Advisory Opinion #88

Parties: Lawrence Meadows and Park City

Issued: July 14, 2010, clarified September 22, 2010

TOPIC CATEGORIES:

E: Entitlement to Approval (Vesting)
F: Complete Land Use Application
R(v): Other Topics (Interpretation of Ordinances)

An applicant is entitled to approval if a complete application complies with the land use ordinances in place. An incomplete application cannot claim vested rights. Erroneous information in an application causes it to be incomplete until the information is corrected.

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:	Lawrence Meadows
Local Government Entity:	Park City
Applicant for the Land Use Approval:	Woodside Development, LLC
Project:	Remodel of Existing Home
Date of this Advisory Opinion:	July 14, 2010
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

I. May an applicant claim vested rights based on an application which relies upon erroneous information?

II. May an appeal authority decline to consider an appeal that has been rendered moot?

Summary of Advisory Opinion

Section 10-9a-509 of the Utah Code provides that an applicant for land use approval may claim vested rights in land use ordinance in effect when a complete application is submitted. The crucial vesting date is the date the application is complete, not necessarily the date the application is filed. A submitted application that is incomplete does not vest. An application that has been withdrawn because crucial information submitted with the application is materially incorrect cannot comply with the zoning ordinances in effect. Therefore, that application cannot be considered complete, and the applicant cannot claim vested rights in the application. A new application must be submitted.

An appeal authority is not obligated to consider a matter which has been made moot. There is no reason to issue a decision that will have no legal effect. If the circumstances of an application have changed and the controversy leading the appeal has been eliminated, a decision from an appeal authority will have no legal effect, and the appeal is moot.

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 Lawrence Meadows on March 22, 2010. A copy of that request was sent via certified mail to Janet Scott, City Recorder of Park City. The City received the request on March 24, 2010. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on March 30, 2010. The Property Owner, Woodside Development, LLC, submitted a response, which was received by the Office on March 29, 2010.

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 from Lawrence Meadows, filed March 22, 2010 with the Office of the Property Rights Ombudsman.
2. Response from Park City, submitted by Polly Samuels McLean, Assistant City Attorney, received on March 30, 2010.
3. Response submitted by Joseph E. Tesch, attorney for the property owner, received by fax on March 29, 2010.
4. Additional materials submitted by Lawrence Meadows, including minutes of the Park City Planning Commission, the City's Historic Preservation Board, and email correspondence between the City's staff and Mr. Meadows.

Background

Woodside Development, LLC, owns a home located 505 Woodside Avenue in Park City ("Woodside"). The home has been designated by Park City as being "historically significant," because the original portion was built around 1904, and is representative of the City's development during its mining heyday.[1] The City has adopted a historic preservation ordinance, which governs replacement or renovation of structures deemed to be historically significant.

[1] The home was designated as "historically significant" after a city-wide survey in 2008. The home is considered historic because it dates from the "mature mining era" (*i.e.*, 1894-1930), but it has no other historic or cultural significance.

According to the materials submitted for this Opinion, there have been additions to the rear of the original 505 Woodside structure, while the front portion retains the original design.

In March of 2009, Woodside applied for a permit to remodel the 505 Woodside structure. The proposed remodeling included replacing much of the rear portion with new construction, and removing about 5 feet from one end of the front portion. Removing the end of the front portion made it possible to construct a driveway around the home, leading to a garage, which was proposed for the rear of the structure.[2] Because the proposed remodeling included alteration of a historic structure, an application was subject to the City's Historic District Design and Review code.

After reviewing the application, the City determined that it was complete, and that it complied with the Historic District Design and Review criteria. The City's planning staff recommended approval, and notified the owners of surrounding properties (as required by City ordinance). One of those owners, Lawrence Meadows, objected to the proposed remodeling, and notified the City in writing.[3] Mr. Meadows stated that the building should not be modified, because it was subject to restrictions under the historic preservation ordinance. He also stated that the City ignored its own provisions related to development of properties with steep slopes.[4]

Mr. Meadows argued that the remodeling required a finding that the structure, or the portion being altered, was "historically insignificant." In addition, no demolition could be performed unless the City granted a "Certificate of Appropriateness of Demolition." Mr. Meadows stated that Woodside had not applied for either of these approvals.

Mr. Meadows also stated that the remodeling could not be approved without a conditional use permit, because the property had a slope greater than 30%. According to the City, however, the Land Management Code only required a conditional use permit when the "natural" grade was greater than 30%. Slopes that were created artificially did not require conditional use permits, even if they were greater than 30%. The City stated that they had evaluated the lot, and determined that the "natural" grade of the lot was 21%, so a conditional use permit was not necessary.

After filing his objection to the remodeling, Mr. Meadows investigated the proposal in greater detail. He found that the application submitted by Woodside was erroneous, because the five feet to be removed from the front of the building was actually part of the original structure, and so removal was subject to the restrictions of the historic preservation ordinance. Woodside claimed

---

[2] The garage would be part of the new construction. The garage would be on the ground floor, with other additions to the home located above the garage.

[3] Mr. Meadows is the owner of Woodside Properties, LLC, which owns the property located at 515 Woodside (next to 505 Woodside). Although Woodside Properties, LLC is the actual owner, for clarity this Opinion will refer to Mr. Meadows as if he were the owner. This should not be interpreted as imputing ownership rights or duties upon Mr. Meadows, and does not alter the actual ownership of the property. Mr. Meadows also argued that the City did not provide adequate notice of the approval for remodeling of 505 Woodside. However, he submitted his objections and appeal within the 10-day period provided by ordinance.

[4] According to the Park City Land Management Code, any structure or access located on a slope greater than 30% must obtain a conditional use permit. *See* PARK CITY MUNICIPAL CODE, § 15-2.2.6.

that the northernmost five feet of the structure was not part of the original home, and so could be removed without invoking the historic preservation requirements. The City's planning staff agreed, and recommended approval.[5]

Mr. Meadows raised his objections and requested a hearing by the Historic Preservation Board. Hearings were scheduled for both November and December of 2009, but were postponed. In December, Woodside submitted revised plans, evidently addressing some of the concerns raised by Mr. Meadows. As part of the application, the owner also submitted a copy of a photo of the property taken in the early 1940s by the Summit County Assessor.[6] Using that photo, the owner's experts had calculated the dimensions of the home, and concluded that the northernmost five feet had been added after the photo was taken.

Mr. Meadows and his expert also evaluated the photo, and determined that the dimensions submitted by the property owner were in error, and that the northernmost five feet was part of the original structure. If that were the case, that five feet could not be removed without specific approval from the Historic Preservation Board. Mr. Meadows brought this to the attention of the City's planning staff, and planned to make it the centerpiece of his appeal.[7] Mr. Meadows pointed out the inaccuracies of those measurements, but he claims the City did not acknowledge the error. A public hearing of the Historic Preservation Board was scheduled for February 3, 2010.[8] That same day, only a short while before the hearing, the Woodside withdrew the application for permission to remodel the home. The Board declined to consider the appeal, although Mr. Meadows appeared, and was prepared to present his arguments.

The City states that Woodside acknowledges that the previous designs were based upon a mistaken reading of the historic photograph, and that the portion of the home slated for removal is in fact subject to historic preservation requirements. The City also states that it is allowing Woodside to amend the application, which will presumably retain the original application date of March, 2009. The date is critical, because the City has since amended its Land Management Code, and the new provisions affect the remodeling proposal. Mr. Meadows argues that because the application used erroneous information, it was never complete, and Woodside cannot claim vested rights under the previous code. Mr. Meadows also claims that his due process rights were denied, because the Historic Preservation Board cancelled the hearing when Woodside withdrew the application.

---

[5] There does not appear to be any opposition to removing the rear portion of the building, which is a newer addition, and not considered part of the historic structure. However, the proposed driveway relied upon removal of five feet from the front of the home.

[6] The photo was taken as part of the assessor's duties to determine the value of properties for tax purposes. The photo was taken from the street in front of the southern edge of the property. The street level is a few feet below the home, so the perspective is looking up and angling away to the north.

[7] Mr. Meadows raised other issues concerned with the appropriateness of allowing extensive remodeling of the historic structure, including whether conditional use permits would be required for some aspects of the project.

[8] Another part of the dispute arose from the City's proposal that the appeal be bifurcated, with the Historic Preservation Board handling appeals based on the historic preservation ordinance, and the City's Planning Commission handling other matters based on the Land Management Code. At the request of Mr. Meadows, this plan was dropped, and the appeal proceeded to the Historic Preservation Board.

Following Mr. Meadows' Request for this Opinion, Joseph E. Tesch, who represents Woodside submitted a response. Mr. Tesch stated that Mr. Meadows has no direct interest in the proposal to remodel 505 Woodside, and so has no standing to request an Advisory Opinion. In addition, he contends that since the owner is amending the application, the matter is not yet ripe for an Opinion.

Analysis

I. As a Potentially Aggrieved Person, Lawrence Meadows may Request an Advisory Opinion.

As the owner of neighboring property that may be affected the application to remodel 505 Woodside, Lawrence Meadows is a potentially aggrieved person, and may request an Advisory Opinion. Section 13-43-205 of the Utah Code provides that "a local government or a potentially aggrieved person may . . . request an Advisory Opinion . . . ." from the Office of the Property Rights Ombudsman. UTAH CODE ANN. § 13-43-205. Mr. Meadows owns the property to the north of 505 Woodside, and will be directly affected by the remodeling project. It appears that the proposal includes construction of a rock wall along the property boundary, which impact Mr. Meadows' property. He thus has an interest in the proposed remodeling. Moreover, Mr. Meadows may appeal any land use decisions related to the proposal. The Park City Land Management Code provides that "[t]he Owner of any Property within three hundred feet of the boundary of the subject site . . ." has standing to pursue an appeal. PARK CITY MUNICIPAL CODE, § 15-1-18(D)(2). Since Mr. Meadows owns property within 300 feet of 505 Woodside, he is entitled to appeal, and is thus a potentially aggrieved person.[9]

II. The Application to Remodel 505 Woodside was Incomplete, so the Owner Cannot Claim Vested Rights.

The application to remodel 505 Woodside was based on erroneous information that was material to determining whether the application should have been granted. If the correct information is used, the application would not comply with the zoning ordinance in effect. The application can therefore not be considered "complete" for vesting purposes, and the applicant cannot claim vested rights in the original application, even if the information is corrected.

A property owner "is entitled to approval of a land use application if the application conforms to the requirements of the municipality'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 . . . ." UTAH CODE ANN. § 10-9a-509(1)(a).[10] This is generally referred to as the "Vested Rights Rule,"

[9] The dispute resolution function of the Advisory Opinion, combined with the fact that Advisory Opinions are advisory and not binding upon either party, supports the conclusion that Advisory Opinions should be made available to more, rather than fewer, parties. Where an Advisory Opinion can help resolve a matter without the need for litigation, it ought to be available. Accordingly, it is the policy of the Office of the Property Rights Ombudsman to interpret the limitations on availability of Advisory Opinions expansively where possible. Advisory Opinions remain unavailable when exclusion is explicit.

[10] *See also* UTAH CODE ANN. 17-27a-508 (same provision applicable to counties).

and the statute is based upon the Utah Supreme Court's decision in *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980). In essence, the rule expressed in *Western Land Equities* provides that a property owner's rights to develop "vest" in the ordinances in place at the time a land use application is filed, and a local government cannot change those ordinances after the application is submitted.

When the Utah Legislature codified the Vested Rights Rule, it added the provision that development rights do not vest unless the application is "complete." Section 10-9a-509(1) thus requires a *complete* application in order for the applicant's development right to vest. The date an application is filed is not as important as the date an application is considered complete. "An application for a land use approval is considered submitted and complete when the application is provided in a form that complies with the requirements of applicable ordinances and all applicable fees have been paid." UTAH CODE ANN. § 10-9a-509(1)(f).[11] It stands to reason that all information material to a decision to grant or deny the request must be present before the application can be considered "complete."

An application relying on mistaken, erroneous, or misleading information of a material nature would be no more valid than one submitted without required information, and cannot be considered complete until the information is stated correctly and clearly. A local government would not be able to accurately review a land use application that was missing important information, and likewise cannot give accurate review to an application that contains important information that is incorrect or misleading. This is especially true where correction of the information means that the application would not comply with the zoning ordinance in effect. *See* UTAH CODE ANN. § 10-9a-509(1)(a). In such cases the application cannot be considered complete. When a complete application with correct information will require redesign of the project to comply with the current zoning ordinance, new notices and new review by the city will also be necessary in order to provide due process. Such a redesign will require a new application, not simply a correction of the old one. [12]

According to the information provided for this Opinion, the application was submitted on March 5, 2009. At the time, the City deemed the application complete, and the staff granted approval. However, as the appeal process moved forward, it was discovered that the applicant, the owner of 505 Woodside, relied upon erroneous material information. Correction of that information means the application does not comply with the zoning ordinance; the northernmost five feet of the home are part of the original structure and cannot be removed without specific authorization. Thereby the driveway cannot be built. Thus, the approval granted cannot be considered effective, and a new application containing a new design will be necessary. The application cannot be considered complete until that new application is submitted that "conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect."

[11] *See also* PARK CITY MUNICIPAL CODE, § 15-1-17 (adoption of vesting rule based upon state statute).

[12] Inconsequential or minor mistakes or omissions on matters that are not material to the decision of whether to approve the application would not render the application incomplete, and an applicant ought to have the opportunity to provide the correct information without the loss of the vested right. The Vested Rights Rule would have little efficacy if unpopular but perfectly legal projects could be halted because an inconsequential mistake obliterated a developer's vested rights.

Therefore, the old application must be considered withdrawn. The old application is thus no longer active or valid, and the applicant cannot rely on vesting under the old application.[13]

III. The Appeal was Rendered Moot When the Application was Withdrawn, and the Historic Preservation Board was not Obligated to Decide the Appeal.

Since the application was withdrawn by the Owner before the Historic Preservation Board considered the appeal, the matter is moot, and the Board is not obligated to issue a decision. The Utah Code authorizes the establishment of appeal authorities, to hear and decide "appeals from decisions applying . . . land use ordinances." UTAH CODE ANN. § 10-9a-701(1)(b). These appeal authorities are quasi-judicial, with authority to decide appeals.[14]

Although not expressly stated in the Utah Code or in the Park City Municipal Code, the authority to decide appeals necessarily includes the ability to decline to decide because the appeal has become moot. "An appeal is moot if during the pendency of the appeal circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect." *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 15.[15] There is no need for a decision that will have no practical effect, and declining to consider an appeal that has been mooted does not deny the appellant's due process rights.

In this matter, the Owner of 505 Woodside withdrew his application in order to address the concerns raised in Mr. Meadows' appeal. This withdrawal changed the circumstances of the controversy, and a decision from the Historic Appeals Board would have little or no legal effect. With the appeal thus mooted, the Board was not obligated to issue a decision. This does not eliminate the possibility that a decision on a proposal may be appealed in the future, neither does it mean that the applicant has been granted any special rights or privileges related to how the application is to be processed, and it does not deny the rights of any interested party to pursue an appeal.

IV. Other Issues Raised in the Request for This Opinion Cannot be Evaluated Because they are not Authorized Topics for Advisory Opinions.

Mr. Meadows raised other issues when he requested this Opinion, but these issues cannot be evaluated, because they are either outside the authorized topics for Advisory Opinions, or because there is not enough information to consider. The Office of the Property Rights Ombudsman may issue Advisory Opinions on matters concerning land use and development.

---

[13] This preserves the integrity of the Vested Rights Rule, because it prevents an applicant from submitting a misleading or incomplete application simply to secure vested rights. Note that this is not meant to imply that Woodside intended to mislead when it submitted its application.

[14] *See* UTAH CODE ANN. § 10-9a-701(3)(a)(i). Appeal authorities may be individual hearing officers or appointed boards, and local governments may designate different appeal authorities for specific types of appeals. For example, the Historic Preservation Board has been designated by Park City "[t]o review all appeals on action taken by the Planning Department regarding compliance with the Design Guidelines for Park City's Historic Districts and Historic Sites" PARK CITY MUNICIPAL CODE, § 15-11-5(H).

[15] This definition is from a case dealing with a judicial action, but is also applicable as a guideline for quasi-judicial and administrative bodies.

Section 13-43-205 lists the topics authorized for Opinions. While that list covers a fairly broad range, there are limits to the issues that can be evaluated. Mr. Meadows raises issues concerning how the application to remodel 505 Woodside was processed, including accusations of impropriety, conflicts of interest, and negligence. Although related to a land use application, such issues are not permitted topics for an Advisory Opinion, and the Office of the Property Rights Ombudsman therefore declines to express an opinion on those matters.[16]

Conclusion

The owner of a neighboring property is a potentially aggrieved person who may request an Advisory Opinion, particularly if a proposed development impacts the property. Mr. Meadows owns property immediately north of the property that is subject to a land use application. His property may be impacted by the construction. In addition, he specifically has standing to pursue an appeal, so it is acceptable to conclude that he may request an Advisory Opinion.

An applicant for land use approval has vested rights in the land use ordinances in effect when a complete application is submitted. The date of vesting is the date the application is complete, not the date of filing. An incomplete application does not establish vested rights. An application that relies upon incorrect, erroneous, or misleading information that renders the application incompliant with the zoning ordinance is not complete until the correct information is provided, even if the application is inadvertently approved. An applicant may amend an application with corrected information, but may not claim an earlier vesting date, because the application is not complete.

An appeal authority may decline to consider an appeal, if the appeal is moot. There is no need to issue a decision that will have no legal effect. A matter is moot if the circumstances have changed, eliminating the controversy, so that a decision will have no legal effect. Since the applicant withdrew the application, the appeal is moot, and the Historic Preservation Board is not obligated to issue a decision.

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

[16] Mr. Meadows also raises the issue of whether the City correctly determined that a conditional use permit was not required, because the slope of 505 Woodside was less than 30%. The slope of the parcel is a factual determination, and such factual questions are outside of the purview, and indeed the ability, of the Office of the Property Rights Ombudsman to determine in an Advisory Opinion.

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, Utah 84060

On this _____ Day of July, 2010, 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

GARY R. HERBERT
Governor

GREG BELL
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

AMENDMENT AND CLARIFICATION OF ADVISORY OPINION

Date:	September 22, 2010
Requested by:	Woodside Development, LLC, by and through its attorney, Joseph E. Tesch, Tesch Law Offices
Local Government Entity:	Park City

Issues

May the applicant owner of 505 Woodside continue to claim vested rights upon submission of an amended application?

Summary

This Amendment and Clarification of Advisory Opinion addresses questions raised by Woodside Development, LLC, owner of 505 Woodside, by and through his attorney Joseph E. Tesch, following the Advisory Opinion issued on July 14, 2010. This document amends and clarifies that Advisory Opinion.

The Office of the Property Rights Ombudsman is not persuaded that the July 14, 2010 Advisory Opinion is in error. As stated in the Advisory Opinion, under the plain language of Utah Code § 10-9a-509, the applicant at 505 Woodside did not vest. Woodside's application never vested, because it did not, in fact, conform to the requirements of Park City's land use maps, zoning map, and applicable land use ordinance in effect.

Revisions to Advisory Opinion

This Amendment and Clarification of Advisory Opinion and the Advisory Opinion issued July 14, 2010 by this Office together constitute the full Advisory Opinion on this matter under Utah Code § 13-43-205. This Amendment and Clarification is not intended to supersede the previous Advisory Opinion, which, together with this document, is hereby in full force and effect. The

Advisory Opinion was suspended by letter dated July 20, 2010 from Brent Bateman, Lead Attorney at the Office of the Property Rights Ombudsman, to Lawrence Meadows. As of the date of this Amendment and Clarification of Advisory Opinion, that suspension is hereby withdrawn.

The owner of 505 Woodside requested that the Office of the Property Rights Ombudsman amend or reconsider the July 14, 2010 Advisory Opinion in a letter it submitted on July 19, 2010 from its attorney Joseph E. Tesch. Included with that letter was a letter dated June 29, 2010, from Tesch Law Offices to Polly Samuels McLean, Assistant Park City Attorney. The OPRO also received a letter from Tesch Law Offices dated August 24, 2010, along with extensive exhibit materials. All of these materials and submissions were considered in reviewing the Advisory Opinion and preparation of this Amendment and Clarification of Advisory Opinion.

Background

Woodside Development, LLC owns a home located 505 Woodside Avenue in Park City that has been designated as "historically significant." The City's Historic District Design and Review ordinance governs renovation of historically significant structures. In March of 2009, Woodside applied for a permit to remodel 505 Woodside. The proposed remodeling included removing about 5 feet from one end of the front portion of the structure. The City deemed that the application complied with the Historic District Design and Review criteria and was complete. Thereafter, the City revised its Land Management Code. Nevertheless, the City considered the applicant to have vested under the previous code.

The next-door neighbor to 505 Woodside, Lawrence Meadows, objected to the proposed remodeling, and appealed the approval of the permit. In addressing Mr. Meadows' objection, the parties learned that the dimensions submitted by the property owner were in error, and that the northernmost five feet was part of the original historic structure, and could not be removed under the City's Historic District Design and Review ordinance without specific approval from the Historic Preservation Board. The applicant acknowledged the error, and withdrew the application to remodel the home.

At issue is whether the applicant, upon submission of a new application to remodel the home, remains vested, so that the new application must be considered under the land management code in effect prior to amendment. The Advisory Opinion in this matter addressed this question, and determined that the application did not comply with the zoning ordinances in effect, and was therefore not complete under Utah Code § 10-9a-509 and did not vest. The applicant disagrees vehemently with that portion of the Advisory Opinion, and requested an opportunity to submit arguments and materials in that regard. The applicant further requests that this Office reconsider the Opinion. The applicant's lengthy submissions argue that Park City lacks authority to deem a substantial change to an application a new application, and that correction of an honest mistake in the application does not mandate a loss of vested rights.

Analysis

The owner of 505 Woodside argues that in Utah a land use applicant vests in the applicable zoning laws in effect on the date certain of application. Although this statement is correct, it is only a partial statement of Utah law. As pointed out in the Advisory Opinion, a land use applicant in Utah vests on the date of application *where that application is complete, and conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect. See* UTAH CODE § 10-9a-509. In any discussion about the Utah vesting rule, the entire statute must be regarded.

The actual language of the Utah vesting rule, adopted in Utah in 1980 in the case of *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 396 (Utah 1980), and codified by the Utah Legislature in UTAH CODE § 10-9a-509(1)(a)(i) is:

> [A]n applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect when a complete application is submitted and all application fees have been paid.

Accordingly, by the plain language of the statute, a land use application vests on the date that (1) a complete application is submitted, (2) that application conforms to the land use maps, zoning map, and applicable land use ordinance in effect, and (3) all fees are paid. All three parts are necessary in order for vesting to occur, and vesting can only be effective on the date that all three are complete. Where an application is submitted and fees are paid, but the application does not conform with the land use ordinance in effect, vesting cannot occur until the date the application conforms. Likewise, a submitted application, even one that fully conforms to the ordinance, cannot be considered complete and vested until the date that fees are paid.

According to the information received from the parties, the application to remodel 505 Woodside did not conform to the ordinance in effect at any time. The application proposed to remove a portion of the historic building, in violation of the Historic District Design and Review criteria. The application did not therefore conform to the applicable land use ordinance in effect. By the plain language of the statute, the application did not vest.

It appears that the nonconforming portion of the application was a simple and understandable error (although significant). Nothing submitted for this Advisory Opinion evidences anything but an honest mistake, and the OPRO has no reason to think that the error was caused by anything but an honest mistake. However, the honesty of the mistake, or existence of a mistake, does not excuse the fact that the application did not comply with the ordinance in effect. Under the plain language of the statute, the application must conform to the municipality's land use maps, zoning map, and applicable land use ordinance in effect. Nothing in that language excepts an honest mistake from the requirement that the application conform to the ordinance in order to vest. The language of the statute is plain and unequivocal.

Although this rule may appear harsh, it provides a modicum of balance to the early vesting rule by encouraging applicants to prepare their applications with care. It disincentivizes intentionally

misleading or careless applications, or applications that the applicant has no intention of constructing, filed simply to take advantage of early vesting. An application must be genuine and correct when filed in order to vest. Under the plain language of the statute, the application to remodel 505 Woodside did not vest.

Park City did in fact deem the application vested. This also appears to have been an innocent and justifiable error arising from the applicant's error. But Park City's error does not excuse the nonconformance of the application. Had an appeal of the application by a third party gone forward, and at that appeal showed that the application did not conform to the statute despite the fact that the City proclaimed that it did, the appeal authority still would have to grant the appeal and overturn the approval. The innocent belief that the application complied and vested, even by the City, does not actually vest the application.

The purpose of the early vesting rule is to provide some reliability and predictability in land use regulation. The early vesting rule gives applicants an appropriate expectation that their application will not be denied midway through the process by unstated rules. Development of property is a difficult and costly process, and developers should be able to rely on their vesting status to ensure that their expenditures are protected. "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." *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 396 (Utah 1980). These policies are vital to preserve. This Office believes that the Utah vesting rule is the best rule among the alternatives and the cornerstone of land development in Utah. This Office frequently combats efforts to avoid or devalue the Utah vesting rule. Nevertheless, the Utah Code § 10-9a-509(1) is plain, and elucidates its narrow exceptions. Those exceptions do not include a provision to allow vesting where an application does not conform with the ordinance in effect. This Office is obligated to follow the plain language of a statute in preparing its opinions.

There is, nevertheless, an available legal remedy in Utah in cases where honest mistake does occur. Where a city mistakenly approves an application, a developer can sometimes find relief for the reliance on that mistaken approval under the theory of zoning estoppel. *See Fox v. Park City*, 2008 UT 85 ¶35. Zoning estoppel

> estops a government entity from exercising its zoning powers to prohibit a proposed land use when a property owner, relying reasonably and in good faith on some governmental act or omission, has made a substantial change in position or incurred such extensive obligations or expenses that it would be highly inequitable to deprive the owner of his right to complete his proposed development.

Western Land Equities, 617 P.2d at 391. Zoning estoppel is an active doctrine in Utah. *See Fox*, 2008 UT 85 at ¶35. Therefore, in a situation where a City grants vesting status to an application, the applicant can proceed with development in reliance upon that status. If it is found later that the applicant did not conform, and therefore did not vest, and if the applicant otherwise qualifies for relief under zoning estoppel, equity may permit the applicant to continue the project.

It is unknown whether the applicant in this matter qualifies for relief under the zoning estoppel doctrine. The parties have not argued that point, and accordingly this Advisory Opinion makes no decision thereupon. The City and the applicant should examine the facts in this matter to determine whether the applicant qualifies for relief under zoning estoppel. As stated above, in order to zoning estoppel to apply, the applicant's reliance must have been in good faith and reasonable. The applicant must have made a substantial change of position or incurred extensive obligations or expenses, and equity must require it. Additionally, when zoning estoppel does apply, it allows a landowner to complete the development he has started. *Id*. It does not, however, cause an applicant to vest. Nevertheless, where an honest mistake by the City has occurred, zoning estoppel may be an available remedy.

Conclusion

The application to remodel 505 Woodside did not conform to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect at the time it was submitted, was not complete, and accordingly did not vest. The mistaken belief of the applicant and of the City, even innocent, that the application is vested does not actually cause vesting to occur.

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 Ave
PO Box 1480
Park City, Utah 84060

On this _____ Day of September, 2010, 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