's case, no petition for referendum was ever filed following the County Commission's rezoning of the Property.[3] RTVC did not file a petition for initiative until over three months after SPC's application was complete and after the Planning Commission had recommended final approval. At the time of SPC's Application, the rezoning ordinance had been in effect for approximately eighteen months. Thus, since Proposition One did not stay the effectiveness of the rezoning, SPC has a vested right to have its Application considered under the zoning ordinances in effect in December of 2007.

The information provided by the Office of the Property Rights Ombudsman contains criticisms by certain citizens of SPC's classification of its Application. This Opinion does not opine on the classification of SPC's Application as either an application for conditional use permit or a planned unit development permit, since any such distinction is unnecessary. The applicable law supporting this Opinion necessitates the same outcome regarding SPC's vested rights regardless of any such classification.

[3] Even if a petition for referendum had been filed following the rezoning of the Property, however, it is unlikely that such an action would have been upheld under a legal challenge, since individual property zoning decisions are typically characterized as administrative actions that are not referable to the voters (unless, under the Mouty decision, the body that makes the zoning decision functions exclusively as a legislative body under the applicable form of government), as opposed to legislative actions, which are subject to challenge via referendum. See, e.g., Save Beaver County v. Beaver County, 2009 UT 8 ¶ 17 (Utah 2009) (citing Mouty, 122 P.3d at 521)); see also Citizen's Awareness Now v. Marakis, 873 P.2d 1117, 1121 (Utah 1994).

Conclusion

SPC has a vested right to have its Application considered by the County Commission under the ordinances of Sevier County in effect at the time SPC's Application was complete and all fees had been paid, which was no later than December 19, 2007. The amendment to the zoning ordinances accomplished by the successful passage of Proposition One thus has no effect on SPC's Application.

NELSON CHRISTENSEN & HELSTEN

Stephen K. Christensen

NOTE:

This is an advisory opinion as defined in Utah Code Annotated § 13-43-205. 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 legal counsel and not rely on this document as a definitive statement of how to protect or advance such 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.

NELSON CHRISTENSEN & HELSTEN

MAILING CERTIFICATE

Utah Code Ann. § 13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with 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 as designated in that database.

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

Ralph Okerlund
Commissioner
250N Main St
Richfield, Utah 84701

On this 1 day of April, 2009, 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.

Stephen K. Christensen