

# Advisory Opinion #78

Parties: Bob Martino and Salt Lake County

Issued: November 24, 2009

## TOPIC CATEGORIES:

E: Entitlement to Application Approval (Vesting)

H: Compelling, Countervailing Public Interests

Lot owners enjoy vested rights a “buildable pad” identified on each lot on the subdivision plat. Those vested rights cannot be impaired, unless there is a compelling, countervailing public interest. The County has a legitimate interest in protecting ridgelines and hillsides, but that interest is not a threat to the public’s health or safety. Therefore, the County does not have a compelling, countervailing public interest, and it may not impair or restrict the owner’s vested rights.

## 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.



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# State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

## ADVISORY OPINION

Advisory Opinion Requested by: Bob Martino

Local Government Entity: Salt Lake County

Applicant for the Land Use Approval: Bob Martino  
Scott Holmes

Project: Single Family Dwelling

Date of this Advisory Opinion: November 24, 2009

Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

### Issue

May a local government restrict building in an area identified on a subdivision plat as a “buildable pad?”

### Summary of Advisory Opinion

The plat that was approved in 1994 identified a “buildable pad” on each lot. Since the pads were approved as part of the plat, lot owners enjoy vested rights in those pads, along with the lot sizes and configurations. Those vested rights cannot be impaired, unless the County has a compelling, countervailing public interest that requires interference with those rights. A serious threat to the public’s health, safety, or welfare is considered sufficiently compelling to justify interference with vested rights.

The County has a legitimate interest in protecting ridgelines and hillsides, but the County has not shown that this interest presents sufficient threat to the public’s health or safety. Therefore, the County does not have a compelling, countervailing public interest, and it may not impair or restrict Mr. Martino’s right to use the buildable pad for construction of a building.

## **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 Bob Martino on July 15, 2009. A copy of that request was sent via certified mail to Sherrie Swenson, Salt Lake County Clerk. The return certificate, indicating that the County received the copy of the Request, was received by the Office of the Property Rights Ombudsman on July 20, 2009. The County submitted a response to the OPRO, which was received on August 18, 2009.

## **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 July 15, 2009 with the Office of the Property Rights Ombudsman by Bob Martino, including attachments.
2. Response from Salt Lake County, including attachments, submitted by Donald Hansen, Deputy District Attorney, received August 18, 2009.

## **Background**

Bob Martino owns parcels located in Emigration Canyon.<sup>1</sup> The parcels are part of a planned unit development entitled “Estates at Emigration Oaks Phase 4,” which was recorded in February of 1994.<sup>2</sup> The plat for Emigration Oaks shows large hillside or canyon lots with privately owned and maintained roads. The lots within the subdivision are five acres or larger; however, the practical buildable area is smaller, because of steep slopes. The plat for phase 4 identifies a “buildable pad” on each lot, showing where a building could be located.<sup>3</sup> Salt Lake County acknowledges the existence of the buildable pads, and notes that about “1/3 to 1/2” of Lot 402 is usable.<sup>4</sup> The plat map does not show dimensions for the buildable pads, but they are apparently drawn to scale.

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<sup>1</sup> Salt Lake County notes that Lot 402, which is the subject of this Opinion, is actually owned by Lana Martino as a Trustee. Bob Martino is listed as the owner of an adjoining lot.

<sup>2</sup> The earlier phases of Emigration Oaks date back to the 1980s and early 1990s.

<sup>3</sup> The size of the buildable pad varies with each lot.

<sup>4</sup> The buildable pad of Lot 402 is shaped somewhat like an arch, with two large areas connected by a narrow neck.

In August of 1997, the County adopted a “Slope Protection Ordinance,” as part of the Foothills and Canyons Overlay Zone regulations. That ordinance prohibits development within a “ridgeline protection area” that has been designated in a county or township general plan.<sup>5</sup> The ordinance defines the term “ridgeline protection area” as

an area consisting of a prominent ridgeline that is highly visible from public rights-of-way or trails, and that includes the crest of any such designated prominent hill or slope, plus the land located within one-hundred feet horizontally (map distance) on either side of the crest.

SALT LAKE COUNTY CODE, § 19.72.070 (definition of “Ridgeline Protection Area”).

The County states that a ridgeline on Lot 402 was identified and mapped in August of 1999, as part of the Emigration Canyon Township General Plan. The Ridgeline Protection Area (100 feet on either side of the ridgeline) extends into the buildable pad identified for Lot 402. Although the Ridgeline Protection Area limits the amount of the buildable area, a home could be located on the remaining area.

Mr. Martino states that the ridgeline protection area restricts building in the most desirable portion of the lot, based on view and accessibility. Mr. Martino states that a potential buyer declined to purchase the lot because of the restrictions imposed by the ridgeline protection area. The buyer intended to build a home in the area nearest the ridgeline, but the protection area would force the home to be located 50-100 feet from the proposed location. Because of the unusual shape of the buildable pad, the buyer’s home would need to be located on the opposite side of the lot. That location is not as desirable, and so the buyer decided not to purchase the lot.<sup>6</sup> Mr. Martino feels that the ridgeline protection area has taken away vested rights to develop the property, and has severely impacted its value.

## **Analysis**

### **I. The Property Owner has a Vested Right in the Buildable Pad Identified on the Plat Map**

Because the 1994 plat map specifically identifies a “buildable pad” on each lot in the Emigration Oaks plat, Mr. Martino has a vested right to build within that pad. A property owner “is entitled to a building permit . . . if his proposed development meets the zoning requirements in existence at the time of his application . . . .” *Western Land Equities v. Logan*, 617 P.2d 388, 396 (Utah 1980). The Utah Legislature later codified that rule at § 17-27a-508 of the Utah Code:

[A]n applicant is entitled to approval of a 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 when a complete application is submitted.

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<sup>5</sup> See SALT LAKE COUNTY CODE, § 19.72.060(B).

<sup>6</sup> The County notes that no application for a building permit or other type of development has been submitted.

UTAH CODE ANN. § 17-27a-508(1)(a). The purpose of the vesting rule was explained by the Utah Supreme Court:

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*, 617 P.2d at 396.

The Utah Court of Appeals recognized that the owner of an approved subdivision plat enjoys some vested rights in the plat, although development would still be subject to changes in zoning regulations:

Some courts have recognized that the filing of a subdivision plat gives a vested right to individual lot owners as to the lots' size . . . . Individual lot owners within an approved subdivision, however, generally have no vested right to build under a given zoning ordinance until the municipality has issued a building permit for that specific lot or the lot owner has incurred substantial expense in reliance on the current zoning ordinance.

*Stucker v. Summit County*, 870 P.2d 283, 288 (Utah Ct. App. 1994). This establishes a sensible balance between an owner's property rights and the public's interest in land use regulation.<sup>7</sup> A lot owner may claim vested rights in a lot's size and configuration, because those are established when the plat is approved and recorded. However, aspects of future development not shown on the plat or otherwise previously vested or approved, such a building height or landscaping for example, remain subject to regulation.<sup>8</sup>

Accordingly, under *Stucker*, Mr. Martino may claim vested rights in the "buildable pads" depicted on the Emigration Oaks plat. It must be presumed that the County knowingly approved the subdivision with a "buildable pad" identified on most, if not all, lots. Because the pad appears on the final plat, the pad is an aspect of lot configuration, and an owner may claim a vested right to build within that area. A subsequent regulation cannot alter that right, unless there is a compelling, countervailing public interest justifying an interference with the owner's rights.

The County's Ridgeline Ordinance was adopted in 1997, and the ridgeline impacting Lot 402 was identified in 1999. The Estates at Emigration Oaks Phase 4 plat was recorded in February of 1994, prior to adoption of the Ridgeline Ordinance, and identification of the ridgeline. Mr. Martino has a vested right to build within the area approved on Lot 402, unless there is a

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<sup>7</sup> See UTAH CODE ANN. § 17-27a-102(2) (Counties to balance public's interests against landowners property rights).

<sup>8</sup> Under the ruling announced in *Stucker*, a property owner could also claim vested rights based on "substantial expense in reliance on the current zoning ordinance." *Stucker*, 870 P.2d at 288. *But see Western Land Equities*, 617 P.2d at 395 (rejecting "reliance" tests used in other jurisdictions). Mr. Martino is not claiming substantial expense in reliance on any former zoning ordinance.

compelling, countervailing public interest that would be jeopardized by permitting building within the designated building pad.

## **II. There Is Not a Compelling Public Interest Sufficient to Hinder the Owner's Vested Rights in the Buildable Pad.**

Although protection of undeveloped hillsides is a legitimate public interest, it cannot be considered compelling enough to justify restricting the Mr. Martino's vested rights in the buildable pad. A local government must honor a property owner's vested rights, unless there is a "compelling countervailing public interest" that warrants interference with the right. The Utah Supreme Court indicated that a significant threat to the public welfare should be considered compelling. "If a proposal met zoning requirements at the time of application but seriously threatens public health, safety, or welfare, the interests of the public should not be thwarted." *Western Land Equities*, 617 P.2d at 395-96.

There is no dispute that the County may regulate land uses to promote the public's health, safety, or welfare. See UTAH CODE ANN. § 17-27a-102(1). Regulations that severely impacted or even prohibited land uses have been upheld as valid exercises of a local government's authority. See e.g., *Arnell v. Salt Lake County Board of Adjustment*, 2005 UT App. 165, ¶ 33, 112 P.3d 1214, 1224 (noting decisions from the United States Supreme Court upholding local restrictions on land use). The County has a legitimate interest in restricting development on hillsides or steep slopes.<sup>9</sup>

The County enacted the Ridgeline Ordinance in order "to preserve the natural character of the foothills and canyons . . ." and "to minimize the scarring and erosion effects of cutting, filling, and grading related to construction on hillsides, ridgelines, and steep slopes . . . ." SALT LAKE COUNTY ORDINANCES, § 19.72.010. While these are laudable and legitimate objectives, absent a showing that they pose a serious impact the public's health, safety, or welfare, they do not warrant interference with a vested property right.<sup>10</sup> The County already approved a buildable pad on Lot 402, indicating that a building could be located anywhere on that pad. It cannot revoke a portion of that right without a showing of a serious threat to public welfare.<sup>11</sup>

The County argues that most of the buildable pad identified on Lot 402 is may still be used even if the Ridgeline Ordinance is strictly enforced. The County notes that the proposed home could be moved "approximately 50 feet to the East" to avoid the ridgeline protection area. However, the County also noted that "only about ½ of the proposed house . . . encroached into the 100-foot protected ridgeline setback line." Despite that characterization, a setback that affects ½ of a proposed building is a significant impact in an already-approved buildable area, and cannot be

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<sup>9</sup> See *Arnell*, 2005 UT App. 165, ¶ 27, 112 P.3d at 1223. (Court of Appeals did not dispute authority to regulate development on hillsides; however, it did hold that a regulation could "go too far.")

<sup>10</sup> The County does not claim that protecting the ridgeline on Mr. Martino's property is necessary to prevent a landslide or other subsidence. If there were such an imminent threat, a restriction on building may be justified.

<sup>11</sup> The County may allow development within a ridgeline protection area, by waiving or reducing the setback required by the Ridgeline Protection Ordinance.

considered insignificant or minimal.<sup>12</sup> Nevertheless, the standard requires a showing that a compelling, countervailing public interest is high, rather than a showing that the impact upon the property is low.<sup>13</sup>

Mr. Martino has a vested right in the buildable pad identified on Lot 402. The County has not shown that there is a compelling, countervailing public interest sufficient to overcome Mr. Martino's rights that have vested by means of the approved and recorded plat. At the time that Mr. Martino or a subsequent owner makes an application for a building permit, the County must make such a showing or honor Mr. Martino's vested rights and allow him to build within the shown buildable area.

## Conclusion

Mr. Martino has a vested right in the buildable pad identified on Lot 402. The pads were included in the subdivision plat when it was approved by the County in 1994, and the owners may rely upon them in the same manner in which they can rely upon the lot sizes and configurations that were approved. The County may not interfere or restrict Mr. Martino's vested rights, unless a serious threat to the public's health, safety, or welfare justifies a restriction.

While protecting ridgelines and hillsides is a legitimate public interest, the County has not shown that there is such a serious threat to the public's health or safety that a property owner's vested rights must be compromised. Without a showing that the public's health or safety is seriously jeopardized unless the regulation is enforced, the County may not interfere with Mr. Martino's right to construct a home on the buildable pad approved for Lot 402.

Brent N. Bateman, Lead Attorney  
Office of the Property Rights Ombudsman

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<sup>12</sup> In addition, "since zoning ordinances are in derogation of a property owner's use of land . . . any ordinance prohibiting a proposed use should be strictly construed in favor of allowing the use. *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 31, 104 P.3d 1208, 1217.

<sup>13</sup> The Ridgeline Ordinance includes a provision allowing for adjustment or waiver of the required setback. Therefore, it is possible to adjust the setback to allow a home to be placed on the buildable pad.

**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:

Sherrie Swenson, County Clerk  
Salt Lake County  
2001 S. State St., #S2200  
Salt Lake City, Utah 84190-1050

On this \_\_\_\_\_ Day of November, 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.

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Office of the Property Rights Ombudsman