Advisory Opinion #149

Parties: Larry Jacobson and Herriman City

Issued: December 5, 2014

TOPIC CATEGORIES:

Appealing Land Use Decisions
Entitlement to Application Approval (Vested Rights)
Exactions on Development

A local government may regulate density in a separate provision from lot size. Development requirements may be derived by reference to a general plan. If an ordinance allows a range of allowable density, there must be objective standards to guide the choice of the density ultimately allowed. Vested rights must be based on an entire zoning ordinance, not on selected passages. If one provision is impacted or limited by another, vested rights must be based on the two provisions read together. The Utah Supreme Court has indicated that a land use applicant has two options to pursue claims from a land use decision: An appeal as provided in § 801 of LUDMA, or a suit to recover damages filed directly in district court.

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ADVISORY OPINION

Advisory Opinion Requested by:	Larry Jacobson
Local Government Entity:	City of Herriman
Property Owner:	Larry Jacobson
Type of Property:	Residential Subdivision
Date of this Advisory Opinion:	December 5, 2014
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

May a City refer to its general plan to establish allowable density for new residential development?

Summary of Advisory Opinion

Local governments have broad discretion to regulate new development, and promote the general welfare. Establishing limits on the number of units allowed, or the density, is well within a local government's authority. A land use ordinance may refer to and apply provisions from a general plan, as long as the provisions are clear, and there are subjective standards to guide decision-makers.

A property owner may claim a vested right to develop by complying with zoning ordinances, but the extent of the right must be based on the totality of the ordinance. A vested right may not be claimed on individual passages which might be impacted by other sections of the ordinance. A harmonious reading of all applicable sections determines the extent of the development's vested rights.

The Utah Supreme Court has established two options for property owners to challenge a land use decision: The administrative appeal process found in § 801 of LUDMA, and by a legal claim

filed directly in district court. However, appellate courts have not yet fully explained how the two options might relate procedurally.

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 § 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 Larry Jacobson on September 22, 2014. A copy of that request was sent via certified mail to J. Lynn Crane, Mayor of Herriman, at 13011 South Pioneer Street, Herriman, Utah. According to the return receipt, the City received the Request on September 25, 2014.

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 Larry Jacobson, received by the Office of the Property Rights Ombudsman on September 22, 2014.
2. Response from Herriman, submitted by John N. Brems, Attorney for the City, received October 8, 2014.
3. Additional information submitted by Larry Jacobson, emailed on November 12, 2014.

Background

Larry Jacobson owns a 3.2 acre parcel located at approximately 7004 West Gina Road (13600 South) in Herriman. Mr. Jacobson sought approval to develop a residential subdivision, known as "Sedona Estates," consisting of 10 lots.[1] He submitted an application, and paid the City's fee on July 14, 2014. The City's Planning Commission conducted a public hearing on the application on August 7. On August 21 the Commission granted approval for an 8-lot subdivision.[2] The Commission's written decision was sent to Mr. Jacobson on August 25. Although Mr. Jacobson

[1] According to the City, Mr. Jacobson received approval for a larger subdivision in 2007. However, the approval expired because the final plat was not recorded. The 2014 application for Sedona Estates is on a smaller portion of the property involved in the earlier proposal.

[2] The 8 lots included an existing home on the parcel. In other words, the Planning Commission approved seven new lots, along with a lot for the existing home.

disagrees with the decision, he did not submit an appeal.[3] Because he did not appeal the Planning Commission's decision, the City states that it must stand.[4]

Mr. Jacobson objects to the Planning Commission's decision, and claims that he is entitled to at least 10 lots on the parcel. The City's zoning regulation for the property establishes a minimum lot size of ¼ acre. Based on that size, Mr. Jacobson argues that there could be as many as 12 lots on the property.[5]

The City, however, points out that its subdivision ordinance (separate from its zoning regulations) requires that the number of lots in a new subdivision comply with the "intent and purpose" of the City's general plan. According to the City, its general plan designates Mr. Jacobson's property as "low density," allowing 1.8 to 2.5 units per acre. The "intent and purpose" of the general plan thus would allow between 5 and 8 units on the property, depending upon the density level used.[6] The Planning Commission approved the maximum number of lots that could be allowed using that approach. The City did not explain why it adopted the maximum density level.

The subdivision ordinance establishes the allowable density by referring to the general plan, the City explains, while the zoning ordinance provides the minimum size for individual lots. The general plan is thus incorporated into the City's subdivision requirements, and development is subject to terms of that plan.[7] Mr. Jacobson disputes the City's position, and argues that a general plan is a guideline only, and not an enforceable ordinance.

I. Property Owners May Pursue Claims Against Local Governments Without Following the Land Use Appeal Process.

Because a property owner may pursue claims related to a land use decision without following the land use appeal process, the issues raised in Mr. Jacobson's Request for Advisory Opinion are not necessarily moot. The appeal process established in the Land Use, Development, and Management Act ("LUDMA") is not the exclusive legal pathway to challenge a land use decision. Property owners "have *two options* when confronted with an unfavorable . . . land use decision. They can either file a petition for review, pursuant to [§ 801 of LUDMA], or they may file a complaint against the land use authority, which may include a variety of claims, including

[3] The City states that Mr. Jacobson could have appealed the decision to its appeal authority, and that the appeal should have been filed within 10 days of the decision.

[4] The City also argues that an Advisory Opinion would be moot, because the Planning Commission's decision cannot be appealed.

[5] 3.2 acres divided by .25 acres per lot equals 12.8 lots.

[6] 1.8 units per acre multiplied by 3.2 acres equals 5.76 units; and 2.5 units per acre multiplied by 3.2 acres equals 8 units.

[7] In addition, the City's ordinances provide that if there are conflicts between development requirements (like the situation involving the subdivision ordinance and the zoning ordinance), the more restrictive provision applies. In this case, the more restrictive provision allows 8 lots instead of 10.

constitutional claims." *Petersen v. Riverton City*, 2010 UT 58, ¶ 27, 243 P.3d 1261, 1268 (emphasis added).[8]

In *Petersen*, the property owners challenged a city's decision denying a rezoning request. The Petersens claimed that the city treated them differently than other similarly-situated property owners, in violation of the Equal Protection Clause.[9] They filed a petition for review with the district court, following the requirements of § 10-9a-801 of the Utah Code (a "§ 801 Appeal"). Because the decision dealt with rezoning, the trial court applied the "reasonably debatable" standard of review, rather than the stricter "substantial evidence" standard. The Petersens also requested that the court allow them to conduct discovery and introduce new evidence.[10] The trial court denied the Petersen's request, and upheld the city's decision.

The Utah Supreme Court affirmed the trial court, including its decision denying additional discovery and evidence. The Court pointed out that § 801 limited a trial court's review to the administrative record. As stated above, the Court held that the Petersens had the option of filing a claim against the city instead of the § 801 Appeal. If the Petersens had chosen to file a claim, it could have conducted discovery and introduced new evidence.

The Court did not elaborate further on an owner's options to file a claim instead of a § 801 Appeal. The language used indicates that an owner must choose one of the two—it does not appear possible that an owner may use both options to challenge a decision. It also appears that an owner must have some sort of claim tied to the land use decision, such as a taking, another type of constitutional or statutory violation, or a tort.[11]

In short, the courthouse door is not necessarily barred shut to Mr. Jacobson's claims. This Opinion does not state that Mr. Jacobson could successfully sue the City, but only notes the possibility that a claim could be filed. It remains to be seen how Utah's courts implement the "parallel" options available to property owners. Since there is a possibility that Mr. Jacobson could pursue a claim against the City, the analysis in this Opinion cannot be considered moot.

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[8] *But see Holladay Towne Center, LLC v. Holladay City*, 2008 UT App 301, ¶ 8, 192 P.3d 302, 304-05. (Denying claims because property owner did not follow the LUDMA § 801 appeal procedure.) The *Holladay Towne Center* decision (from the Utah Court of Appeals) was not discussed in *Petersen*, but it must be subordinated to the more recent decision by the Utah Supreme Court.

[9] *Petersen v. Riverton City*, 2010 UT 58, ¶ 5, 243 P.3d 1261, 1264. The Equal Protection Clause is found in the Fourteenth Amendment to the Federal Constitution. The Petersens also argued that the city's decision denied them Due Process.

[10] *Id.*, 2010 UT 58, ¶¶ 6-7, 243 P.3d at 1264. In a § 801 Appeal, the court reviews the administrative record of the proceedings, including any transcript of public hearings. The trial court does not accept evidence outside of the record, except in very limited circumstances. *See* UTAH CODE ANN. § 10-9a-801(8)(a)(i).

[11] *See Petersen*, 2010 UT 58, ¶ 27, 243 P.3d at 1268-69. After the Utah Supreme Court's decision, the Petersens unsuccessfully pursued similar claims in Federal Court. *See Petersen v. Riverton City*, 784 F. Supp. 2d 1234 (D. Utah 2011). The Federal Court ruled against the Petersens, mainly because the issues had already been litigated in the Utah courts. The District Judge observed, however, that the city was not immune from a claim of interference with contractual rights. *Id.*, 784 F. Supp. 2d at 1246.

II. Allowable Density May Be Defined Separately From Minimum Lot Size, By Reference to a General Plan.

A. Authority to Regulate Density of New Residential Development

The City may regulate and define its allowable density separately from minimum lot size. Local governments have broad discretion to promote the public welfare through regulation of land development.

> (1) The purposes of this chapter [*i.e.*, Chapter 10-9a] are to provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of each municipality and its present and future inhabitants and businesses, to protect the tax base, to secure economy in governmental expenditures, to foster the state's agricultural and other industries, to protect both urban and nonurban development, to protect and ensure access to sunlight for solar energy devices, to provide fundamental fairness in land use regulation, and to protect property values
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> (2) To accomplish the purposes of this chapter, 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.

Id., § 10-9a-102. Regulating density by limiting the number of units allowed in new residential subdivisions promotes the general welfare and improves the good order, comfort, and aesthetics of a community. The City may therefore choose to regulate the density allowed for new residential subdivisions through its ordinances.

In Utah's communities, density is often a function of minimum lot size. For example, if the minimum lot size were one-half acre, the maximum allowable density would be two units per acre. However, as noted above, a local government may choose to regulate density independently of lot size. The number of units allowed would be dictated by an ordinance establishing density limits, but the lots would still be required to meet minimum area and dimension requirements. Returning to the aforementioned example, if a separate density ordinance limited the number of

units allowed to 1.5 per acre, that number would establish the limit for the number of units, not the lot size.[12]

B. Using a General Plan to Establish Density Limits

A local government may use any reasonable means to define what density would be allowed in a given area, including referring to its general plan.[13] Although a general plan is usually considered advisory, a local government may determine the extent to which its plan is implemented. "[T]he general plan is an advisory guide for land use decisions, the impact of which shall be determined by ordinance." UTAH CODE ANN. § 10-9a-405. The discretion to determine the impact includes referring to the general plan to establish density limits.

Section 10-9a-405 requires an ordinance to determine the "impact" of a general plan. If an ordinance dictates that the all or part of a general plan be applied in a land use decision, then the general plan language used is the same as a zoning ordinance.[14] Referring to standards and requirements by reference is within a local government's discretion, and, as long as the applicable standards may be ascertained and applied with specificity and uniformity, there should be no reason why they would not be as enforceable as any other zoning ordinance.

One concern with Herriman's ordinance is that it defines the allowable density in a new subdivision by referring to the "intent and purpose" of the general plan. *See* HERRIMAN CITY CODE, § 11-2-2. The phrase "intent and purpose" is very fluid, and could mean whatever the City wishes it to mean in any given context. Property owners should be able to ascertain what can and cannot be done under a local land use ordinance, and are entitled to reliability and objectivity in development standards. *See Western Land Equities v. City of Logan*, 617 P.2d 388, 396 (Utah 1980). Incorporating nebulous language such as "intent and purpose," without objective standards to guide how an ordinance is implemented, does not provide the level of stability property owners should expect.

Likewise, in this matter the general plan provided a density range between 1.8 and 2.5 units per acre. The City eventually decided on the maximum density (2.5 units per acre). However, the City did not explain how it arrived at that figure, or what guided its decision. Using a density range, rather than designating specific density standards is overly subjective. Developers are entitled to specific criteria to determine the exact level of density – not just a subjective density range – that can be achieved. Nevertheless, in this matter, the City approved the maximum density allowable. Thus, there is no reason to disturb the City's action based upon a lack of objectivity.

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[12] Of course, other factors could impact the number of units that could be built in a subdivision, such as topography or roads.

[13] A "general plan" is a document adopted by a local government establishing general guidelines for future development. *See* UTAH CODE ANN. § 10-9a-103(13). General plans are required of all local governments. *Id.*, § 10-9a-401(1).

[14] The obvious question is why the City doesn't simply adopt the density ranges as part of its land use ordinance, eliminating the need for any reference to the general plan. However, since reference to a general plan is an acceptable means crafting a land use ordinance, this Opinion sees no reason to disturb the City's approach.

III. The Extent of Vested Development Rights are Based on the Totality of Provisions in a Land Use Ordinance, Not on Isolated Sections.

The extent of a property owner's entitlement to develop is based on all of the applicable portions of a land use ordinance, not on single sections or phrases. The vested rights rule provides that "an applicant is entitled to approval of a land use application if the application conforms to the requirements of . . . an applicable land use ordinance in effect when a complete application is submitted . . .." UTAH CODE ANN. § 10-9a-509(1)(a)(ii). To be most effective, the rule envisions vesting in all of the requirements of an ordinance read together, not on individual passages.

For example, one section of a zoning ordinance may allow a density of two units per acre, but another section prohibits development on steep slopes. The two provisions must be read together, with the slope restriction potentially limiting the allowable density. A property owner cannot claim vested rights by "picking and choosing" only the most favorable passages of a zoning ordinance. The vested right to develop must derive from the entirety of a zoning ordinance.[15]

In this matter, Mr. Jacobson claims the right to at least 10 lots, based on the City's minimum lot size for his property. However, the City's ordinance also includes a separate provision defining the allowable density. Reading the entire ordinance (as it applies to Mr. Jacobson's development) harmoniously requires that the allowable density be lower than what would be expected from the lot size alone.

Conclusion

The City may adopt an ordinance establishing density limits for new development. That ordinance may adopt limits found in the City's general plan, which may be applied as if it were a zoning ordinance itself. A density "range" may also be used, instead of specific numbers, as long as the City incorporates objective standards to guide the land use authority's choice of the density number.

A property owner may claim the vested right to develop under a zoning ordinance, but the right must be based on the entire language of the ordinance. An owner may not pick and choose individual passages, and ignore others which impact those passages. Maximum development allowed under one zoning provision could be limited by another section. The extent of development claimed as a vested right must be based on a harmonious reading of the entire zoning ordinance.

The Utah Supreme Court has ruled that a property owner has two options to challenge a land use decision—either through an appeal as provided in § 801 of LUDMA, or by filing a claim in district court. It remains to be seen how the two options relate procedurally, however. This

[15] *See Scherbel v. Salt Lake City*, 758 P.2d 897, 900-01. In *Scherbel*, an applicant appealed a city's denial of a proposed development, and claimed the vested right to complete the project. The Utah Supreme Court pointed out that the applicant had not fully complied with all of the city's zoning ordinance, and so could not claim a vested right to develop.

Opinion does not conclude that Mr. Jacobson does or does not have a valid claim to file in court, but only notes the possibility.

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.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

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:

Jackie Nostrom, City Recorder
City of Herriman
13011 South Pioneer Street
Herriman, Utah 84065

On this 5th Day of December, 2014, 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