# Advisory Opinion #54

Parties: Gary McDougal and City of Eagle Mountain

Issued: November 5, 2008

**TOPIC CATEGORIES**:
E: Entitlement to Application Approval (Vesting)
J: Requirements Imposed Upon Development
R(viii): Other Topics (Interpretation of Ordinances)

Setback requirements are primarily imposed when construction begins, but a developer may rely upon existing setbacks when designing a subdivision plat. To the extent that existing setbacks were relied upon, a developer may claim vested rights in those ordinances. Local ordinances which unreasonably limit construction on approved lots may be invalid.



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Department of Commerce

**OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN**

# ADVISORY OPINION

Vested Rights in Setback Ordinance

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| Advisory Opinion Requested by: | Gary McDougal |
| Local Government Entity: | Eagle Mountain City |
| Applicant for the Land Use Approval: | Musketeer, LLC/Valley View AB, LLC<br>Howard C. Freiss Construction, Inc.<br>Lyne Coy |
| Project: | Residential Subdivision |
| Date of this Advisory Opinion: | November 5, 2008 |
| Opinion Authored By: | Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman |

## Issues

May a local government impose new setback requirements on a subdivision that had been approved before the new ordinance was enacted?

## Summary of Advisory Opinion

Setback requirements are typically found within the zoning ordinances, but are primarily a function of construction upon a lot. A complete *building permit* application that complies with setback ordinances in place will vest the developer in those setbacks. Nevertheless, when making a subdivision application, a developer may reasonably rely upon existing setback ordinances and building code provisions when designing lot layouts and orientation. To the extent that a developer reasonably relied on setback ordinances in designing the development, the developer vests in those ordinances at the time of subdivision application. A community cannot approve a subdivision with narrow lots, and then modify setbacks or other building ordinances to such an extent that renders building upon the approved lots impossible or impractical.

## 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. The 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 Arbitration/Mediation was received from Musketeer, LLC on March 6, 2008. Mediation requests were subsequently received from Howard C. Freiss Construction, Inc. on April 17, 2008, and from Lyne Coy on April 21, 2008. All three requests concerned essentially the same issue. Letters with the requests attached were delivered to Eagle Mountain City. It was agreed that the issues raised could be best addressed in an Advisory Opinion. The City submitted a response, which was received by the Office of the Property Rights Ombudsman on April 2, 2008. Musketeer, LLC submitted additional materials as invited. These materials were received on June 16, 2008. The City submitted additional materials, which were received on June 25, 2008. The other two requestors, Howard C. Freiss Construction and Lyne Coy did not submit any additional materials.

## 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 Arbitration/Mediation filed March 6, 2008 with the Office of the Property Rights Ombudsman on behalf of Musketeer, LLC, with Attachments.
2. Response from Eagle Mountain City, submitted by Jeremy R. Cook, Counsel for the City, received on April 2, 2008.
3. Request for Arbitration/Mediation, filed on April 17, 2008, on behalf of Howard C. Friess Construction, Inc., with attachments.
4. Request for Arbitration/Mediation, filed on April 21, 2008, on by Lyne Coy, with attachments.
5. Additional materials submitted by Musketeer, received on June 16, 2008.
6. Additional materials submitted on behalf of Eagle Mountain City, received on June 25, 2008.

## Background

Beginning in 2004, Musketeer LLC, along with other development partners, applied for approval to develop a residential subdivision, entitled “Valley View Ranch,” located on about 305 acres which had been annexed into Eagle Mountain City. By October of that year, the City and

Musketeer had entered a Master Development Agreement, which provided that a maximum of 355 units could be built. The parcel is located to the north of Highway 73, and includes the Tickville Wash, most of which is unsuitable for building due to steep slopes. The Developers agreed to dedicate the wash to the City for open space and stormwater control, and also to build park areas within the development. In order to accommodate the number of units, the Agreement allowed ½-acre lots in some areas, but in the rest of the development, the minimum lot size was 1 acre.[1]

The Development Agreement specifically stated that 1-acre lots were to have at least 150 feet of frontage, and ½-acre lots were to be at least 100 feet wide. The Agreement did not address side yard setback requirements, but, according to the developer, the City's Development Code at the time required 10 foot setbacks. The parties agreed that Valley View Ranch would consist of "custom" homes with a minimum interior area of 1400 square feet, and that standard plans would be avoided.

In December of 2004, the City's Planning Commission approved the preliminary plat for the Valley View Ranch South Subdivision. The Commission recommended several conditions, including total sideyard setbacks of 30 feet on the half-acre lots, with a twelve foot minimum setback.[2] The Planning Commission did not change the minimum lot width, which remained at 100 feet. On February 5, 2005, the final plat was approved by the Commission. The Commission imposed various conditions, but without reference to a setback requirement, or to minimum lot width.

On March 15, 2005, the City Council began consideration of the Final Plat. Mayor Kelvin Bailey stated that the Valley View subdivision met the requirements made in the Development Agreement. However, he was concerned that the "spirit" of the agreement was not being carried out. The 100 foot width allowance in the Development Agreement was drafted to allow "latitude" to accommodate the topography of the area.[3] The Mayor contended that the developer was "abusing" that latitude by creating the maximum number of lots with the minimum width. He suggested that the action be tabled, so that the developer could "reflect upon the spirit of the agreement" and consider a new proposal for the plat.

The developer redrew the plat, and widened a majority of the lots. The City Council was pleased that the developers were willing to redesign the plat to accomplish a "win-win" solution. The Council approved the plat on the condition that "the plat meet all of the requirements for this

[1] The agreement provides that up to 5% of the total lots may be slightly smaller than ½ acre, if required due to "topographical features or road alignment technical issues."

[2] In other words, the total of the two sideyards added together had to be at least 30 feet, and no setback could be less than 12 feet. The other conditions are not at issue in this Opinion. On one-acre lots, the Planning Commission proposed a 30-foot minimum sideyard setback.

[3] The Development Agreement includes language allowing a greater number of ½ acre lots, when necessary to accommodate topography.

development set forth in the Valley View Development Agreement and City Development Code."[4] The Council did not address setback requirements as a condition of plat approval.

The Developer states that the City's Development Code required 10-foot sideyards when the Development Agreement was signed in 2004. By the time the Valley View final plat was approved, the City's Development Code required 25 foot sideyard setbacks for the lots in the plat. As development of the subdivision proceeded, the City was clear that it intended to enforce the 25-foot setbacks, even on the narrow lots. The City maintains that development must comply with its standards. Musketeer, LLC objects to the City's stand, stating that it has the right to develop using the either the 10-foot setbacks in place when the agreement was signed, or the 30-foot "total" setback proposed by the Planning Commission when it approved the preliminary plat.

## Analysis

### I. The Developer has not Vested in Setbacks through the Development Agreement

Local governments are authorized to use development agreements.[5] Such agreements allow for greater flexibility in development, and can address specific needs associated with individual properties. That appears to be the case with the Valley View Ranch subdivision. The City and the Developer agreed that some of the lots in the subdivision could be narrower than otherwise would be allowed, in part to compensate for a large area that could not be developed. The developer agreed to dedicate that area to the City for open space and flood control. The City and the Developer have agreed to the terms of the Development Agreement, and therefore, the Developer is entitled approval of a land use application that complies with the terms of that agreement. The Valley View Ranch subdivision plat appears to be consistent with the terms of the Agreement.

However, the Development Agreement and the final plat do not contain any information or restrictions regarding building setbacks. It cannot be said, therefore, that the building setbacks are vested as of the date of the development agreement. Accordingly, to determine whether the developer has a vested interest in building setbacks requires an examination of Utah law and Eagle Mountain City Ordinance.

### II. The Developer Vests in Setbacks in Place at the Time of Subdivision Application to the Extent that the Developer Relied on the Setback Ordinances in Preparing the Subdivision Application

In Utah, a land use applicant is entitled to approval of a complete land use application if the application conforms to the requirements of the county's land use maps, zoning map, and applicable land use ordinance in effect.[6] This rule, sometimes known as the "vesting rule," was adopted in Utah in 1980 in *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 396 (Utah

[4] The City Council imposed other conditions which are not at issue here.
[5] *See* Utah Code Ann. § 10-9a-102; 17-27a-102 (Development agreements authorized).
[6] Utah Code Ann. § 10-9a-509(1)(a)(i). Exceptions to this rule exist. None are relevant to this Advisory Opinion.

1980), and later codified at UTAH CODE ANN. § 10-9a-508(1)(a)(i).[7] The intent of the rule is to provide some reliability and predictability in land use regulation:

> It is intended to strike a reasonable balance between important, conflicting public and private interests in the area of land development. 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.

*Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 396 (Utah 1980).

This rule dictates how a local government can control the land use activities within its boundaries. If restrictions or guidelines on development are desired, the county must adopt ordinances to do so. Once properly enacted, those ordinances must be followed by land use applicants. Yet applicants also have an appropriate expectation that their application will not be denied midway through the process by new rules. Development of property is a difficult and costly process, and the rule prevents a local government from unfairly denying a compliant land use application after significant funds are spent. "The economic waste that occurs when a project is halted after substantial costs have been incurred in its commencement is of no benefit either to the public or to landowners." *Id*.

As in many communities, Eagle Mountain City's setback requirements are contained in the municipal zoning ordinances. Therefore, they are land use ordinances.[8] As land use ordinances, they are subject to the vesting rule. UTAH CODE ANN. § 10-9a-508 indicates that where a land use application (1) is complete and fees are paid, and (2) conforms to the requirements of the county's land use maps, zoning map, and applicable land use ordinance in effect, that application is entitled to approval. Setback ordinances are therefore subject to vesting.

Not all land use applications, however, are created equal. Although both are land use applications, a subdivision application will involve different considerations from a building permit application. More importantly, a subdivider will rely on certain ordinances to a greater or lesser extent than a builder. Setback ordinances are an example. When applying for a building permit, the footprint of the proposed building is a prime consideration. The building permit applicant will rely heavily on the setback ordinances in place when preparing the building permit application. A complete and compliant building permit application will therefore vest the builder in the setbacks in place at the time of application.

Conversely, a subdivider will rely more heavily on other ordinances such as lot size, and setback requirements may not be highly considered. Some subdivisions are prepared with complete disregard for building location on the lot. A developer may not intend to build on the subdivided

[7] There is a corresponding section applicable to municipalities, found at § 10-9a-509(1).
[8] UTAH CODE ANN. § 10-9a-103(20) defines "Land use ordinance" as "a planning, zoning, development, or subdivision ordinance of the county, but does not include the general plan."

lot for some time. In such a case, vesting in setback ordinances may unwisely limit the ability of the municipality to plan for future growth.

On the other hand, a subdivider might rely very heavily on setbacks in designing a subdivision. Developers often design a lot to accommodate a specific building. In such an instance, setback ordinances will be crucial in the subdivision design, and the level of reliance on those setbacks high. Changing the setback ordinances after subdivision could eviscerate the developer's intent for the development.

Where setbacks are relied upon by the subdivider in subdivision design, the developer's reliance on those setbacks must be protected. If setbacks do not vest with a subdivision application, a municipality may do an end run around the vesting rule by approving an application, but then changing the setbacks on the approved lots, effectively rendering the developer unable to build upon those lots. The vesting rule's purpose, as expressed in *Western Land Equities,* is to avoid exactly this kind of situation. Therefore, in accordance with *Western Land Equities,* setback ordinances can vest at the time of subdivision application to the extent that the setbacks were relied upon in the subdivision design.

## III. The Developer Relied Upon the Setback Ordinances In Designing the Subdivision, and Therefore Vests In those Setbacks to the Extent Of That Reliance.

The evidence provided to the Office of the Property Rights Ombudsman indicates that the Developer heavily relied upon the City's former setback requirements when it designed the subdivision. The developer and the City entered into the Development Agreement, which allowed a number of lots more narrow than normally allowed. The narrower lots could only have been a viable option to the developer to the extent that the developer could build upon those lots. It is unlikely that the developer would have designed narrow lots, in accordance with the agreement,[9] without reliance on the setbacks in the zoning ordinance. In addition, the Development Agreement anticipates "custom" homes with a minimum interior area of 1400 square feet. Custom homes require greater flexibility in placement, and a minimum size contemplates a certain size footprint. This also indicates that the Developer expected that the sideyard setbacks would remain at 10 feet, which would allow that flexibility and greater variety of the type of homes that could be built.

Because of the setbacks were important considerations in the planning of the subdivision and the Development Agreement, the Developer relied upon the former setback requirements. To the extent that of the reliance, the Developer may claim a vested right the former sideyard setback requirements.

[9] By entering into the Development Agreement and by approving the subdivision with the narrow lots, the City engaged in an affirmative act that could be viewed as agreeing to the setbacks as they existed. This raises issues of zoning estoppel. Zoning estoppel "estops a government entity from exercising its zoning powers to prohibit a proposed land use when a property owner, relying reasonably and in good faith on some governmental act or omission, has made a substantial change in position or incurred such extensive obligations or expenses that it would be highly inequitable to deprive the owner of his right to complete his proposed development." *Western Land Equities*, 617 P.2d at 391.

## IV. The Current Sideyard Setbacks May Impose an Unreasonable Burden on Narrow Lots in the Subdivision.

The Developer and Property Owners point out that the new setbacks severely limit the type of homes that may be located on the narrow lots. It is noted that the current sideyard setback requirements are large. The new sideyard setbacks are 25 feet on either side, which consumes one-half of a 100-foot wide lot, leaving a building area only 50 feet wide. Ordinarily, local governments have broad discretion to select and implement zoning regulations which they feel will best address local needs.[10] Despite this discretion, however, a particular application of a zoning ordinance may be invalid if it is applied in an unreasonable manner.[11] An ordinance may be valid as written, but oppressively restrictive when applied to a specific parcel, or to a particular factual situation.

While implementing a 25-foot sideyard setback may in general be a valid exercise of the City's zoning authority, the impact on the narrow lots in the Valley View Ranch subdivision may be a situation where the ordinance is being applied in an unreasonable manner. The governmental objectives promoted by sideyard requirements do not seem to justify imposing such a harsh burden on individual property owners. In addition, the history of the application and approval process strongly suggests that the City may be acting capriciously by imposing the 25-foot setback. If so, that would also invalidate how the ordinance is applied to the narrow lots in the subdivision. This extreme situation may be remedied by a variance request, or perhaps the City could reevaluate its position on the sideyard setbacks, particularly on narrow building lots.[12]

## Conclusion

The developer and the property owner may rely on the Valley View Ranch subdivision plat, and the terms of the Development Agreement. The City is bound to recognize the plat layout and lot sizes of the subdivision. The City is also obligated to follow the terms of the Development Agreement as they apply to the subdivision.

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[10] *See Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 24, 70 P.3d 47, 54: "Though a municipality may have a myriad of competing choices before it, the selection of one method of solving the problem in preference to another is entirely within the discretion of the [municipality]; and does not, in and of itself evidence an abuse of discretion." (citations omitted).

[11] *See Gibbons & Reed Co. v. North Salt Lake City*, 19 Utah 2d 329, 333, 431 P.2d 559, 562 (1967): "Although the wisdom and the nature of zoning power has been left in the discretion of [local] authorities, the courts may still intervene and set aside their action if such ordinances are confiscatory, discriminatory, or unreasonable." *See also Harmon City, Inc. v. Draper City*, 2000 UT App. 31, ¶ 12, 997 P.2d 321, 325.

[12] It must also be noted that an ordinance which is applied in an overly restrictive fashion, even if valid in other situations, may be considered a regulatory taking. "Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect upon the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and character of the governmental action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (*quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). This Opinion only notes the possibility of a takings claim, and does not attempt to analyze the City's setback requirement as a potential taking of private property.

The Developer has a vested right in the sideyard setback requirements in place when the subdivision was approved, to the extent that they relied upon those setbacks when the subdivision was planned. Rights in particular zoning ordinances vest when an application is filed which implicates those ordinances. A complete application for a building permit would vest the applicant with the right to rely upon the setbacks in place on the date of the application. A subdivision application implicates zoning ordinances related to lot size and layout, but not necessarily setback requirements. However, a developer may rely upon the setback requirements in an ordinance when the subdivision is planned and designed. To the extent that the Developer relied upon the City's setback requirements when the subdivision was designed, the Developer and Property Owner may rely upon those requirements, and claim vested rights in the setback ordinance.

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.**

**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:

Fionnuala Kofoed, City Recorder
Eagle Mountain City
1650 E. Stagecoach Run
Eagle Mountain, UT 84043

On this _____ Day of September, 2008, 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