Advisory Opinion #234

Parties: Sam Lapray; Trenton Town
Issued: December 3, 2020

TOPIC CATEGORIES:

Entitlement to Application Approval (Vested Rights), Subdivision Plat Approval, Temporary Land Use Ordinances

Utah law provides that a land use application is complete and entitled to review by the land use authority when the applicant has submitted an application "in a form that complies with the requirements of applicable ordinances and pays all applicable fees." Moreover, submitting a complete application entitles the applicant to substantive review of the application under the regulations in effect on the date the application is submitted and applicable to the application or information shown on the application.

The property owner, therefore, has vested rights to have those features detailed in the submitted sketch plan application, as well as matters involved in a sketch plan review, considered under ordinances in effect on the date of initial submittal. The Town Code indicates that sketch plan review includes such matters as the configuration, size, and number of lots, points of access, plans and need for water, sewer, roads, and sanitation disposal, among others.

In addition, the temporary land use regulation pausing review and approval of land use applications was not supported by evidence establishing a compelling, countervailing public interest, and therefore, the property owner is entitled to have future complete land use applications reviewed under land use ordinances in effect prior to the enactment of the moratorium.

Lastly, the Town's policy to limit new water hookups to six per year and one per person does not appear arbitrary or capricious, and does not appear otherwise illegal, and is thus valid, so long as the requirement is found in the legislatively enacted Town Code. If, however, the requirement is simply an internal policy historically practiced by the Town, the Town may not enforce the policy on new and existing applications.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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ADVISORY OPINION

Advisory Opinion Requested By:	Sam H. Lapray, Trustee, Lyle E. Lapray and Margaret W Lapray Revocable Living Trust
Local Government Entity:	Trenton Town
Applicant for Land Use Approval:	Sam H. Lapray
Type of Property:	Agriculture (A-5) and Residential (R-1)
Date of this Advisory Opinion:	December 3, 2020
Opinion Authored By:	Marcie M. Jones, Attorney Office of the Property Rights Ombudsman

ISSUES

1. Did the applicant submit a complete Minor Subdivision Application that is entitled to substantive review under land use regulations in effect at the time of submission?
2. Did the town lawfully enact a temporary land use regulation prohibiting development for a period of time?
3. May the town limit the number of new water hookups per year to six total hookups with a limit of one per person?

SUMMARY OF ADVISORY OPINION

Utah law provides that a land use application is complete and entitled to review by the land use authority when the applicant has submitted an application "in a form that complies with the requirements of applicable ordinances and pays all applicable fees."[1] Moreover, submitting a complete application entitles the applicant to substantive review of the application under the regulations in effect on the date the application is submitted and applicable to the application or information shown on the application.

[1] UTAH CODE § 10-9a-509(1)(c).

The property owner, therefore, has vested rights to have those features detailed in the submitted sketch plan application, as well as matters involved in a sketch plan review, considered under ordinances in effect on the date of initial submittal. The Trenton Town Code indicates that sketch plan review includes such matters as the configuration, size, and number of lots, points of access, plans and need for water, sewer, roads, and sanitation disposal, among others.[2]

In addition, the temporary land use regulation pausing review and approval of land use applications was not supported by evidence establishing a compelling, countervailing public interest, and therefore, the property owner is entitled to have future complete land use applications reviewed under land use ordinances in effect prior to the enactment of the moratorium.

Lastly, the Town's policy to limit new water hookups to six per year and one per person does not appear arbitrary or capricious, and does not appear otherwise illegal, and is thus valid, so long as the requirement is found in the legislatively enacted Town Code. If, however, the requirement is simply an internal policy historically practiced by the Town, the Town may not enforce the policy on new and existing applications.

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 Sam H. Lapray on May 13, 2020. A copy of that request was sent via certified mail to Mayor Edward Lee Cottle, 1207 South 400 East, Trenton, Utah 84338.

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 Sam H. Lapray on May 13, 2020 including past correspondence with Trenton Town regarding this matter.
2. Response submitted by Daniel K. Dygert, Esq. on behalf of Trenton Town on June 5, 2020.
3. Response submitted by Sam H. Lapray on June 13, 2020.
4. Response submitted by Daniel K. Dygert, Esq. on behalf of Trenton Town on June 19, 2020.

[2] Lapray Town Subdivision Ordinance Chapter 13.03.2 Sketch Plan Requirements.

BACKGROUND

On March 9, 2020, Sam H. Lapray submitted what he understood to be an application for a minor subdivision to Trenton Town. The application was accepted and the item was placed on the next Planning and Zoning Commission meeting agenda, which did not occur until May 1, 2020 due to restrictions on public gatherings.

Lapray's submission included (1) application paperwork, (2) an aerial photograph of the property indicating the proposed property boundaries, and (3) a fifty-dollar fee. Trenton Town maintains that Lapray's submission was for a sketch plan review only, and did not contain the items necessary for a minor subdivision application.

When the item was considered by the Planning Commission on May 1, 2020, Lapray discussed his plan to create a subdivision with twenty-three lots and five agriculture remainder parcels. The Planning and Zoning Commission informed him that the Town Council was considering passing a subdivision moratorium, and therefore, they would not consider his application for subdivision at that time. Four days later, on May 5th, the Town imposed a temporary six-month moratorium on subdivision applications.

Lapray maintains that he submitted what was asked for in connection with a minor subdivision application, and that his completed application obtained an entitlement to be reviewed under the then-existing ordinances, which would not be affected by a later-passed moratorium. Conversely, the Town maintains that Lapray's submission was for a sketch plan review only, and as a consequence, the moratorium was passed before a completed subdivision application was submitted and would therefore apply to any future subdivision application Lapray submits.

The paperwork Lapray submitted includes some information that leads to the conclusion that it is for a minor subdivision and some information that leads to the conclusion that it is only for sketch plan review. For instance, the paperwork Lapray filled out is titled "Subdivision Application & Checklist" and appears to be the proper paperwork for a variety of applications, including minor subdivisions. Furthermore, Lapray maintains that he let city staff know he wanted to subdivide his property and was told this was the proper application. He maintains that he was not told that this was only a pre-submittal application.

The top of the form Lapray submitted includes several options. Applicants indicate what purpose the application is fulfilling by circling one. The form includes an option for:

- Major (more than 5 lots) Preliminary / Final,
- Minor (two (2) to five (5) lots),
- Lot Split (two lots), or
- Sketch Plan.

Lapray has circled "Minor (two (2) to five (5)" presumably to indicate that his intent was to apply for a minor subdivision. However, on the second page of the application, within a section titled

"Sketch plan review meeting" city staff (presumably) has filled in "March 26, 2020 @ 7pm" in the blank next to "Date meeting scheduled."

The Town points out that even though Lapray circled "Minor (two (2) to five (5)" at the top of the application, that the materials he submitted support only a sketch plan application, the review fee he paid was for a sketch plan, and the issue was scheduled for the Planning and Zoning Commission meeting as an agenda item titled "Sketch plan review." Furthermore, the proposed development includes twenty-three building lots and five agricultural remainder parcels, and would therefore require a "Major (more than 5 lots) Preliminary / Final" plat.

The Town maintains that a subdivision application must include the following:

1. Subdivision Application. Completed subdivision application.
2. Preliminary Plat. A Preliminary Plat.
3. Title Report. A Title Report for the property proposed to be subdivided provided by a Title Company dated within thirty days of the date of subdivision application.
4. Tax clearance. A tax clearance from Cache County Treasurer indicating that all taxes, interest, and penalties owing for the property have been paid.
5. Neighbor addresses. Addresses of all owners of record of real property within 300 feet of the parcel of land proposed for subdivision, including names and addresses of the holders of any known valid mineral leases.
6. Fees. Payment of the non-refundable administrative processing fee, and a refundable subdivision application fee, as established by resolution by the Town Council. This fee, for the twenty-three building lots and five remainder agricultural parcels would be $6,250.

The Town notes that Lapray did not submit a checklist for subdivision application nor the contents for a subdivision application. The Town further notes that the paperwork Lapray received and signed includes a note stating that "[a] sketch plan does not constitute an application for subdivision and is in no way binding on either the town or the applicant." Furthermore, Lapray had received a copy of the Town's subdivision ordinance, which states that "A sketch plan does not constitute an application for subdivision and is in no way binding on either the town or the applicant. Any discussion that occurs at a Sketch Plan review meeting shall not be considered any indication of subdivision approval or disapproval, either actual or implied." Lapray understands that he did not submit the materials on the subdivision checklist, but maintains that "there are several steps following the checklist to reach subdivision approval, but in the process, there is only one application."

Lapray also has questioned whether the subdivision moratorium passed by the town is proper and legal. The Town states that the moratorium was issued "while the city evaluates its water resources and updates its subdivision ordinance" and was supported by findings that the "existing subdivision ordinances are antiquated and inadequate" and water resources "need to be studied and guidelines which ensure adequate service determined." Lapray maintains that the reasons put forward by Trenton for the moratorium are unsubstantiated because the ordinances were updated in 2018 and a recent water report created by Town staff indicates there is adequate water for several years' worth of growth.

Lapray has also questioned the legality of Trenton's current policy to limit new water hook ups to six total permits per year, and only one per year per person, particularly when studies have proven water is available and the improvements to the current system were funded in part by federal taxes.

Lapray has requested this advisory opinion to determine (1) whether the paperwork he submitted grants him vested rights for a subdivision application, (2) whether the subdivision moratorium passed by the town is proper and legal, and (3) whether the town may limit the new water hookups to six total hookups per year with a limit of one per person.

ANALYSIS

I. Lapray has vested rights in details provided on the sketch plan and applicable sketch plan review

In Utah, an applicant for development is entitled to consideration and approval if the development application is complete, and if it complies with all zoning requirements in place *at the time of the application*. Put another way, the right to develop "vests" when a complete application that complies with zoning ordinances is submitted.

The State Land Use Development and Management Act (LUDMA) provides that whenever a municipality receives a land use application it must "determine whether [the] application is complete for…purposes of subsequent, substantive land use authority review."[3] The determination of when an application is complete is important because:

> An applicant who has submitted a complete land use application...including the payment of all application fees, is entitled to substantive review of the application under the land use regulations:
>
> A) in effect on the date that the application is complete; and
> B) applicable to the application or to the information shown on the application.[4]

Once an applicant has submitted a complete application under this provision, a municipality may not subsequently change the rules[5] that apply to that application,[6] for instance, by passing a moratorium. Hence, Lapray has stated that as he has submitted what he understands to be a subdivision application, the later-passed subdivision moratorium would not affect his submission.

The Utah Code plainly states that "[a] land use application is considered submitted and complete when the applicant provides the application in a form that complies with the requirements of

[3] UTAH CODE § 10-9a-509.5(1)(a).
[4] UTAH CODE § 10-9a-509(1)(a)(i).
[5] *See Western Land Equities v. Logan City*, 617 P.2d 388, 396 (Utah 1980) ("A property owner should be able to plan for developing his property in a manner permitted by existing zoning regulations with some degree of assurance that the basic ground rules will not be changed in midstream.")
[6] Certain exceptions apply. *See* UTAH CODE § 10-9a-509(1)(a)(ii)(A)-(B). Neither party has asserted that either of these exceptions applies. Accordingly, we will not consider them in this opinion.

applicable ordinances and pays all applicable fees."[7] This provision identifies only two criteria an applicant must satisfy to submit a complete application: 1) the applicant must submit an application in a form that complies with the requirements of applicable local ordinances, and 2) the applicant must pay all applicable fees associated with the application submittal.

Based on the information provided, and in light of the process laid out in the Town Code for subdivision review, Lapray had submitted all necessary materials and fees for a sketch plan review, but not a subdivision application, prior to passage of the moratorium. Lapray submitted (1) application paperwork, (2) an aerial photograph of the property indicating the proposed property boundaries, and (3) a fifty-dollar fee. In contrast, a subdivision application must include the following: (1) application paperwork, (2) Preliminary Plat, (3) recent Title Report, (4) tax clearance from Cache County Treasurer, (5) neighbor addresses, and (6) subdivision plat application fee of a minimum of $300.[8]

Therefore, as Lapray had submitted a complete sketch plan application, Lapray has vested rights to have those features detailed in the submitted application, or applicable to a sketch plan application, reviewed under ordinances in effect as of March 9, 2020. This includes a number of items. According to the Town's Ordinance, these features include such matters as the configuration, size, and number of lots, points of access, plans and need for water, sewer, roads, and sanitation disposal, as well as other matters listed in the Town's sketch plan review requirements, found in Section 13.03.2 of the Town Code.[9]

II. The subdivision moratorium passed by the Town was not supported by compelling, countervailing public interests

Under Utah law, a municipality may adopt an ordinance temporarily pausing review and approval of land use applications.[10] This is frequently referred to as a "moratorium on development" or more simply, a "moratorium." The Utah Code refers to such ordinances as "temporary land use regulations."[11] Utah Code permits a municipal legislative body to "enact an ordinance establishing temporary zoning regulation . . . if the legislative body makes a finding of *compelling, countervailing public interest*."[12]

Typically, "[a] property owner should be able to plan for developing his property in a manner permitted by existing zoning regulations with some degree of assurance that the basic ground rules will not be changed in midstream."[13] An applicant for approval of a planned and permitted use should not be subject to shifting policies that do not reflect serious public concerns."[14] On the other hand "compelling public interests, may when appropriate, be given priority over individual economic interests."[15] There may be instances when an application would for the first time draw

[7] UTAH CODE § 10-9a-509(1)(c).
[8] *See* Lapray Town Subdivision Ordinance Chapter 13.03 Requirements.
[9] Lapray Town Subdivision Ordinance Chapter 13.03.2 Sketch Plan Requirements.
[10] UTAH CODE § 10-9a-504.
[11] *Id.*
[12] *Id.*
[13] *Western Land Equities v. City of Logan,* 617 P.2d 388 (Utah 1980).
[14] *Id.*
[15] *Id.*

attention to a serious problem that calls for an immediate amendment to a zoning ordinance."[16] In such instances, the decision of the legislative body must be supported by compelling, countervailing public interest.

The term "compelling interest" is used sparingly in Utah statute. It appears to be used just four times in land use statutes where private interests are balanced against a true public necessity, and a handful of times outside land use statutes – once each in describing concerns about nuclear waste and confidential treatment of certain protected government records, and four times with regard to the protection of children.[17]

As an example of compelling public interest, in *Gardner v. Bd. of County Comm'rs*[18] the Utah Supreme Court affirmed the district courts findings that a county's temporary land use ordinance was supported by "undisputed evidence . . . that there has been legitimate concern over the geology of the development area for a substantial period of time" and, furthermore "there is nothing in the pleadings or the evidence before this Court by way of affidavit or other submission that would lead this Court to conclude that the County's enactment of the moratorium was an arbitrary or capricious reaction to the long-standing geologic concerns." In that case, the board of commissioners decision to enact a temporary moratorium was supported by a number of in-depth geological studies expressing concern over the slope stability and septic system suitability in the area and the landowner's own opposition to new development and agreement that the area was ecologically sensitive.[19]

In the case at hand, the Town claimed that a temporary six-month moratorium on subdivision applications served a compelling, countervailing public interest in protecting the health, safety, and welfare of its residents. The findings supporting the moratorium were given as (1) the existing subdivision ordinances were antiquated and inadequate and (2) a need to determine whether water flows were adequate over the next thirty years. However, the Town provides no support for their contention that the existing subdivision ordinances are inadequate, and the water study provided indicate there is water available for approximately 105 new hook-ups.

Lapray contends that the ordinances were recently updated in 2018 and cites a water report produced by the Town Council indicated there is water available for additional services. He maintains that these indicate a lack of compelling need for a moratorium. This Office agrees. However laudable the Town's goals, the Town's findings do not meet the higher threshold of a compelling, countervailing public interest.

Therefore, the moratorium is not supported by sufficient evidence that temporary halting of development will serve a compelling, countervailing public interest as required by law.

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[16] *Id.*

[17] The phrase is used to justify laws regulating the treatment and storage of high level radioactive waste at UTAH CODE § 19-3-318; to protect the lives of unborn children at UTAH CODE § 76-7-301; regarding the confidential treatment of records at UTAH CODE § 63G-2-405; to protect children in adoption cases in UTAH CODE § 78B-6-102; to punish those who abuse or neglect children in UTAH CODE § 62A-4a-201; and to require the least restrictive means of providing certain emergency medical treatment for a minor in the juvenile court system.

[18] 2008 UT 6, 178 P.3d 2008 Utah.

[19] *Id.*

Consequently, Lapray is entitled to have his complete land use applications reviewed under the land use ordinances in effect prior to the enactment of the temporary land use regulation.

III. The town may limit the number of new water hookups per year to six total hookups with a limit of one per person

Very limited information addressing the topic of limiting water hookups was provided. According to Lapray, the Town currently permits only six new water hookups per year, with a limit of one per individual. Neither party has included the source for this regulation in the record. It is not clear if this is an internal policy or if it is formalized somewhere in an ordinance. However, both parties appear to agree that it is the current standard applied to land use applications.

The Town argues that Utah law provides that "[e]very city and town may enact ordinances, rules and regulations for the management and conduct of the waterworks system owned or controlled by it." Furthermore, the Town points out that it is not a public utility and has no obligation to provide water service to all members of the public.[20] As indicated, the record does not discuss the findings leading to the decision to limit water hookups in this way, but it does discuss in detail concern for the future water supply.

A city's land use regulations are entitled to a significant degree of deference. When reviewing the validity of a land use regulation, a district court must presume the land use regulation is valid[21] and the court's determination is limited to whether the regulation is "expressly preempted by, or was enacted contrary to, state or federal law," and whether "it is reasonably debatable that the land use regulation is consistent with (LUDMA)."[22]

If the requirement to limit hookups was properly enacted as a land use regulation under LUDMA, and is found in the Town's ordinances, then it is likely a valid requirement. A reasonable mind could conclude that water hookups should be limited in this way. Furthermore, Lapray does not argue that the requirement violates any existing law, and the Office is unaware of any Utah or federal law that the requirement would violate.

However, if the requirement limiting yearly hookups is not a legislatively enacted requirement, but simply an internal policy the Town has historically followed, the Town may not enforce it. The Town may not simply read additional requirements into the Town Code. It may only impose requirements and conditions expressly allowed by State law or the Town's legislatively enacted ordinances.[23]

[20] *See, eg. Ramsey v. Salt Lake City Corp.,* 724 P.2d 958 (Utah 1986)(affirming dismissal of complaint seeking to compel the defendant to provide water service).
[21] UTAH CODE § 10-9a-801(3)(a)(i).
[22] UTAH CODE § 10-9a-801(3), *Gardner v. Bd. of County Comm'r*, 2008 UT 6)(a)(ii).
[23] UTAH CODE § 10-9a-509(f).

CONCLUSION

Utah law provides that a land use application is complete and entitled to subsequent, substantive review by the land use authority when the applicant has submitted an application "in a form that complies with the requirements of applicable ordinances and pays all applicable fees."[24] Lapray therefore has vested rights to have those features detailed in the submitted sketch plan, or applicable to a sketch plan application, reviewed under ordinances in effect as of March 9, 2020.

In addition, the temporary land use regulation pausing review and approval of land use applications was not supported by evidence establishing a compelling, countervailing public interest, and therefore, Lapray is entitled to have his complete land use applications reviewed by land use ordinances in effect prior to the enaction of the moratorium.

Finally, the Town's policy to limit new water hookups to six per year and one per person does not appear arbitrary or capricious, and does not appear otherwise illegal, and is thus valid, so long as the requirement is found in the legislatively enacted Town Code. If, however, the requirement is simply an internal policy historically practiced by the Town, the Town may not enforce the policy upon new and existing applications.

Jordan Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

[24] UTAH CODE § 10-9a-509(1)(c).

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 Edward Lee Cottle
1207 South 400 East
Trenton, Utah 84338

On this 3rd day of December, 2020, 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