Advisory Opinion #107

Parties: United Park City Mines Company and Park City

Issued: October 27, 2011

TOPIC CATEGORIES:
E: Entitlement to Application Approval (Vesting)
G: Proceeding With Reasonable Diligence
R(viii): Other Topics (Appealing Land Use Decisions)

Given the policies underlying the land use process, a time limit for a developer to complete a required condition ought to be tolled during the pendency of an appeal, when it is equitable to do so. This equitable tolling time mitigates the potential injuries a developer may face due to an appeal, while upholding the importance of the appellate process. Tolling should not be unreasonably withheld when appropriate, but should also not be granted to simply excuse inactivity by a developer.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	United Park City Mines Company
Local Government Entity:	Park City
Applicant for the Land Use Approval:	United Park City Mines Company
Project:	Residential Subdivision
Date of this Advisory Opinion:	October 27, 2011
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

Does a pending appeal of a land use approval toll a period in which a property owner is required to record a subdivision plat?

Summary of Advisory Opinion

Given the policies underlying the land use process, Utah laws, and Utah cases, this Opinion concludes that a time limit for a developer to complete a required condition ought to be tolled during the pendency of an appeal, when it is equitable to do so. This equitable tolling time mitigates the potential injuries a developer may face due to an appeal, while upholding the importance of the appellate process. Tolling should not be unreasonably withheld when appropriate, but should also not be granted to simply excuse inactivity by a developer.

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 ANN. § 13-43-205. The 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 Christie Babalis, attorney for United Park City Mines, on June 2, 2011. A copy of that request was sent via certified mail to Janet M. Scott, City Recorder of Park City. A certified mail receipt, indicating that the City received the letter, was delivered to the Office of the Property Rights Ombudsman on June 7, 2011.

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, including attachments, from United Park City Mines filed June 2, 2011 with the Office of the Property Rights Ombudsman.
2. Response from Park City, submitted by Polly Samuels McLean, Assistant City Attorney, received September 26, 2011.

NOTE: A group of neighboring property owners, who were involved in the appeal of the subdivision approval discussed in this Opinion, were also informed of the Request for Advisory Opinion. A representative submitted an email to the Office of the Property Rights Ombudsman stating that the group agreed with the City's Response.

Background

On November 6, 2008, the United Park City Mines Company (UPCM) obtained approval for a subdivision plat, located at 100 Marsac Avenue in Park City. Shortly after the City approved the plat, a group of neighboring property owners appealed the decision by filing a suit in the Third District Court.[1] That appeal was dismissed, and the litigation was concluded on August 13, 2009.

UPCM's proposed development was for a ten-lot subdivision on a 2.7 acre parcel, allowing ten single-family residences. The zoning for the area was "HR-1," (Historic Residential), which allowed single family homes. UPCM proposed that its subdivision would provide affordable housing, and the project was titled the "Marsac Avenue Affordable Housing Subdivision." The final approval included several conditions, including preservation of historic walls, deed restrictions to protect open spaces, and development of a pedestrian sidewalk and street crossing.

[1] The appeal was filed on December 8, 2008, and challenged the approval process, claiming that the City did not follow its own ordinances, and did not follow proper notice and hearing requirements. In addition, the appellants objected to the City approving use of a private drive (belonging to the appellants) as a secondary emergency access for the new subdivision. After briefing and oral argument, the District Court dismissed the appeal in the summer of 2009.

One of the conditions placed on the subdivision approval required that the subdivision plat be recorded within one year after approval. If the plat was not recorded within one year, it would be voided, and the property owner would need to reapply for a subdivision. Based on that condition, therefore, the plat should have been recorded before November 6, 2009. That condition did not specifically provide for an extension of the time to record, but evidently the City would consider a request for an extension.[2]

While the appeal of the subdivision approval was pending, UPCM did not record the subdivision plat. On November 17, 2009, UPCM requested an extension of the recording deadline. The City maintains that the deadline had passed on November 6, and the company argues that the appeal tolled, or temporarily stopped the one-year period from running. According to UPCM, since the appeal tolled the one year period, they had until July 11, 2010 to record the subdivision or request an extension. The City maintains that tolling is not necessary, because UPCM has not shown that it could not record the subdivision or fulfill the other conditions due to the appeal.

Analysis

I. The Utah Code Provides That Local Governments May Require Recording of Subdivision Plats Within a Reasonable Time Period.

The condition requiring that subdivision plats be recorded within one year of approval is within the City's authority and promotes valid public interests. Local governments are granted fairly broad authority to regulate land use and development:

> To accomplish the purposes of [Chapter 10-9a], municipalities may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and development agreements governing uses, density, open spaces, structures, buildings, energy efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities, fundamental fairness in land use regulation, considerations of surrounding land uses and the balance of the foregoing purposes with a landowner's private property interests, height and location of vegetation, trees, and landscaping, unless expressly prohibited by law.

UTAH CODE ANN. § 10-9a-102(2).[3] This grant includes authority to approve subdivisions. *See id.*, §§ 10-9a-601 to -611.

[2] The City did consider UPCM's request for an extension of the time to record, and it notes that extensions were granted for UPCM's Master Planned Development, Steep Slope Conditional Use, Historical District Design Review applications. All of these applications were related to the subdivision.

[3] Counties have similar authority. *See* UTAH CODE ANN. § 17-27a-102(2) (§§ 17-27a-101 through -803).

Section 10-9a-603(5) of the Utah Code requires that new subdivision plats be recorded. That section also provides that a city may impose a time period in which a subdivision must be recorded. Failure to record a plat within that time period makes the plat voidable:

> (5) (a) After the plat has been acknowledged, certified, and approved, the owner of the land shall, within the time period designated by ordinance, record the plat in the county recorder's office in the county in which the lands platted and laid out are situated.
>
> (b) An owner's failure to record a plat within the time period designated by ordinance renders the plat voidable.

Id., § 10-9a-603(5). The City may therefore designate a reasonable time period in which a subdivision must be recorded. The Utah Code does not establish the length of a time period, so it follows that any reasonable time frame could be adopted. The state code provides that if an owner fails to record a plat within the time frame, the plat is "voidable." This means that the city could choose to recognize the plat as valid, or it could simply treat the plat as void.[4]

A requirement that a plat be recorded within a set time serves valid public purposes. It promotes certainty and finality in subdivision plats, and helps avoid unnecessary problems caused by "phantom," or unrecorded plats and deeds. A recording deadline also helps encourage economic development, and commits applicants to completion of the subdivision process. Because of the authorization in the Utah Code, and the sound supporting policy, the City may impose a condition requiring that subdivision plats be recorded within one year of approval.

II. An Appeal of a Land Use Decision Does Not Automatically Stay the Decision, But a Stay May be Requested by the Aggrieved Party.

A. Vested Rights and The Land Use Application and Decision Process

Utah recognizes the importance of a property owner's right to use and develop property, especially when approval to develop is granted. The Utah Supreme Court firmly established that policy in its landmark decision of *Western Land Equities v. Logan*.[5] "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 mid-stream." *Western Land Equities*, 617 P.2d at 396.

In *Western Land*, the Utah Supreme Court expressed concern that unduly preventing development from occurring not only denies a property owner of the right to develop, it creates economic waste, and increases burdens on both the public and developers.

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[4] The state code does not clearly state whether a local government must affirmatively act to void a plat, or if voiding may be automatic via an ordinance or a condition. *See also id.*, § 10-9a-509(h) (conditions on approval must be expressed in a statute or ordinance, or in documents approving an application).
[5] 617 P.2d 388 (Utah 1980).

> The economic waste that occurs when a project is halted after substantial costs have been incurred in its commencement is of no benefit either to the public or to landowners. . . . Governmental powers should be exercised in a manner that is reasonable and, to the extent possible, predictable. . . .
>
> Clearly it is desirable to reduce the necessity for a developer to resort to the courts. An applicant for approval of a planned and permitted use should not be subject to shifting policies that do not reflect serious public concerns.

Id., 617 P.2d at 395-96. The right to develop arises when a complete application that conforms to existing zoning regulations is submitted to a local government for consideration, not when approval is granted. *Id.*

B. Appealing a Land Use Decision

In Utah, any "aggrieved person" may appeal a land use decision by filing a petition for review with a district court. Decisions that may be appealed include those considered by an appeal authority, such as variances or other administrative appeals, and decisions by a land use authority, such as ordinance changes or subdivision approvals.[6] If there is a record of the proceedings, the district court's review is limited to that record, including transcripts of any public hearings. UTAH CODE ANN. § 10-9a-801(8)(a).[7] A court should uphold a final decision if it is supported by substantial evidence, and is not arbitrary, capricious, or illegal. *Id.*, § 10-9a-801(3)(c).

The appeal process established by the Utah Code is meant to provide an expeditious review of a land use decision; however, the review is not meant to supplant the local government's judgment.[8] The court reviews the record of the proceedings below, and takes no new evidence, except in limited circumstances. The decision being reviewed is presumed to be valid, and will be overturned only if arbitrary, capricious, or illegal.

C. Requesting a Stay of a Decision During the Pendency of an Appeal

The Utah Code does not allow an "automatic stay" of a land use decision while an appeal is pending, but an affected party may request that a decision be stayed.

> (a) The filing of a petition [*i.e.*, an appeal to district court] does not stay the decision of the land use authority or authority appeal authority [sic], as the case may be.
>
> (b) (i) Before filing a petition under this section or a request for mediation or

[6] The Utah Code allows a local government to designate a "land use authority" to consider applications, including approval of subdivisions. UTAH CODE ANN. § 10-9a-103(23) The land use authority may be a city council (or county commission) or a planning commission. *See id*., § 10-9a-604. Appeals of subdivision approvals may be taken directly to a district court, without going through a local appeal authority. *See id.*, § 10-9a-801.

[7] If there is no record, the court may take evidence and call witnesses. *Id.*, § 10-9a-801(8)(b).

[8] *See Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032, 1034 (Utah 1984); *Cottonwood Heights Citizen Association v. Board of Commissioners*, 593 P.2d 138, 140 (Utah 1979).

arbitration of a constitutional taking issue under Section 13-43-204, the aggrieved party may petition the appeal authority to stay its decision.

(ii) Upon receipt of a petition to stay, the appeal authority may order its decision stayed pending district court review if the appeal authority finds it to be in the best interest of the municipality.

(iii) After a petition is filed under this section or a request for mediation or arbitration of a constitutional taking issue is filed under Section 13-43-204, the petitioner may seek an injunction staying the appeal authority's decision.

UTAH CODE ANN. § 10-9a-801(9).[9] The statute clearly states that an appeal to a district court does not automatically stay a decision made by a land use authority or an appeal authority. The statute also provides that the petitioner (but apparently no other party) may request that an appeal authority's decision be stayed.[10] Notably, the statute does not specifically authorize a request to stay a decision appealed directly from a land use authority.[11]

III. If it is Equitable to do so, Any Time Limits to Complete Conditions of a Land Use Approval Should be Tolled if an Appeal Delays or Prevents a Land Owner From Completing the Conditions.

There is no law or case in Utah that directly addresses whether a time limit to complete conditions of a land use approval should be tolled while an appeal is pending. However, the policies underlying the land use application and decision process, as well as the procedure used for appeals, leads to the conclusion that such time limits ought to be tolled when it is fair and equitable to do so. The statute prohibiting an automatic stay does not prevent a local government from recognizing the need to allow more time for a land owner to complete conditions.

A. Some States Have Allowed Tolling, While Other Jurisdictions Have Not

1. Jurisdictions Which Recognize Tolling When Equitable

With no specific guidance from Utah sources, it is helpful to look to other jurisdictions for guidance. UPCM cites to cases from Maryland, Ohio, and Rhode Island which allowed tolling on equitable grounds.[12] To these may be added decisions from Connecticut, Massachusetts,

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[9] Section 13-43-204 authorizes the Office of the Property Rights Ombudsman to mediate or arbitrate disputes involving a property taking or eminent domain.

[10] A court may issue an injunction or a temporary restraining order, pursuant to Rule 65A of the Utah Rules of Civil Procedure. Presumably, a district court could therefore stay all or any part of a land use decision.

[11] A land use authority is a person, board, or commission authorized to act upon a land use application. *See* UTAH CODE ANN. § 10-9a-103(23). This may include a city council, county commission, planning commission, or an employee who makes decisions. Some decisions of a land use authority are appealed to an appeal authority, while other decisions are appealed to a district court. The City Council, acting as a land use authority, approved UPCM's subdivision application. A group of neighboring property owners appealed that approval to the district court.

[12] *See City of Bowie v. Prince George's County*, 863 A.2d 976 (Md. Ct. Spec. App. 2004); *Cardinale v. Ottawa Regional Planning Commission*, 627 N.E.2d 611 (Ohio Ct. App. 1993); *Tantimonaco v. Town of Johnston*, 232 A.2d 385 (R.I. 1967).

Missouri, and Vermont.[13] Interestingly, Connecticut, Maryland, and Rhode Island had laws similar to § 10-9a-801(9), which prohibited automatic stays.[14] The Maryland Court of Special Appeals nevertheless determined "that principles of equity compel a tolling, narrowly tailored to the facts of the case . . . ." *City of Bowie v. Prince George's County*, 863 A.2d 976, 990 (Md. Ct. Spec. App. 2004). The court went on to explain that

> when a developer cannot proceed administratively because of litigation or when the administrative entity declines to permit him to proceed while matters are being litigated, the time period within which an applicant for subdivision must take further action . . . is to be tolled during the time that litigation is pending . . . . What we do is to avoid the mischief that could otherwise occur if litigation is used solely to cause administrative deadlines to be missed.

Id., 863 A.2d at 990-991. The Rhode Island Supreme Court adopted similar reasoning to protect developers' economic interests:

> [C]ommon prudence understandably acts as a brake against incurring obligations, the benefits of which would be cancelled by an adverse decision . . . . [W]e think it clear that the requirement of activating a permit set forth in an ordinance does not apply during such time as the legality of a permit is open to question by reason of litigation amounting to an appeal from the issuance thereof.

Tantimonaco v. Town of Johnston, 232 A.2d 385, 388 (R.I. 1967). Connecticut's Appellate Court followed the same philosophy, explaining that the statute preventing automatic stays of decisions on appeal did not afford adequate protections for developers. The court also noted the complexities usually involved in obtaining land use approvals, and determined that tolling time limits while an appeal was pending was appropriate. *Fromer v. Two Hundred Post Associates*, 631 A.2d 347, 354 (Conn. App. Ct. 1993).

The Ohio Court of Appeals also recognized that failing to toll a time limit could impose hardship on a land developer.

> To fail to toll time during the pendency of a legal challenge by adjoining property owners "would make development a pure gamble; success would depend on the whim of adversaries to litigate or not". . . . Such a result would contravene the policy that a developer who diligently proceeds in good faith should be able to do so with assurance.

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[13] *See Fromer v. Two Hundred Post Associates*, 632 A.2d 347 (Conn. App. Ct. 1993); *Belfer v. Boston*, 294 N.E.2d 857 (Mass. 1973); *Krekeler v. St. Louis*, 422 S.W.2d 265 (Mo. 1967); *Pressault v. City of Burlington*, 315 A.2d 244 (Vt. 1974).

[14] The laws were in place when the appellate decisions were written. Other than Utah, this Opinion makes no representation on current statutes in the jurisdictions discussed.

Cardinale v. Ottawa Regional Planning Commission, 627 N.E.2d 611, 615 (Ohio Ct. App. 1993) (*citing Pressault v. Wheel*, 315 A.2d 244, 248 (Vt. 1974)).[15] The Ohio court, however, did not make tolling automatic, but tempered its rule by allowing tolling only when equitable:

> [W]e hold that where a final plat approval has been made on condition that specific deficiencies be corrected within a specified time, and the developer of that approved plat is prevented from satisfying the named conditions by the legal intervention of third-party adversaries, the developer's time within which to comply with the conditions should be tolled when it is equitable to do so.

Cardinale, 627 N.E.2d at 615.[16] As a coda to this discussion, it is noted that Missouri's statutes provided an automatic stay when administrative decisions were appealed. *Krekeler v. St. Louis County*, 422 S.W.2d 265, 268 (Mo. 1967).

2. Jurisdictions Which do not Allow Tolling

In contrast, cases from Illinois, Washington, and the District of Columbia rejected a tolling rule, because the affected parties could have requested stays. The Washington Court of Appeals rejected an argument that an appeal from a land use decision automatically stayed any time limits associated with that decision. The case dealt with a development approval that was finally awarded after a 15-year "on-again, off-again" process. The final approval, from 2005, imposed a two-year time limit to obtain necessary permits to begin construction. A group of neighboring property owners filed an appeal, and the trial court overturned the approval. The developer appealed, but the property owners argued that the appeal was moot, because the developer had not obtained the required permits. Since the two-year time limit had passed, the approval had expired.

The court of appeals agreed with the neighboring property owners, and dismissed the appeal. The court based its reasoning on a Washington statute that did not prevent an automatic stay but allowed any party to seek a stay of a decision that was under review. Since the developer had not obtained a stay, the time limits kept running, and so the original approval expired. "[A] party against whom time has expired under the original grant cannot avail himself of an 'automatic stay' under the common law." *Kelley v. Chelan County*, 185 P.3d 1224, 1229 (Wash Ct. App. 2008). The court felt it would be "illogical" for a court to invent an automatic stay rule when the statute clearly provided a party with the means to obtain one. *Id.*, 185 P.3d at 1228.

The Washington court relied heavily on a decision from the Illinois Court of Appeals, which was also reluctant to create an automatic stay in light of statutory authorization allowing parties to

[15] Note the similarity in language to that quoted earlier from *Western Land Equities.*

[16] The Massachusetts Supreme Court also approved tolling as a means of protecting developer's economic interests. *Belfer v. Boston*, 294 N.E.2d 857, 859-60 (Mass. 1973).

request one.[17] The Illinois court reasoned that an automatic stay rule contravened the authority of courts to best manage appeals. *Gold v. Kamin*, 524 N.E.2d 625, 627-28 (Ill. App. Ct. 1988).[18]

In like manner, the District of Columbia Court of Appeals refused to create an automatic stay that was contrary to a municipal statute specifically preventing automatic stays. A property owner was granted approvals to modify a building to be used as office space. The municipal code required that an applicant obtain building permits within six months of the approvals. Neighboring property owners appealed the approvals on various grounds. By the time the matter reached the Court of Appeals, more than six months had passed.

The D.C. Municipal Code prohibited automatic stays, like § 10-9a-801(9) of the Utah Code. Nevertheless, the D.C. Office of the Corporation Counsel had issued an advisory opinion concluding that a time period to obtain a permit was tolled during the pendency of an appeal. The court rejected that opinion, and held that since the property owner had not requested a stay of the decision, the time kept running, and the approvals expired after six months. "The statute simply will not permit a court . . . to accept the contrary view of the Corporation Counsel" *French v. District of Columbia Board of Adjustment*, 658 A.2d 1023, 1030-31 (D.C. 1995).[19]

Of the jurisdictions that have considered the question, three have held that there is no automatic tolling of time limits to complete required actions. Those courts reasoned that a developer would be aware of the time limits, and could either ask for a stay or take the risk that the approval expires. On the other hand, six states have held that an automatic tolling may be necessary to prevent inequity, even in the face of statutes that prohibited automatic stays of decisions. Those states reasoned that a developer should not be penalized because the appeal process causes an approval to expire. Tolling a time limit does not necessarily constitute a stay of a decision, and protects developers and property owners from inequitable results.

B. Similar Cases from Utah Support Tolling of Time Limits When Equitable

Although there is no Utah case announcing a rule on tolling due to appeal of a land use decision, there are two decisions which have considered fairly similar situations. In a 1951 decision, the Utah Supreme Court upheld a local ordinance which invalidated a building permit if construction were suspended for 60 days.[20] In June of 1945, a developer obtained a building permit to construct a gas station. The city's building code required that if construction activity was not started within 60 days, or if construction were suspended for 60 days, the permit would expire. The developer began construction activity, including installation of underground storage tanks. However, due to wartime rationing of building materials, the developer was unable to get the

[17] Like the Washington statute, the Illinois law provided that a party may request a stay. It did not prohibit an automatic stay, like § 10-9a-801(9) of the Utah Code. The approach from Washington and Illinois essentially boiled down to this: The developer should have recognized the need to toll the time limit, and then asked a court to grant a stay.

[18] *Gold* considered whether a requirement that building permits be obtained within 18 months after a variance was granted. Because of appeals from the variance decision, the developer did not apply for building permits.

[19] The D.C. Court of Appeals is the supreme court for the District of Columbia. It should not be confused with the federal Court of Appeals for the D.C. Circuit.

[20] *Judkins v. Fronk*, 234 P.2d 849 (Utah 1951).

lumber and other building supplies until 1948.[21] Construction on the gas station ceased in March 1946. In the summer of 1946, the city amended its zoning ordinances, prohibiting gas stations within the zone where the developer's property was located.

In October of 1948, the developer requested an extension of the building permit, explaining that he was unable to purchase the needed building materials for the gas station. The city denied his request because more than two years had passed since any construction activity had occurred.[22] On appeal, the developer argued that, despite the city's ordinances, he had obtained a vested right to proceed, because he had expended funds and taken steps to begin construction. He should not be denied this vested right due to delays that were beyond his control.[23] The Utah Supreme Court rejected the developer's arguments, and held that too much time had passed, and the permit had expired. The court reasoned that even if the time limit were suspended because of the rationing, the developer still took too much time to request an extension or begin work.[24]

More recently, the Utah Supreme Court held that a public referendum on a zoning ordinance tolled the effective date of the ordinance, preventing a developer from claiming a vested right in the newly approved language.[25] A city had adopted an amendment to its zoning ordinance, which expanded the allowable uses in commercial zones. A citizen's group launched a successful petition drive, securing enough signatures to submit the amendment to a public vote. A developer submitted plans for property subject to the new zoning regulations, and claimed the vested right to develop, regardless of the referendum. The Utah Supreme Court, noting that the Utah Constitution guarantees citizens the right to seek referenda on ordinances and statutes, held that the effective date of the new amendments "was tolled pending the exercise of the referendum right . . . ." *Mouty v. Sandy City*, 2005 UT 41, ¶14, 122 P.3d 521, 526. In other words, the property owner could not acquire any vested right to develop until the referendum process had been completed.[26] This not only respects the citizens' referendum rights, but also protects developers from potential economic loss if the referendum were successful.

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[21] The developer applied for approval to purchase the materials, but was denied. The rationing remained in place until July, 1947, but shortages still existed for another year or so. *Judkins*, 234 P.2d at 850. Although there were shortages, there were no longer official restrictions on the sale of building materials.

[22] The city's building code allowed a developer to request an extension up to one year after construction activity ceased. *Id.*, 234 P.2d at 851.

[23] This conception of vested rights is different than that expressed in *Western Land Equities*.

[24] *Id.* The opinion did not evaluate the argument that the time limit should be tolled. The court used the example to illustrate that the developer had simply waited too long.

[25] *Mouty v. Sandy City*, 2005 UT 41, 122 P.3d 521. The referendum was not an appeal of the decision, but was initiated by a petition drive.

[26] The court also observed that a voter referendum on a zoning amendment constitutes a "compelling, countervailing public interest," constituting an exception to the vested rights doctrine. *See Western Land Equities*, 617 P.2d at 396; *see also* UTAH CODE ANN. § 10-9a-509(1)(a)(i).

C. Tolling is Consistent With Utah Law, and the Policies Underlying the Land Use Approval Process

1. Tolling Provides a "Degree of Assurance" that Plans can be Completed

If a referendum on a zoning ordinance amendment tolls the effective date of that amendment, then it is reasonable to conclude that an appeal of a land use decision may operate to toll any time limits impacted by that appeal. Like the tolling required in *Mouty*, a rule suspending required time limits protects developers from economic loss because an appeal impedes progress on a development. A developer should not have to risk losing an entire project simply because the appeal process delays completion of a required condition. Given the complexity of most development projects, along with the significant economic investment necessary to even obtain approval, the reasoning of the Ohio Court of Appeals should apply:

> To fail to toll time during the pendency of a legal challenge by adjoining property owners "would make development a pure gamble; success would depend on the whim of adversaries to litigate or not". . . . Such a result would contravene the policy that a developer who diligently proceeds in good faith should be able to do so with assurance.

Cardinale, 627 N.E.2d at 615; *see also Western Land Equities*, 617 P.2d at 396 (Property owners should be able to plan for development with a "degree of assurance"). However, an appeal should not simply "stop the clock" on any time limits. A time limit should be tolled when the appeal blocks or delays compliance, and when tolling is equitable.[27]

This position is consistent with *Judkins*, because it recognizes the duty on the developer to proceed with diligence. In *Judkins*, the property owner lost his building permit because he waited too long to request an extension, not because the court insisted upon a draconian application of the city's time limits. If a developer is not seeking compliance (or extensions of time limits) with diligence, then tolling would not be equitable, and the developer should not be able to take advantage of a tolling rule. On the other hand, if a developer is diligently seeking to complete conditions within a required time frame, and an appeal frustrates those efforts, then tolling the time limits may be equitable.

2. Reconciliation with § 10-9a-801 and the Land Use Appeal Process

A policy allowing tolling of required time limits does not offend § 10-9a-801(9) of the Utah Code, which proscribes automatic stays. Tolling a time limit when appropriate is not an automatic stay of the entire decision. Rather, it recognizes that there are circumstances where tolling is fair, but completely suspending a land use decision would not be necessary. In addition, tolling could be applied after an appeal is resolved, as opposed to a stay, which would be requested from the onset of an appeal. As explained above, three states with similar statutes

[27] *Cardinale*, 627 N.E.2d at 615. (In *Cardinale*, the decision noted that the development at issue required approvals from several different agencies. Because the initial approval had been appealed, the developer's lender would not release funds for the project, effectively preventing the developer from seeking the necessary approvals.)

allowed tolling, because their appellate courts felt it was fair and appropriate. The rulings did not grant an automatic stay from the beginning of the appeal, but allowed a post-appeal application of an equitable tolling rule.

The process for land use appeals also allows a tolling rule. As explained above, the land use appeal process is meant to provide an expedited review of a decision, and is a review of the record of that decision (except in limited circumstances). Tolling a time limit to complete required conditions is in harmony providing an expedited review, and in limiting that review to the record only. Disallowing tolling would complicate the review process by inserting a requirement that a party obtain a stay at the beginning of an appeal.[28] A policy of allowing time limits to be tolled, when equitable to do so, thus promotes efficiency while preserving the rights of the parties to the appeal.

Finally, the Utah Code authorizes local governments to require a developer to record a plat within a reasonable time. *See* UTAH CODE ANN. § 10-9a-603(5). Failure to record within that time makes the plat voidable, meaning that the local government may still recognize the plat as valid. This language grants discretion to the local government to allow additional time to record the plat. If tolling of the time limit to record a plat is not allowed, the language of § 10-9a-603(5) is nullified, and a *voidable* plat becomes a *void* plat, despite the language allowing a local government to validate the plat.

3. Application of a Tolling Rule

As has been explained, this Opinion concludes that time limits to complete required conditions ought to be tolled during the pendency of an appeal, when it is equitable to do so. This is not an "automatic" tolling that would apply every time a land use decision is appealed, but is an equitable rule to be applied when fairness dictates. A number of factors should be considered when deciding whether to toll a time limit: Whether a developer has been blocked or delayed from complying with the requirement, the developer's diligence in seeking compliance, the costs incurred by the developer to comply, the potential impact to all parties if the time limit is not tolled, etc. Finally, this Opinion also concludes that tolling should not be unreasonably withheld when appropriate.

Although this tolling rule is advocated, it is not possible for this Opinion to apply the rule UPCM's situation. There is simply not enough information to make a decision, other than the timing of the appeal and the deadline for recording. UPCM has not presented evidence that it was delayed from recording due to the appeal, or that the appeal made it financially burdensome or unduly speculative to proceed with the project while the appeal was pending. Without this information, this Opinion cannot determine whether the time to record the subdivision plat should be tolled or not. The City should reevaluate its decision to deny any additional time for

[28] It is acknowledged that a request for a stay would probably not consume a great deal of time or resources. However, an appeal of a land use decision is meant to be an expedited review of the record only, and requesting a stay complicates that process. This is the approach taken by the District of Columbia, Illinois, and Washington, as discussed earlier.

UPCM to record the subdivision plat, by undertaking the type of analysis described herein. If the City concludes that fairness and equity require, additional time for recording may be granted.

Conclusion

Local governments have jurisdiction over subdivision approvals, and may impose reasonable conditions on subdivisions. The Utah Code allows local governments to require that a subdivision be recorded within a reasonable time period after approval. Such a rule promotes finality and accuracy in land descriptions, and serves as an incentive for developers to complete projects.

Although the Utah Code prevents an automatic stay when a land use decision is appealed, a policy allowing tolling of time limits to complete required conditions is appropriate. Tolling time limits is not an automatic stay of a decision, but a reasonable policy to prevent inequity. A tolling policy is also consistent with the land use appeal process, and encourages expedited appeals based on the record of the decision. Local governments have discretion to recognize the validity of subdivision plats, even if the plats are not recorded within a required time frame. Other jurisdictions have allowed tolling when equitable to do so, even in light of provisions prohibiting automatic stays.

After a review of the Utah Code, Utah cases, and the policies underlying the land use process, this Opinion concludes that time limits to complete required conditions during the pendency of an appeal ought to be tolled, when equitable and reasonable to do so. The impacts on the developer, the local government, and other affected parties should be considered when determining whether a time limit should be tolled. Tolling should not be unreasonably denied when appropriate, but its use should also not constitute an abuse of local discretion.

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. § 63G-7-401 (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, Utah 84060

On this _____ Day of October, 2011, 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