Advisory Opinion #69

Parties: Michael Cox and City of Willard

Issued: May 18, 2009

TOPIC CATEGORIES:
E: Entitlement to Application Approval (Vesting)
R(iii): Other Topics (Waiver of Conditions)
R(iv): Other Topics (Lot Line Adjustment within a Subdivision)

A flag lot was properly created, and was allowed under existing City ordinances. The Property Owner's right to develop the lot vested on the date the application was submitted. Even if acquisition of additional property were a condition, the property owners complied by acquiring the property. The City is estopped from claiming that the flag lot was improper, because the subdivision was approved, and the City issued a building permit. The owners relied on the City's representations, and are not creating a new flag lot, but merely adjusting the boundaries of the existing flag lot so that a new lot could be created.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Michael Cox
Local Government Entity:	Willard City
Applicant for the Land Use Approval:	Michael Cox
Project:	Subdivision of Parcel
Date of this Advisory Opinion:	May 18, 2009
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

I. Did the property owners create a valid flag lot in 1998, before flag lots were prohibited by the City?

II. May the City's Board of Adjustment grant a variance adjusting the width requirements in order to allow building on a lot?

Summary of Advisory Opinion

In 1998, the property owners applied for a subdivision of a parcel, proposing a "flag lot," which was allowed under the City's ordinances in effect at the time. The City approved the subdivision, including the flag lot, and issued a building permit to construct a home on the lot. Shortly after that approval was granted, the City amended its zoning ordinances to ban flag lots. However, the subdivision had already been approved, so the City cannot question its existence.

The property owners have acquired some adjoining property, and are petitioning to add that property to the flag lot, and adjust the remaining lot boundaries. This does not create a "new" flag lot, but only adjusts the boundary of the existing lot.

The City's Board of Adjustment may grant a variance to the width requirements. Variances are within the discretion of the Board, and may be granted if the Board finds that criteria listed in the Utah Code are met. The Board may also require conditions which mitigate or lessen the impact of the variance.

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 ANN. § 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 Michael Cox on March 24, 2009. A copy of that request was sent via certified mail to Ryan Tingey, Mayor of Willard City. The City received the request on April 2, 2009. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on April 27, 2009. Mr. Cox emailed additional information on May 4, 2009. The parties also participated in mediation held on May 7, 2009 at the Willard City Offices.

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, including attachments, filed March 24, 2009 with the Office of the Property Rights Ombudsman by Michael Cox.
2. Response from Willard City, submitted by Jay Aguilar, City Planner, received on April 27, 2009.
3. Email reply from Michael Cox, received May 4, 2009.

Background

Michael Cox owns property located on Main Street in Willard. The property has been in his family for several years.[1] Until 2007, the parcel consisted of approximately 2.3 acres, and was approximately 198 feet wide, and had a home that had been built several years earlier. In 1998, Mr. Cox and Charles Paul applied to subdivide the lot. However, the City's zoning ordinance required that all lots be at least 100 feet wide. The parcel was just barely too narrow to accommodate two 100-foot wide lots. A variance was requested to modify the width requirement, but the request was denied.

[1] The Cox family includes Michael, his father, and his brother, who were all involved in the subdivision applications. Charles Paul was also involved as a purchaser. For the sake of convenience and clarity, this Opinion will refer to Michael Cox as if he were singly responsible.

Mr. Cox and Mr. Paul then sought to create a "flag lot" on the property.[2] Most of the records concerning his application are no longer available; however, the minutes of the City Council indicate that the flag lot subdivision was approved in March of 1998. The total area of the flag lot was about ½ acre. The lot included a 20-foot wide lane, which connected the lot to Main Street. The owners recorded deeds describing the lot shortly after approval. The City issued a building permit in June of 1998 to Mr. Paul, who proceeded to construct a home on the flag lot. Mr. Paul also undertook the expense of installing a fire hydrant and a culvert for the entry to the flag lot. Shortly after Mr. Paul's subdivision application was approved, the City enacted an ordinance prohibiting flag lots.

The City states that it agreed to the subdivision on the condition that the owners acquire title to a lane that runs along the southern boundary of the original parcel. This lane was not part of the property that was subdivided in 1998. It has been used to access property to the rear of the Cox parcel, including access by the City for flood control on that rear property. Ownership of the lane was in dispute, and in 2007 Mr. Paul was able to acquire title through a tax deed.[3] The lane has not been joined to the original Cox parcel.

In 2005, Leland Jacobsen, the City Planner, issued a written statement explaining the status of the 1998 subdivision application. In this memo, written on City letterhead, Mr. Jacobsen stated that the City had consulted its records and found that in 1998, three lots were created from the original Cox parcel: (1) Lot 1, a 1.28 acre lot where the original home is located; (2) Lot 3, the flag lot, with a home constructed in 1998; and (3) Lot 2, a lot between Main Street and the "flag" portion of the flag lot, which did not contain any buildings. Lot 2 was described as a "residual" lot, and, at 98 feet, was still too narrow to meet the minimum width requirement. In order to obtain a building permit, the lot would need to be wider.[4]

After Mr. Paul obtained title to the lane adjoining the parcel, the property owners applied for approval to join the lane to the flag lot, and adjust the boundaries of the other lots. They proposed that the lane become the access, or "pole" of the flag lot. The lane would serve the flag lot, and the City would be permitted to use the lane to access the storm water facilities to the east of the flag lot. The existing access lane would be eliminated, and returned to the "residual" lot (Lot 2). Finally, a small triangular portion would be removed from Lot 1, and joined to the flag lot.[5] The addition of the lane provides more than enough frontage to create a lot from the "residual" lot. However, that additional width includes the access for the flag lot, which must belong to that lot. Therefore, the residual lot (Lot 2) is still a few feet too narrow to be allowed

[2] A "flag lot" accesses a public road via a lane or driveway, with the bulk of the lot in the rear of existing development. Such lots allow for development of interior properties. The flag lot created in 1998 was for Charles Paul.

[3] Because the previous owner did not pay property taxes on the lane for five years, Mr. Paul was able to acquire title by paying the back taxes, and filing a quiet title action in district court.

[4] The "residual" lot borders the access lane, or "pole" of the flag lot. According to the City's ordinance, the access for a flag lot must be part of that lot. If that is the case, the residual lot would actually be 20 feet narrower than the Jacobsen memo indicated, in order to accommodate the flag lot.

[5] This would not negatively impact the width or area of either lot, and was proposed as a compromise with the owner of the flag lot.

as a lot. The City rejected the application to adjust the boundaries, because the City's planner believed that the application would create a flag lot, which is prohibited by current ordinances.

In November of 2008, Mr. Cox applied for a variance to allow the flag lot.[6] The City's Board of Adjustment denied the variance application. Mr. Cox then proposed narrowing the access lane slightly, to make the residual lot 100 feet wide, and granting an easement to the flag lot owners to preserve the width of the access lane. This proposal, however, did not resolve the width problem, but merely transferred it to the flag lot. The City's ordinances require that the access portion of a flag lot be at least 20 feet wide, and that the entire access be part of the flag lot. In order to make the new proposal valid, the City would need to grant a variance altering the width of the access lane.

The City maintains that the 1998 subdivision is invalid, because the owners did not fulfill all of the conditions until after flag lots were prohibited. According to the City, the owners' right to create a flag lot did not vest until all of the conditions were met.

Analysis

I. The Flag Lot was Created by the 1998 Subdivision.

The City approved the subdivision application in 1998, which created the flag lot. Although the City imposed conditions on that approval, the owners' right to develop the flag lot vested when the application was submitted.

> [A]n applicant for subdivision approval . . . is entitled to favorable action if the application conforms to the zoning ordinance in effect at the time of the application, unless changes in the zoning ordinance are pending which would prohibit the use applied for, or unless the municipality can show a compelling reason for exercising its police power retroactively to the date of application.

Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 391 (Utah 1980). A property owner may therefore rely upon the language of the zoning ordinance in effect on the date an application is submitted. After a conforming application has been submitted, the local government may not change its zoning ordinance to prohibit the application from being approved.

Although the records are scant, it is not disputed that Mr. Paul applied for subdivision approval in the early part of 1998 (or the last part of 1997). At the time of the application, the City's ordinances allowed flag lots. The application proposed a flag lot on the Cox parcel. That application was considered and approved by the City's Planning Commission and the City Council. The minutes from March and April of 1998 show that the City Council approved the application, and specifically approved a flag lot.

Evidently, the City directed Mr. Cox or Mr. Paul to acquire title to the adjoining lane in order to allow the creation of a third lot on the parcel (the lot referred to as "the residual lot"). The

[6] According to Mr. Cox, the variance request proposed a reduction of either the lot width requirement, or the width of an access lane for a flag lot. Either variance would allow the residual lot (Lot 2) to be created.

additional property was necessary so that the residual lot could satisfy the width requirement.[7] However, that additional property had no impact on the existence of the flag lot, which satisfied the criteria of the City's zoning ordinance when it was created in 1998. No additional property was necessary for the flag lot, and so the acquisition of the lane cannot be a condition on the existence of the flag lot. The property owners are proposing that the flag lot be reconfigured due to the additional property. That does not mean that a new lot is being approved, only a change to an existing lot.

The City appears to take the position that the flag lot does not legally exist because the owners did not join the lane to parcel until they applied to do so recently. Even if the additional property were required to make the flag lot comply with zoning ordinances, the owners have acquired the property. All that remains to be done is approval to join the additional property to the lots. The owners appear to have diligently worked to comply with the condition, which necessarily required some time to complete. Moreover, even if the acquisition of the adjoining property was a condition precedent to creating the flag lot, the vesting rule of *Western Land Equities* mandates that once the condition is satisfied, the subdivision must be approved under the ordinances in existence on the date of the application. Intervening ordinance changes cannot take away the owners' rights.

To conclude, is clear that the City approved the flag lot as it is currently configured, and that the flag lot does not require additional property to make it comply with the City's standards in effect when the owners applied for the subdivision in 1998. Therefore, the City cannot negate the owners' vested right to the flag lot because intervening ordinances were adopted particularly when the owners have diligently sought to acquire the property as suggested by the City.

II. The City is Estopped from Denying the Legal Existence of the Flag Lot.

The City's approval of the 1998 application, coupled with its recognition of the lot, prevents it from denying that the lot legally exists. Local governments are estopped, or barred, from claiming that a zoning use is prohibited "when a property owner, relying reasonably and in good faith on some government 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. In addition,"[t]he action upon which the developer claims reliance must be of a clear, definite and affirmative nature." *Utah County v. Young*¸ 615 P.2d 1265, 1268 (Utah 1980).

The City is estopped from asserting that the flag lot is not permitted because the owners reasonably relied upon the City's clear, definite, and affirmative acts. First, the City Council approved the subdivision application in 1998, specifically stating that the subdivision created a flag lot. Second, the City issued a building permit to Mr. Paul for a home on the flag lot. A reasonable person would conclude that those two acts indicated that the City accepted the existence of the lot. Furthermore, the owners made substantial changes relying upon those acts. The property owner transferred ownership of the flag lot to Mr. Paul, who incurred the expense

[7] This was explained by the Leland Jacobsen memo in 2005. The additional property was necessary to make the residual lot wide enough, not the flag lot.

of constructing a home on the flag lot. These are extensive obligations and expenses, and it would inequitable to deny the existence of the flag lot at this point.

In contrast, estoppel does not prevent the City from claiming that the residual lot does not comply with its standards. The 2005 memo from Leland Jacobsen points out that the residual lot had insufficient frontage, and a building permit for that lot could not be approved. There is thus no City action indicating that the residual lot would be acceptable that would justify reliance by the owners.

III. It is Possible to Vary Either of the Width Requirements.

The City's Appeal Authority may approve a variance to either width requirement, which would allow the residual lot to be developed. The City's zoning ordinance require that lots have a minimum width of 100 feet, and that access lanes for flag lots be at least 20 feet wide. Because there is not enough frontage to accommodate the residual lot and the access lane—even with the addition of the adjoining property—the width requirement for either the lane or the lot will need to be adjusted before a building permit may be issued for the residual lot.

Variances of local zoning ordinances may be approved by local appeal authorities only if:

> (i) literal enforcement of the ordinance would cause an unreasonable hardship for the applicant that is not necessary to carry out the general purpose of the land use ordinances;
>
> (ii) there are special circumstances attached to the property that do not generally apply to other properties in the same zone;
>
> (iii) granting the variance is essential to the enjoyment of a substantial property right possessed by other properties in the same zone;
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> (iv) the variance will not substantially affect the general plan and will not be contrary to the public interest; and
>
> (v) the spirit of the land use ordinance is observed and substantial justice done.

UTAH CODE ANN. § 10-9a-702(2)(a). A variance may be granted if the local appeal authority feels one is justified by all five of these criteria.[8] *See Wells v. Board of Adjustment*¸ 936 P.2d 1102, 1104 (Utah Ct. App. 1997). In addition, the hardship may not be self-imposed or economic, and the special circumstances must relate to the hardship. UTAH CODE ANN. § 10-9a-702(2)(b)-(c). A local appeal authority may not grant a "use variance," which would allow a use expressly prohibited by a zoning ordinance.[9] *See id.*, § 10-9a-702(5).

[8] Every local government must appoint an appeal authority to consider variance applications and zoning appeals. This authority may be a board of adjustment or a hearing officer. *See* UTAH CODE ANN. § 10-9a-701.

[9] It should be noted that granting a variance adjusting the width of the access lane does not somehow "resurrect" flag lots within the City. The variance would only affect that lot, and would be simply an adjustment of the requirements previously found in the City's ordinances.

The width requirements in the City's code may be varied if the City's Board of Adjustment feels a variance is warranted. Such a variance would only adjust a specific requirement pertaining to the width of one lot within the City. It would not allow an impermissible use or create an unauthorized lot. Furthermore, each variance decision must be based on the circumstances of the property in question. Prior decisions do not bind a city to the same actions in the future. Every parcel of property is unique, every development is unique, and zoning authorities must have discretion to take actions that are deemed best to address each particular situation.

> It must be remembered that zoning is not a static thing which once established becomes set in concrete forever. . . . It is obvious that there must be some pliability so that in performing its function the [local government] may keep abreast of changing conditions as life courses onward and meet the varying needs of the growing [locality].

Naylor v. Salt Lake City Corp., 17 Utah 2d 300, 302, 410 P.2d 764, 766 (1966). Past actions in similar circumstances may be evidence that the same decisions could be adopted, but they do not force a local government to always take the same action.[10]

This Opinion does not state that a variance *should* be granted, only that one *could* be granted. The focus of the inquiry should be whether an adjustment to one of the two width requirements should be varied in order to allow a building on the residual lot. The overall parcel is large enough to accommodate at least five lots, but is so narrow that only two lots are possible (at least without a new access road). A board of adjustment may conclude that a narrow, deep lot constitutes a special circumstance, because it hinders development and efficient use of property. In addition, the access drive for the flag lot must be allowed. This reduces the available frontage for the residual lot, and may constitute a special circumstance.

Literal enforcement of the width requirement prevents development of the residual lot which could be found to constitute an unreasonable hardship on the property owners. The owners are proposing to build a residence on the residual lot, which is a property right enjoyed by other properties in the area. Because the proposed development is no different than what is being done in that vicinity, a board of adjustment could find that a variance is justified because it would not substantially affect the general plan. A small adjustment to a width requirement could be found to be consistent with the spirit of the zoning ordinance, and necessary to provide substantial justice.

An appeal authority is also authorized to impose conditions on a variance, which mitigate, or lessen, the impact of the variance, and help serve the purpose of the standard being mitigated. *See* UTAH CODE ANN. § 10-9a-702(6). It would therefore be within a board of adjustment's authority to require conditions such as landscaping, setbacks, even placement of buildings, if those conditions are designed to lessen the impact of the variance.

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[10] *See, e.g. Cottonwood Heights Citizens Ass'n v. Board of Commissioners of Salt Lake County*, 593 P.2d 138, 140 (Utah 1979) "The fact that a prior application has been denied should not preclude the Commission from granting a later application if there has been a material change in circumstances." (citations omitted).

Conclusion

The flag lot was created by the City in 1998. Its existence should not be in question now. The right to subdivide property in a certain way vests on the date a conforming application is submitted. The City's zoning ordinance may prohibit flag lots now, but it did not in 1998, when the owners applied for the subdivision. The proposed lot line adjustment, to add adjoining property, does not affect the legal existence of the flag lot, only its boundaries. In addition, by approving the subdivision and granting a building permit, the City is estopped from claiming that the flag lot is not allowed.

There is still insufficient frontage to allow the creation of a third building lot from the "residual lot." The City's Board of Adjustment may grant a variance, adjusting either the lot width requirement, or the width requirement for the access lane serving the flag lot. Such a variance would allow creation of the residual lot as a conforming building lot. The Board of Adjustment would need to make the findings required by § 10-9a-702 of the Utah Code, but has discretion to determine that a variance is justified. If a variance is granted, the Board may also require conditions meant to mitigate the impact of the variance.

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:

Mayor Ryan Tingey
Willard City
80 West 90 South
Willard, Utah 84340

On this _____ Day of May, 2009, 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