

# Advisory Opinion #6

Parties: Boyd Brown and West Valley City

Issued: September 5, 2006

## TOPIC CATEGORIES:

M: Substantive Review of Application

R(i) Other Topics (Temporary land use ordinances)

The Land Use, Development, and Management Act authorizes local governments to adopt temporary land use ordinances. During the effective dates of the temporary ordinance, property owners are subject to the regulation in the same manner that they are subject to other zoning ordinances. A local government may decline to process development applications during the period when a temporary land use ordinance is in effect.

## DISCLAIMER

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.



The Office of the Property Rights Ombudsman  
Utah Department of Commerce  
PO Box 146702  
160 E. 300 South, 2<sup>nd</sup> Floor  
Salt Lake City, Utah 84114

(801) 530-6391  
1-877-882-4662  
Fax: (801) 530-6338  
[www.propertyrights.utah.gov](http://www.propertyrights.utah.gov)  
[propertyrights@utah.gov](mailto:propertyrights@utah.gov)



JON M. HUNTSMAN, JR.  
*Governor*

GARY R. HERBERT  
*Lieutenant Governor*

# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

### Advisory Opinion

Advisory Opinion Requested by: Boyd Brown

Local Government Entity: West Valley City

Applicant for the Land Use Approval: Ty Thomas and Boyd Brown

Project: Vistas at Westbridge No. 2  
Approx. 4700 South 5800 West  
West Valley City

Date of this Advisory Opinion: September 5, 2006

**Issue: Is the decision by West Valley City to delay the processing of the subdivision application for the Vistas at Westridge No. 2 in harmony with state law?**

#### Review:

The request for an advisory opinion in this matter was received by the Office of the Property Rights Ombudsman on Wednesday, June 7, 2006. A letter with the request attached was sent by certified mail, return receipt requested, to the City of West Valley City on June 16, 2006. The letter was addressed to Sheri C. McKendrick, City Recorder, at the address shown on the Governmental Immunity Act Database at the Utah State Department of Commerce, Division of Corporations and Commercial Code as required by statute. The letter was received by the City on or before June 22, 2006. Nicole Cottle, Deputy City Attorney, responded with the City's approval that I proceed to prepare this opinion via email on June 22, 2006 and by mail on June 26, 2006. My decision to proceed with the preparation of the opinion was made on June 26, 2006.

Prior to the preparation of this opinion, I discussed the matter with Jason Harris, representative of the applicant and exchanged voice mail with Boyd Brown. I also exchanged email and voice mail messages with and spoke on the telephone with Nicole Cottle.

The following documents were reviewed prior to completing this advisory opinion:

1. West Valley City Ordinance No. 06-14, adopted March 7, 2006 and effective March 14, 2006, with an attached one-page staff report recommending adoption.
2. Map – proposed Mountain View Corridor Moratorium
3. Minutes of the West Valley City Council meeting held December 20, 2005.
4. Minutes of the West Valley City Council meeting held March 7, 2006.
5. Timeline for GPZ-4-2005, an application for zone change by Ty Thomas and Boyd Brown, prepared by West Valley City staff.
6. Map identifying the corridor study area as it relates to the proposed subdivision.
7. Minutes – West Valley Planning Commission, December 14, 2005
8. Minutes – West Valley Planning Commission, January 25, 2006
9. Council Packet for proposed zone change #GPZ-4-2005, including minutes from the West Valley Planning Commission meeting of February 8, 2006 and other related documents including an ordinance to effect the zone change requested. Also included is a blank copy of a development agreement, among other materials.
10. Application for general plan/zoning district amendment application, dated November 14, 2005 identified as application #GPZ-04-2005, with Ty Thomas and Boyd Brown as Developer/Agent.
11. Fax Transmittal Form and attached documents related to access, including a real estate purchase agreement, copies of deeds, and other materials. Marked as “Documents related to access” by West Valley City staff who provided the documents.
12. Cover letter to the above information dated June 26, 2006, addressed to Craig Call from Nicole Cottle, Deputy City Attorney for West Valley City.

Assumed facts:

1. The individual who requested this advisory opinion is the applicant for a zone change and for subdivision approval from West Valley City.
2. An application for a zone change for the property which is the subject of this opinion was submitted on November 14, 2005 to the City.
3. The application for a zone change was reviewed by the City and approved on March 28, 2006
4. On March 7, 2006 the West Valley City council adopted a moratorium or “temporary zoning ordinance” (TZO).
5. The TZO applies only to the lands shown on an exhibit attached to the ordinance which includes a substantial portion of the subject property.
6. The ordinance provides that no new construction shall occur or no subdivision applications shall be processed which involve property within the TZO area during the effective period of the TZO.
7. The TZO became effective for a six month period commencing on March 14, 2006.

8. Boyd Brown, with others, has requested subdivision approval and been advised informally that subdivision applications related to property within the TZO area will be accepted, but not processed, during the effective date of the TZO.

**Analysis:**

**Right to Approval:**

According to Utah Code Annotated, Section 10-9a-509(1)(a):

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 and all 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.

**Temporary Land Use Ordinances for Corridor Planning:**

There are exceptions to this entitlement, however. The land use management act also provides specific guidelines for a temporary land use ordinance (TLUO), which, if it limits development, can also be known informally as a “moratorium.” Special provisions for TLUO’s in proposed transportation corridors are found at Section 10-9a-504(3) of the Utah Code under “temporary land use regulations”

- (3) (a) A municipal legislative body may, without prior planning commission consideration or recommendation, enact an ordinance establishing a temporary land use regulation prohibiting construction, subdivision approval, and other development activities within an area that is the subject of an Environmental Impact Statement or a Major Investment Study examining the area as a proposed highway or transportation corridor.
- (b) A regulation under Subsection (3)(a):
  - (i) may not exceed six months in duration;
  - (ii) may be renewed, if requested by the Transportation Commission created under Section 72-1-301, for up to two additional six-month periods by ordinance enacted before the expiration of the previous regulation; and
  - (iii) notwithstanding Subsections (3)(b)(i) and (ii), is effective only as long as the Environmental Impact Statement or Major Investment Study is in progress.

This statute allows West Valley City to approve a TLUO as they did in ordinance 06-14. The language of the TLUO is somewhat more expansive than the statute, in that the statute

allows a municipality to delay the “approval” of subdivisions, but the ordinance as enacted instructs the staff to suspend “processing” of subdivisions.

I have reviewed the documents noted above and it appears that the City has legally enacted the TLUO, although to so state in this advisory opinion may be beyond the scope of the role of this Office in providing advisory opinions. The statute that creates the Office of the Property Rights Ombudsman specifically authorizes the use of the advisory opinion process for issues arising out of the first statute cited above, but does not specifically authorize the issuance of advisory opinions on TLUO’s.

This opinion is, therefore, within the scope of the advisory opinion authorization if I treat the TLUO as legal and render my opinion based on that assumption. I am aware of no reason why the TLUO would not be of full force and effect, so will assume that it is.

That said, assuming the subdivision application as filed does comply with the other applicable land use ordinances in effect when the application is submitted, it is still subject to the TLUO and as a matter of law the application need not be approved so long as the TLUO or a subsequent extension of the TLUO is in effect.

The applicant should bear in mind that the maximum length of time that the refusal to approval land use applications can remain in effect without extension is six months; that the period cannot be extended unless 1) the Transportation Commission requests such an extension; 2) the request is filed with the City before the then-applicable six-month period expires; 3) the City takes action to extend before the then- current period of non-approval ends; and 4) there are no more than two extensions (at six months each) of the original six month TLUO. This makes the total time that a TLUO can be in place for corridor preservation purposes eighteen months.

I am advised by the City Attorney’s office that potential applicants can hold their place in line by filing applications during the period of the TLUO, but that the City will not process those applications. Since it can be very expensive to provide a complete submittal for approval, and since eventual development allowed within the area controlled by the TLUO may be dramatically altered, it would seem to be a minor matter that the City’s ordinance prohibits the processing of applications and the state statute only allows the prohibition of the approval of applications. I doubt a court would consider that to be a significant distinction and order the processing, but not approval, of land use applications while a TLUO is in effect.

**Conclusion:**

Based on the assumed legal enactment of a temporary land use ordinance for the purposes of allowing study of an area that is the subject of an Environmental Impact Statement or a Major Investment Study examining the area as a proposed highway or transportation corridor, I find that West Valley City may suspend the processing of an application for

subdivision approval for the Vistas at Westridge No. 2 subdivision at approximately 4700 South 5800 West. This decision is in harmony with state law.

Craig M. Call, Attorney  
Office of the Property Rights Ombudsman

**NOTE:**

**This is an advisory opinion as defined in Utah Code Annotated, 13-42-205. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.**

**While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.**

**An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.**

**Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.**

**MAILING CERTIFICATE**

Utah Code Annotated Section 13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. Section 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:

Sheri C. McKendrick, City Recorder  
West Valley City  
3600 Constitution Blvd.  
West Valley City, UT 84119

On this Sixth day of September, 2006, 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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Craig M. Call, Office of the Property Rights Ombudsman