

# Advisory Opinion #122

Parties: Michael M. McKee and Logan City

Issued: April 11, 2013

## TOPIC CATEGORIES:

E: Entitlement to Application Approval

Other Topics(ii): Subdivision Plat Approval

An applicant is entitled to approval if a land use application is complete and complies with applicable ordinances. Applicable ordinances includes all land use ordinances, and a local government is obligated to follow and uphold them. If an application would create or exacerbate an ordinance violation if it was approved, it cannot be considered complete, and the applicant may not claim the right to approval. A local land use authority may withhold approval of an application to avoid creating or exacerbating zoning violations.

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



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# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

### ADVISORY OPINION

Advisory Opinion Requested by: Michael B. McKee

Local Government Entity: Logan City

Applicant for the Land Use Approval: Michael B. McKee  
MM Golf Course, LLC

Type of Property: Residential Subdivision

Date of this Advisory Opinion: April 11, 2013

Opinion Authored By: Elliot R. Lawrence  
Office of the Property Rights Ombudsman

### Issues

May a local government withhold subdivision approval because zoning ordinance violations would result if approval were granted, even if the potential violations are beyond the control of the applicant?

### Summary of Advisory Opinion

Subdivisions application are entitled to approval if the application complies with all applicable ordinances in effect on the date of submission. If the application does not comply with applicable ordinances, or would create or exacerbate a violation, the application is not complete, and the applicant may not claim the right to approval.

Local governments must follow and uphold their ordinances, and a decision approving a development application or subdivision that violates a zoning ordinance would be an arbitrary abuse of discretion. A local government may therefore withhold approval of a subdivision until the application is able to comply with applicable ordinances, or be approved without causing an ordinance violation.

## 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. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Michael B. McKee on January 23, 2013. A copy of that request was sent via certified mail to Teresa Harris, City Recorder for Logan City, at 290 North 100 West, Logan, Utah. 84321. The City received that copy on January 24, 2013.

## Evidence

The following documents and information with relevance to the issue involved in this Advisory Opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion, with attachments, submitted by Michael B. McKee, of MM Golf Course, LLC, received by the Office of the Property Rights Ombudsman on January 23, 2012.
2. Response from Logan City, submitted by Michael A. DeSimone, Community Development Director, received February 11, 2013.
3. Statement from A.W. Lauritzen, attorney for Ray Dahle, received February 1, 2013
4. Reply from Mr. McKee, received on February 27, 2013.

## Background

In the summer of 2012, Michael B. McKee applied to subdivide a 1.25 acre parcel into four building lots. As the application was processed, it was discovered that Mr. McKee's parcel had been illegally subdivided from a 5.5 acre parcel.<sup>1</sup> The 5.5 acre parcel was created in 2001 as part of an approved subdivision, but the owner of the parcel illegally created the 1.25 acre parcel, and pledged it as security for a loan.<sup>2</sup> In February 2012, the 1.25 acre parcel was repossessed and sold by the lender, and Mr. McKee acquired it at that sale. Mr. McKee proposes to divide the parcel into four residential building lots.

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<sup>1</sup> The 1.25 acre parcel was created by deed, without being approved by Logan City, making it an illegal subdivision. See UTAH CODE ANN. § 10-9a-603 (With certain exceptions, any division of land must be approved by a local government).

<sup>2</sup> The owner of the 5.5 acre parcel was Ray Dahle, who now owns the remaining 4.25 acres. Through his attorney, he declined to participate in this Opinion. The 1.25 acres included Mr. Dahle's home, which is now owned by Mr. McKee. The property is not developed, with the only improvements being the home and accessory building.

When the illegal division was discovered, the City agreed to “ratify” the 2001 division, if the remainder of the original parcel were included in the application. Thus, the subdivision application includes the entire 5.5 acre parcel being divided into five lots—four lots from the 1.25 acres illegally split from the original parcel, with the remaining 4.25 acres comprising the fifth lot. This action would legitimize all of the lots, eliminating potential legal problems in the future. The City does not object to the subdivision, and the owner of the 4.25 acre parcel, Ray Dahle, agreed as well and signed the subdivision application.

Mr. Dahle lived in a home on the 1.25 acre parcel until the foreclosure action, when he moved to a shop (or accessory) building on the 4.25 acre remainder parcel. The shop building does not meet residential building codes, and would require upgrades before the City would approve it as a residence. Although the City has no objection to the subdivision application, it will not complete the approval process until the shop building is upgraded to meet minimum residential building code requirements, and thus become a “primary” structure on the property.<sup>3</sup>

The City maintains that the shop building is currently an accessory structure. The Logan City Code allows accessory buildings, but only in conjunction with a primary use or structure.<sup>4</sup> According to the City, if the subdivision were approved, the shop building (an accessory structure) would be located on a separate lot than the home on the 1.25 acre parcel (the primary structure). The City maintains that it cannot approve a subdivision that would create a violation of its ordinances.<sup>5</sup> The City stresses that it will approve the subdivision application if the shop building is upgraded to residential standards.<sup>6</sup> Mr. Dahle, the owner of the shop building, has applied for a building permit to undertake improvements. As of the date of this Opinion, the City has not granted the permit, but is awaiting additional information from Mr. Dahle.

Mr. McKee objects to the condition, stating that he should not be responsible for conditions on another person’s property. He also feels that although the City has valid concerns about the shop building being used as a residence, those concerns should not jeopardize his subdivision application.

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<sup>3</sup> The materials submitted for this Opinion do not explain what would need to be done to upgrade the shop building to a residence.

<sup>4</sup> See LOGAN LAND DEVELOPMENT CODE, § 17.13.020.B. (Accessory use or structure permitted, but only when a primary use is established).

<sup>5</sup> Because the division in 2001 was illegal, it is void, and the parcel technically was never changed from its original 5.5 acre configuration.

<sup>6</sup> The proposed subdivision otherwise complies with the City’s ordinances.

## Analysis

### **An Application That Would Create an Ordinance Violation Does Not Comply With Existing Zoning Ordinances, so Approval May be Withheld.**

#### *A. An Applicant's Right to Approval Vests With a Complete and Compliant Application.*

As provided in Utah Law, a property owner is entitled to approval of a subdivision, if the application complies with the zoning ordinances in place when the application was submitted.

[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, a municipal specification for public improvements applicable to a subdivision or development, and an applicable land use ordinance in effect when a complete application is submitted and all application fees have been paid, unless:

- (i) the land use authority, on the record, finds that a compelling, countervailing public interest would be jeopardized by approving the application; or
- (ii) in the manner provided by local ordinance and before the application is submitted, the municipality has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted.

UTAH CODE ANN. § 10-9a-509(1)(a). This language was borrowed directly from the Utah Supreme Court's decision in *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980).

[A]n applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest. Furthermore, if a city or county has initiated proceedings to amend its zoning ordinances, a landowner who subsequently makes application for a permit is not entitled to rely on the original zoning classification.

*Id.*, 617 P.2d at 396. Stated bluntly, the vested rights rule essentially means that a local government may not change the rules in the middle of the game, but must approve an application that complies with existing ordinances. *See id.*

An applicant may not claim the right to approval unless the application complies with all applicable ordinances. "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(f). "Applicable ordinances" includes any local ordinance or state law that may apply to the property or land use being proposed in the application.<sup>7</sup> If the proposed development violates an

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<sup>7</sup> See UTAH CODE ANN. § 10-9a-103(24) ("Land use ordinance" means a planning, zoning, development, or subdivision ordinance of the municipality, but does not include the general plan.")

ordinance, or if it will cause a violation if approved, then the application does not “compl[y] with the requirements of applicable ordinances,” and would not be considered complete.

*B. A Local Government May Act to Prevent Ordinance Violations.*

Although a local government must respect a property owner’s right to develop property, the local government is also obligated to uphold and enforce its own ordinances. “Municipal zoning authorities are bound by the terms and standards of applicable ordinances and are not at liberty to make land use decisions in derogation thereof.” *Springville Citizens for a Better Community v. City of Springville*, 1999 UT 25, ¶ 20, 979 P.2d 332, 337-38 (See also UTAH CODE ANN. § 10-9a-509(2)).<sup>8</sup> Any government body has an obligation to uphold laws and ordinances, and may not presume the authority to ignore provisions that might be inconvenient. There is no point in enacting zoning ordinances if they are not followed. While local governments may change their zoning ordinances, they do not have authority to simply ignore them.

The City has stated that it does not object to Mr. McKee’s subdivision application, but the City will not give final approval until the shop building is improved to residential standards.<sup>9</sup> The City argues that approving the subdivision without addressing the shop building would create a violation of the following section of the City’s Land Development Code:

An accessory use or structure may be permitted in compliance with the applicable provisions of the zone in which it is located. An accessory use shall not commence and no accessory structure shall be constructed without a primary use first being lawfully established on the subject site.

LOGAN MUNICIPAL CODE, § 17.13.020 (B). The City explains that this section will be violated if the subdivision is approved without changes to the shop building, because dividing the parcel places an accessory building (the shop building) on a separate parcel than its primary structure (the home now on the 1.25 acre parcel). The City feels that it should not approve a development application that creates a violation. Upgrading the shop building to residential standards converts the accessory building to a primary structure, thus eliminating the potential violation. As explained above, the City is obligated to follow and uphold this and any other ordinance.

*C. The City May Require That the Shop Building Be Upgraded to a Primary Use or Approved as an Accessory Use.*

The City may withhold final subdivision approval until the shop building is either upgraded to residential standards, or is otherwise approved as an accessory use on the newly-created parcel.

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<sup>8</sup> In *Springville Citizens*, a group of citizens objected to a land use decision, arguing that the decision was arbitrary because the city did not comply with mandatory requirements of its ordinance. In like manner, a land use decision would be arbitrary, capricious, or illegal if it disregarded or violated a zoning ordinance.

<sup>9</sup> The City insists that it is not denying the application, but that it has “conditioned the approval of the subdivision to require that the other [property owner, Mr. Dahle] to bring his property into compliance with current City code prior to final approval.” Response Letter from Michael A. DeSimone (February 8, 2013), at 4. In other words, the application will not be denied, it just won’t be approved until the shop building complies with the City’s code.

Although the property may be subdivided as the owner desires, approving the application would create a violation of the City's zoning ordinance. The application therefore does not comply with the requirements of applicable ordinances, and cannot be approved. While the result may feel like draconian rigidity to the applicant, the City may nevertheless withhold final approval to avoid creating a violation. Mr. McKee's application is not complete because of the issue with the shop building, so he may not claim the vested right to application approval.<sup>10</sup>

This conclusion stems from the City's stated position that the shop building would not be allowed to stand alone on the 4.25 acre lot. Other than the presence of the home and the shop building, it is not clear what other property uses are being conducted. Section 17.13.020 allows accessory buildings for either a primary use or a primary structure, so it may be permissible to allow the shop building if it is accessory to a primary use (such as agricultural production), even if the home was located on a separate lot.<sup>11</sup>

In addition, if the City's objection were based solely on the use of the shop building as a residence, then withholding approval of the subdivision application would most likely be an abuse of the City's discretion. In the first place, the City's objection to using the shop building as a residence is not based on a land use ordinance, but a building code. Secondly, the violation already exists, and would not be created or exacerbated by the subdivision. The City may enforce its building code and require upgrades so the building may be used as a residence, but it should not withhold subdivision approval for that reason alone.<sup>12</sup>

## **Conclusion**

An applicant for a subdivision is entitled to have that application approved if it complies with all applicable ordinances, including any land use ordinances which may apply to the property proposed for division. If an ordinance violation would be created or exacerbated if an application is approved, the application does not comply with applicable ordinances, and the applicant cannot claim the right to approval.

Local governments are obligated to follow and uphold their own ordinances, and do not have discretion to simply ignore requirements in a land use ordinance. The City is thus within its

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<sup>10</sup> If the issue with the shop building can be resolved, Mr. McKee may claim the vested right to approval, provided that his application would then comply with the City's applicable ordinances. According to the information provided for this Opinion, Mr. Dahle has applied for a building permit to make the necessary improvements to the shop building. If those improvements are undertaken, the City would likely have discretion to approve the subdivision.

<sup>11</sup> This Opinion recognizes the circumstances which have led to this situation. The original parcel was purportedly divided, and a portion sold to Mr. McKee without proper approval from the City. A subdivision recorded without proper approvals or signatures is void, and any land transfer based on an improper subdivision may be voided. UTAH CODE ANN. § 10-9a-604. Mr. McKee acquired the property in a foreclosure action, and hopes to divide and develop the property, but has been thrust into an undesirable position of being a co-owner (or tenant in common) of a parcel that cannot be subdivided unless certain improvements are made. The City, for its part, is willing to rectify the problem, by approving the subdivision once the improvements are made.

<sup>12</sup> This position would only apply if the City's sole reason for withholding subdivision approval was because the shop building did not meet residential building standards.

rights to withhold subdivision approval if an ordinance violation would result. In this matter, approving the subdivision would violate § 17.13.020 of the City code, because the proposed subdivision leaves an accessory building on a lot separate from its primary use. If that situation can be corrected, then the application appears to be complete, and the property owner may claim the right to approval.

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 Utah 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 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 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 be awarded 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:

Teresa Harris, City Recorder  
Logan City  
290 North 100 West  
Logan, UT 84321

On this \_\_\_\_\_ day of April, 2013, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

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Office of the Property Rights Ombudsman