Advisory Opinion #210

Parties: Nilson Homes, Plain City
Issued: June 18, 2019

TOPIC CATEGORIES:

Complete Land Use Application
Pending Ordinances

State law requires a local government to review an applicant's land use application under the local ordinance in existence at the time the applicant submits a complete application, unless the local government can show that an exception to the rule applies.

Here, the City argues that it formally initiated procedures to amend its ordinance before applicant submitted a complete application on May 3, 2108, and that the City is therefore not obligated to review applicant's application under the Code as it existed on that date. However, a correct interpretation of State law indicates that the City did not formally initiate procedures to amend its ordinance until May 8, 2018—five days after applicant submitted its complete application.

While the City may have had informal discussions in open meetings about the possibility of changing its ordinances prior to applicant submitting a complete application, the City did not formally initiate proceedings to amend the ordinance until it placed the matter on a meeting agenda and provided notice to the public of the meeting. As indicated, this did not occur until May 8, 2018. Consequently, the City must review applicant's application for development approval under the City Code as it existed on May 3, 2018 when applicant submitted its application for development approval.

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ADVISORY OPINION

Advisory Opinion Requested By:	Bruce L. Nilson of Nilson Homes
Local Government Entity:	Plain City
Applicant for Land Use Approval:	Nilson Homes
Type of Property:	Residential
Date of this Advisory Opinion:	June 18, 2019
Opinion Authored By:	Jordan S. Cullimore Office of the Property Rights Ombudsman

ISSUE

Is Plain City required to review Nilson Homes' land use application under the Plain City Code as it existed on May 3, 2018—the date on which the applicant submitted a complete application?

SUMMARY OF ADVISORY OPINION

State law requires a local government to review an applicant's land use application under the local ordinance in existence at the time the applicant submits a complete application, unless the local government can show that an exception to the rule applies.

Here, the City argues that it formally initiated procedures to amend its ordinance before Nilson Homes submitted a complete application on May 3, 2108, and that the City is therefore not obligated to review Nilson's application under the Code as it existed on that date. However, a correct interpretation of State law indicates that the City did not formally initiate procedures to amend its ordinance until May 8, 2018—five days after Nilson submitted its complete application.

While the City may have had informal discussions in open meetings about the possibility of changing its ordinances prior to Nilson submitting a complete application, the City did not formally initiate proceedings to amend the ordinance until it placed the matter on a meeting agenda and provided notice to the public of the meeting. As indicated, this did not occur until May 8, 2018. Consequently, the City must review Nilson's application for development approval

under the City Code as it existed on May 3, 2018 when Nilson submitted its application for development approval.

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 Bruce L . Nilson on August 16, 2018. A copy of that request was sent via certified mail to Plain City Mayor Jay Jenkins on August 16, 2018.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion submitted by Bruce L. Nilson of Nilson Homes on August 16, 2018.
2. Reply submitted by Brandon R. Richards, attorney for Plain City, on September 17, 2018.

BACKGROUND

On May 3, 2018, Nilson Homes (Nilson) submitted to Plain City (the City) a conditional use permit application seeking approval of a Planned Residential Unit Development (PRUD) project, which, at that time, was an allowed conditional use under the Plain City Code (the City Code). On July 12, 2018, after holding additional meetings concerning the matter, the Plain City Planning Commission voted to recommend to the City Council that the Council amend the City Code to eliminate the provision allowing PRUD projects, including the type proposed by Nilson. On July 19, 2018, the City Council voted to amend the City Code accordingly.

On July 26, 2018, the City informed Nilson that, because of the City Council's decision to eliminate PRUDs from the City Code, the Planning Commission could no longer consider or approve Nilson's conditional use permit. Nilson subsequently submitted to this Office an Advisory Opinion request.

In its request for an Advisory Opinion, Nilson argues the City's decision is unlawful because Nilson obtained a vested right to have its application considered under relevant City Code provisions as they existed on May 3, 2018—the day Nilson filed its application to the City. The

City, however, takes the position that "formal action was taken to modify/remove the PRUD subdivision option at the time the request by Nilson Homes was made." Consequently, the City believes that, under the pending ordinance exception, it does not have a legal obligation to approve Nilson's PRUD application.

ANALYSIS

Under Utah law, an applicant who submits a complete land use application and pays all applicable fees related to the application is entitled to review and approval of the application under the ordinances and standards "in effect on the date that the application is complete," and "applicable to the application or the information shown on the application," as long as the application conforms to those applicable ordinances and standards. UTAH CODE § 10-9a-509(1)(a)(i)-(ii). This rule is known as the "vested rights" rule. *See also Western Land Equities v. Logan City*, 617 P.2d 388 (Utah 1980) ("[A]n applicant is entitled to [land use application approval] if his proposed development meets the zoning requirements in existence at the time of his application…").

There are two exceptions to the vested rights rule. A city does not have to review an applicant's application under the ordinances in effect at the time a complete application is submitted (1) if "the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application," or (2) if, "in the manner provided by local ordinance and before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted." UTAH CODE § 10-9a-509(1)(a)(ii)(A)-(B).

Here, the City contends that the second exception applies. The City, as stated previously, asserts that it took formal action to "remove the PRUD subdivision option at the time the request by Nilson Homes was made," and that it is therefore not obligated to review Nilson's application under the rules as they existed when Nilson submitted its application. To support this assertion, the City has provided agendas and minutes from Planning Commission and City Council meetings spanning from January 25, 2018, when it appears the City began considering Nilson's development proposal, to July 12, 2018, when the City Council formally eliminated the PRUD ordinance from the City Code.

The City Code does not specifically identify what action or event constitutes formal initiation of proceedings to amend the subdivision ordinance. Consequently, we must interpret and apply relevant provisions of state law to determine what version of the Plain City Code must apply to Nilson's development application. If the City formally initiated proceedings to remove the PRUD option from the City Code before May 3, 2018—the uncontested date on which Nilson submitted a complete land use application, then the City is not obligated to review the application under the Code as it existed on that date.

Interpretation of a statute begins with an analysis of the provision's plain language. *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 1208. The primary goal of interpretation is "to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute [or ordinance] was meant to achieve." *Foutz v. City of South Jordan*, 2004 UT 75, ¶ 11,

100 P.3d 1171 (emphasis added). "When the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed." *Selman v. Box Elder County*, 2011 UT 18, ¶ 18, 251 P.3d 804. *See also* UTAH CODE § 10-9a-509(a)(ii)(B).

Here, since the local ordinance doesn't specifically identify an event that formally initiates proceedings to amend the ordinance, we must determine the definition of "proceedings" to determine what event formally initiates the process of amending the Code. Neither State statute nor City Code specifically define the term "proceedings," so we turn to the word's common meaning for guidance. *See Salt Lake City v. Roberts*, 2002 UT 30 ¶ 27 ("[I]n the absence of evidence of intent to the contrary, the words of a statute or ordinance are given their common meaning").

The Oxford English Dictionary defines "proceedings" as "[a]n event or series of activities involving a set procedure."[1] According to this definition, a municipality does not formally initiate proceedings to amend its ordinance simply by expressing a desire to amend an ordinance, or by discussing the possibility of amending an ordinance in a public meeting. These events and activities do not involve any sort of a set procedure. The municipality must set into motion an "event or series of activities involving a set procedure."

This conclusion is strengthened by the statutory requirement that the proceedings be "formally initiat[ed]." Ordinance interpretation requires us to assume that each word is used advisedly. *Selman v. Box Elder County*, 2011 UT 18, ¶ 18. "Formally initiates" certainly contemplates some action to start the process (*initiates*) that is official, procedural, and more than casual (*formally*).

The Planning Commission and City Council agendas and minutes submitted to this Office for review indicate that the Planning Commission began considering Nilson Homes' development proposal in some fashion on January 25, 2018. The submitted materials also indicate that the City began generally discussing changes to the City Code's subdivision regulations on March 8, 2018. These discussions predate May 3, 2018, the date on which Nilson submitted its PRUD application for review.

However, the first agenda item within that time period that could be interpreted to set in motion a set procedure to formally amend the Code to remove the PRUD provision appears on the May 10, 2018 Planning Commission agenda, which lists the following Legislative Item: "b. Set Public Hearing: PRUD Ordinance Amendment – Title 11, Chapter 6." According to the "Notice and Agenda" for that meeting, the City distributed and posted formal public notice for the May 10, 2018 Planning Commission meeting on May 8, 2018. Therefore, the earliest the City could have "formally initiated procedures to amend its ordinance" under State law is May 8, 2018—the date on which the City published formal notice of a set procedure to amend the PRUD Ordinance.

Because Nilson submitted its complete application on May 3, 2018, five days prior to May 8, 2018, the City must review Nilson's application under the City Code as it existed on the day Nilson submitted its application.

[1] *Proceedings*, Oxford English Dictionary, https://en.oxforddictionaries.com/definition/proceedings.

CONCLUSION

State law requires a local government to review an applicant's land use application under the local ordinance in existence at the time the applicant submits a complete application, unless the local government can show that an exception to this rule applies.

Here, the City has argued that it formally initiated procedures to amend its ordinance before Nilson Homes submitted a complete application on May 3, 2108, and that the City is therefore not obligated to review Nilson's application under the Code as it existed on that date. However, a correct interpretation of State law indicates that the City did not formally initiate procedures to amend its ordinance until May 8, 2018—five days after Nilson submitted its complete application.

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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:

Mayor Jon Beesley
Plain City
4160 West 2200 North
Plain City, UT 84404

On this 19th Day of June, 2019, 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