Advisory Opinion #14

Parties: Michael Moyal and MBI, LLC and Ogden City

Issued: April 16, 2007

TOPIC CATEGORIES:
E: Entitlement to Application Approval (Vesting)
K: Compliance with Mandatory Land Use Ordinances
R(i): Other Topics (Temporary Land Use Ordinance)

Utah law requires the finding of a "compelling, countervailing public interest" to support the enactment of a temporary land use ordinance (or "moratorium"). The City's findings for the temporary ordinance did not meet the higher threshold of a compelling, countervailing public interest, and was therefore illegally enacted.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

Advisory Opinion

Advisory Opinion Requested by:	Michael Moyal and MBI, LLC by Alvin R. Lundgren, Attorney at Law
Local Government Entity:	Ogden City
Applicant for the Land Use Approval:	Michael Moyal
Project:	River Inn – Restaurant Remodel
Date of this Advisory Opinion:	April 16, 2007

Issue

Did the City of Ogden legally refuse to consider a land use application to establish a restaurant at 1875 Washington Boulevard either because: 1) the City acted legally to adopt Ordinance No. 2007-2 on January 2, 2007, thereby imposing a six month prohibition on development activities in the Ogden River Redevelopment Project Plan Area or 2) the City had a "pending ordinance" in place at the time which would have prohibited approval of the land use application as submitted?

Summary of Advisory Opinion

Utah law requires the finding of a "compelling, countervailing public interest" to support the enactment of a temporary land use ordinance. These temporary land use ordinances (some of which could be styled as a "moratorium") are enacted without any of the notice and due process requirements typically required of land use statutes. They have the ability, such as in this case, to completely deny all changes in the use of developed private property, or any use at all of vacant land, for a period of time of six months or less. Because of the intrusive nature of such temporary ordinances, adopted without the same due process, there is a higher duty imposed on local municipal officials to justify them. Ogden's findings cite a preference for one land use over another as justification for the temporary ordinance, and suggest that the matter is urgent, although the river project plan, which is the basis for the temporary ordinance, was adopted four and a half years ago. These findings did not meet the higher threshold of a compelling, countervailing public interest. Ogden Ordinance No. 2007-2, the temporary land use ordinance for the River Project, was therefore illegally enacted. Since it was not legally enacted, it also does not and did not constitute a "pending ordinance" that could be relied upon to deny the application for a restaurant at 1875 Washington Boulevard. If that application was complete and in a form that the City would normally proceed to review and act upon, the City must do so.

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 U.C.A. § 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.

The request for an advisory opinion in this matter was received from Al Lundgren, Attorney for the Applicant, on January 23, 2007. A letter with the request attached was sent by certified mail, return receipt requested, to Cindi Mansell, Ogden City Recorder, at 2549 Washington Blvd. Suite #210, Ogden, UT 84401. Ms. Mansell is the individual whose name is listed as the designated agent on the records of the Division of for the receipt of notice under the Utah Governmental Immunity Act. A return receipt was received on January 26, 2007 indicating that Ms. Mansell's office had received the request.

The parties did not appoint a neutral to write the opinion, so this office has prepared it. Prior to the preparation of this opinion, Craig Call of this office visited on several occasions and/or traded emails with Al Lundgren, Attorney for the Applicant; Michael Moyal, the Applicant; Gary Williams, the Ogden City Attorney; Joe Linford, Assistant Ogden City Attorney; and Greg Montgomery, Ogden City Planning Staff.

Evidence

The following documents with relevance to the issue involved in this advisory opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion filed January 24, 2007 with the Office of the Property Rights Ombudsman by Alvin R. Lundgren, Attorney at Law for Michael Moyal.
2. Ordinance No. 2007-2, Ogden City Ordinances
3. "Temporary Ordinance For River Project Area" – Council Staff Review for Ogden City Council Meeting, January 2, 2007.
4. "Ogden River Project History" unsigned and undated chronology provided to me by the City of Ogden.
5. "Ogden City Council Transmittal" dated December 19, 2006 to Ogden City Council through John Patterson, CAO from Richard McConkie, CED Deputy Director.
6. "Notice of Temporary Ordinance in Affect (sic) December 19, 2006 to June 19 2007" undated notice provided to me by the City of Ogden.

7. Email from Greg Montgomery to Community Development; Mansell, Cindi; Lockwood, Andrea; related to "Temporary Ordinance in Affect" (sic) December 19, 2006-June 19, 2006.
8. Letter dated December 13, 2006 to "Mr. Moyal" from John Mayer, Planner, Ogden City.
9. Undated graphic rendering of proposed restaurant facades provided by Michael Moyal.
10. Proposed site plan, undated and untitled, for restaurant and motel.
11. Mountain View Community Plan, adopted August 2004. Approx 30 pages including maps and graphics, provided to me by the City of Ogden.
12. Ogden City Ordinances, Chapters 4 – Development Plan Review Process, 15 – Single-Family Residential Zones, 21 - Manufacturing Zones, and 38 - Commercial Zones.
13. Ogden River Redevelopment Project Area Plan Final Project Area Plan dated June 20, 2002 by the Redevelopment Agency of Ogden City, provided to me by Ogden City.
14. Ogden River Neighborhood Schematic Plan and General Information – five full-color sheets outlining proposed plan for Washington Blvd & 20th Street provided to me by the City of Ogden.
15. "Ogden's Riverfront Neighborhood" undated summary of area plan provided to me by the City of Ogden. Eleven 11x17 inch full-color pages.
16. Timeline for events regarding 1825 and 1839 Washington Blvd. Ogden, Utah 84401 a.k.a. Ogden River Inn and Old Restaurant/Deli Site. Four page document provided by Michael Moyal.
17. "Petition to Amend Ogden City Zoning Map" filed 10-13-06 by Michael Moyal.
18. Agenda November 1, 2006, Ogden City Planning Commission.
19. Audio recording of the January 2, 2007 meeting of the Ogden City Council found online at www.ogdencity.com.

Other documents were submitted by the Applicant related to the same property but not the issues involved in this Advisory Opinion. They were descriptive of zoning enforcement issues and business licensing of the Applicant's business there and were not deemed relevant to this opinion and therefore not reviewed in connection with its preparation.

Assumed Facts

1. The River Inn is a motel in Ogden that has been in operation for decades at 1875-1839 Washington Boulevard.

2. The River Inn is owned by MBI, LLC. Michael Moyal is a principal of that business entity.

3. The owners of the River Inn submitted documents to the City of Ogden that were reviewed by the staff of the City prior to December 13, 2006. These documents

consisted of a “concept plan” for a proposed restaurant. City staff conducted conversations with various City service providers regarding the restaurant proposal.

4. On December 13, 2006, John Mayer, a Planner for Ogden City, notified Michael Moyal by a letter that the “concept plan” review concluded that there were significant issues with the concept plan related to parking and landscaping and that the proposal could not be approved under the existing ordinances. The letter required an “official site plan submittal” would be required and these two issues would need to be addressed. Mayer also noted that issues would exist with regard to a grease trap and hood and associated duct exhaust system.

5. On January 2, 2007, the Ogden City Council adopted Ordinance 2007-2 (the “Ordinance”) establishing a temporary land use ordinance relating to development activity in the area included in the Ogden River Redevelopment Project Area Plan, which includes approximately the area between 18th Street and 20th Street and between Washington and Wall Avenues, excluding the area between the Ogden River and 20th Street and between Grant Avenue and Washington Boulevard.

6. The Ordinance prohibits the issuing of building permits, site plan reviews, conditional use permits, rezoning, subdivisions, changes of use, or other development approvals in the area between December 19, 2006 and June 19, 2007.

7. At various times Michael Moyal claims that he has tendered an application on behalf of MBI for review of a proposed restaurant to be located on the River Inn site.

8. The City of Ogden has refused to further consider the site plan for the restaurant at the River Inn, citing the temporary land use ordinance.

Analysis

Land use decisions by municipal officials in the land use context are afforded great deference.

> This court has long recognized that municipal land use decisions should be upheld unless those decisions are arbitrary and capricious or otherwise illegal. Indeed, municipal land use decisions as a whole are generally entitled to a "great deal of deference.". . . Given this deferential disposition, we have held that it is "the court's duty to resolve all doubts in favor" of the municipality, and the burden is on the plaintiff challenging a municipal land use decision to show that the municipal action was clearly beyond the city's power.

Bradley v. Payson City Corp., 2003 UT 16, 70 P.3d 47, at ¶10, 12, 14. (citations omitted).

> (3) (a) The courts shall:

> (i) presume that a decision, ordinance, or regulation made under the authority of this chapter is valid; and (ii) determine only whether or not the decision, ordinance, or regulation is arbitrary, capricious, or illegal.
> (b) A decision, ordinance, or regulation involving the exercise of legislative discretion is valid if the decision, ordinance, or regulation is reasonably debatable and not illegal.
> (c) A final decision of a land use authority or an appeal authority is valid if the decision is supported by substantial evidence in the record and is not arbitrary, capricious, or illegal.
> (d) A determination of illegality requires a determination that the decision, ordinance, or regulation violates a law, statute, or ordinance in effect at the time the decision was made or the ordinance or regulation adopted.

U.C.A. § 10-9a-801(3).

Vested Rights

Utah law also provides, however, that there are specific and defined standards that determine whether a land use decision violates vested rights. According to statute:

> An applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, and 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.

U.C.A. § 10-9a-509(1)(a). In this matter, Moyal claims he attempted to file an application on behalf of MBI for a land use approval and the City refused to consider it. The City has cited two reasons for that refusal: 1) that there is a temporary land use ordinance in place prohibiting the consideration of land use applications and/or 2) that the temporary ordinance was a "pending ordinance" which is to say an amendment to the land use ordinance as described in item (ii) above, at the time that Moyal claims he tendered his application.

This opinion is to address the issue of whether or not the City may refuse to consider MBI's application under either or both of these bases.

Temporary Land Use Ordinance

Under Utah law, a municipality may adopt a temporary land use ordinance (sometimes inaccurately referred to as a "moratorium") with an effective period of no more than six months. Again, the statute:

> (1)(a) A municipal legislative body may, without prior consideration of or recommendation from the planning commission, enact an ordinance establishing a temporary land use regulation for any part or all of the area within the municipality if:
> (i) the legislative body makes a finding of compelling, countervailing public interest; or
> (ii) the area is unregulated.
> (b) A temporary land use regulation under Subsection (1)(a) may prohibit or regulate the erection, construction, reconstruction, or alteration of any building or structure or any subdivision approval.
> (c) A temporary land use regulation under Subsection (1)(a) may not impose an impact fee or other financial requirement on building or development.
> (2) The municipal legislative body shall establish a period of limited effect for the ordinance not to exceed six months.

U.C.A. § 10-9a-504. The City of Ogden passed the Ordinance on January 2, 2007. It had an effective date of December 19, 2006 on its face and is set to expire on its own terms on June 19, 2007.

The Ordinance provides that within the defined project area and during that six month period there is to be no erection, construction, or alteration of any building or structure; no acceptance or approval of any application for subdivision, use changes, building permits, site plan reviews, conditional use permits or other development approval for new construction, remodeling, or additions; and no acceptance or processing of a petition for rezoning.

A temporary land use ordinance related to developed property can only be legally enacted if the legislative body of the municipality finds a "compelling, countervailing public interest". U.C.A. § 10-9a-504(1)(a)(i) (emphasis added).

Compelling, Countervailing Public Interest

The term "compelling, countervailing public interest" is only found twice in Utah statutes. The term is used in the statute cited above for temporary land use ordinances and also in U.C.A. § 10-9a-509, which allows a city to deny an application conforming with the city's ordinances if the city finds a compelling, countervailing public interest. The two words "compelling, countervailing" appear together in five of Utah's appellate decisions, most prominently in *Western Land Equities v. Logan City*, a land use case.

> The above competing interests are best accommodated in our view by adopting the rule that an applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, *absent a compelling, countervailing public interest.*

617 P.2d 388, 396 (Utah 1980) (emphasis added). The other cases involve three issues: a referendum on zoning decisions (*Mouty v. Sandy City Recorder*, 2005 UT 41); a court's reluctance to take judicial notice of disputed facts (*State v. Redd*, 954 P.2d 230 (UT App 1998) and *Finlayson v. Finlayson*, 874 P.2d 843 (UT App 1994)); and the raising of new issues on appeal to the appellate court (*Mel Trimble Real Estate v. Monte Vista Ranch*, 758 P.2d 451 (UT App 1988)). In *Mouty*, the Utah Supreme Court ruled that the right of citizens to place legislative land use decisions on the ballot is a compelling, countervailing public interest. The latter line of cases each held that the facts of each case did not create a compelling, countervailing basis that justified an exception to a prevailing rule.

If we broaden the search for a definition of the phrase and unbundle the words, we find the phrase "compelling state interest" is used quite extensively in our jurisprudence, most notably with the protection of constitutional rights.

A compelling state interest is a "paramount" interest, one of "the highest order." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). Such interests are usually associated with fundamental rights:

> the right to earn one's livelihood by rendering a useful service is a property right, which should not be impaired unless there is a compelling public interest which supersedes it and justifies interfering therewith.

Stone v. Dept. of Registration, 567 P.2d 1115 (Utah 1977). Utah's appellate courts have commonly used the term "compelling" to describe the type of public interest that can be countervailing, usually when discussing individual rights.[1]

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[1] For example: *Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998) (holding that free speech is only to be burdened if a compelling state interest is found and the law is the least restrictive means of accomplishing that interest, and the state has a compelling interest in ensuring that all parties are able to resolve legal disputes before a neutral tribunal); *Kearns-Tribune Corp. v. Lewis,* 685 P.2d 515 (Utah 1984) (holding that the public's right of access to a criminal trial subject only to "narrowly tailored exceptions tied to a compelling state interest"); *In re P,* 648 P.2d 1364 (Utah 1982) (holding that the cutting of family ties is a step of the utmost gravity which should be done only for the most compelling reasons *); State v. Holm*, 2006 UT 31 (holding that Utah is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship); *Gallivan v. Walker*, 2002 UT 89 (holding that "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively"); and *State v. Debooy*, 2000 UT 32 (holding that the State has a clear and compelling interest in promoting highway safety and keeping drunk drivers off the road) (emphasis added).

While the phrase "compelling interest" is used sparingly in state statutes, it does appear five times outside of the land use statutes --- once in describing concerns about nuclear waste and four times with regard to the protection of children.[2]

The use of the term "compelling public interest" implicates a balancing of competing interests, and, when considered in light of the other contexts in which the phrase is used, indicates that fundamental rights are in play:

> With respect to the specific provisions before this Court, it is necessary to determine at the outset the proper standard of review, namely, whether the challenged provisions . . . operate to the disadvantage of a suspect class or impinge upon a fundamental right protected by the constitution such that the state would need to demonstrate a compelling interest in the subject matter of the statute in order to justify the resulting discrimination . . .
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> * * * * *
>
> A legislative determination to interfere with, limit, or abrogate the availability of remedies for injuries to person, property, or reputation requires an important state interest and a rational means of implementation. The greater the intrusion upon the constitutionally protected interest, the greater and more explicit the state's reasons must be. It is necessary for the legislature, first, and this Court, second, to balance the weight of the governmental interest at stake against the countervailing importance of the individual rights being compromised.
>
> This due process approach offers some degree of flexibility. Under equal protection, the selection of the standard of review virtually determines the outcome, and selection of the standard of review depends in turn on a rather rigid system of classification of the individual rights in question.
>
> Most frequently, the level of protection which the courts will afford the constitutional provision depends on the nature of the substantive right being asserted in the underlying claim. If the substantive right is deemed to be "fundamental," statutory restrictions will be examined very closely under the strict scrutiny test; only the presence of a compelling state interest will justify the restriction or denial of access to the courts. If, on the other hand, the substantive right being asserted is not the subject of a specific constitutional protection and is therefore not fundamental, then the rational basis test provides that access to the

[2]The phrase is used to justify laws related to the transfer and storage of nuclear and radioactive waste, U.C.A. § 19-3-318(2)(a); separation of natural parents from their children, U.C.A. § 62A-4a-201(1); avoidance of abuse and neglect of children, U.C.A. § 62A-4a-201(2); protection of the lives of unborn children, U.C.A. § 76-7-301.1(2); and provision of stable and permanent homes for adoptive children and in the requirement that parents meet the medical and financial needs of children, U.C.A. § 78-30-4.12 (emphasis added in each case).

> courts may be restricted if a rational or reasonable basis for the restriction is shown.

Condemarin v. University Hospital, 775 P.2d 348 (Utah 1989) (emphasis added). By this analysis, therefore, the Court is saying that the use of the term "compelling interest" is essentially linked to a "fundamental right". Since the legislature used the term "compelling, countervailing public interest" to describe the kind of imperative that would justify interference with property uses by a temporary land use ordinance, those property rights protected by such a standard must be "fundamental" and the justification for interfering with those rights must be significant. This makes eminent sense, since the statute that allows the imposition of a temporary land use ordinance waives some of the normal due process requirements of the land use regulation system. A temporary land use ordinance need not be reviewed by the planning commission and therefore need not have the more thorough review and public comment period that the land use regulation system provides.

Did Ogden Establish a Compelling, Countervailing Public Interest?

In the landmark case in this area, the Utah Supreme Court gave some indication about what would and would not be a "compelling, countervailing public interest."

> . . . a rule which vests a right unconditionally at the time application for a permit is made affords no protection for important public interests that may legitimately require interference with planned private development. 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, Inc. v. City of Logan, 617 P.2d 388, 395-396 (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. Clearly it is desirable to reduce the necessity for a developer to resort to the courts. An applicant for approval of a planned and permitted use should not be subject to shifting policies that do not reflect serious public concerns.

Id. at 617 P.2d 396. According to *Western Land Equities*, it was not a compelling, countervailing public interest to disallow subdivisions in an M-1 zone and permit residences by special permit, even though the City of Logan raised fire protection concerns. Inadequate sidewalks were also mentioned as not rising to the level of a compelling public interest. "It is incumbent upon a city, however, to act in good faith and not to reject an application because the application itself triggers zoning reconsiderations that result in a substitution of the judgment of current city officials for that of their predecessors." *Id.*

The *Western Land Equities* case allows, however, that:

> A city should not be unduly restricted in effectuating legitimate policy changes when they are grounded in recognized legislative police powers. There may be instances when an application would for the first time draw attention to a serious problem that calls for an immediate amendment to a zoning ordinance, and such an amendment would be entitled to valid retroactive effect.

Id. It is a balancing test. "Regardless of the circumstances, a court must be cognizant of legitimate public concerns in considering whether a particular development should be protected from the effects of a desirable new law." *Id.*

So, to summarize, if an interest is a compelling, countervailing interest, then it is a "legitimate public concern"; "a serious problem" that calls for an "immediate amendment to a zoning ordinance." It is not just a "zoning reconsideration" that results in a "substitution of the judgment of current city officials for that of their predecessors."

According to *Western Land*, A court will review the details of a claim by a municipality that a compelling, countervailing public interest exists, and will not find such an interest just because fire safety is mentioned, for example. It will probe deeper to determine if there really is a legitimate fire safety concern rather than just find a compelling interest because the municipality raises a fire safety issue.

As a court would do, this advisory opinion will therefore determine if the justifications cited by the City of Ogden for its temporary land use ordinance pass muster as compelling, countervailing public interests.

Ogden's Justifications

In general, moratoria are commonly accepted tools in the land use planning arena. Indeed, even the Supreme Court of the United States has commented to that effect:

> In fact, the consensus in the planning community appears to be that moratoria, or "interim development controls" as they are often called, are an essential tool of successful development. See J. Juergensmeyer & T. Roberts, Land Use Planning and Control Law §§5.28(G) and 9.6 (1998); Garvin & Leitner, Drafting Interim Development Ordinances: Creating Time to Plan, 48 Land Use Law & Zoning Digest 3 (June 1996) ("With the planning so protected, there is no need for hasty adoption of permanent controls in order to avoid the establishment of nonconforming uses, or to respond in an ad hoc fashion to specific problems. Instead, the planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view"); Freilich, Interim

Development Controls: Essential Tools for Implementing Flexible Planning and Zoning, 49 J. Urb. L. 65 (1971).

* * * * *

To the extent that communities are forced to abandon using moratoria, landowners will have incentives to develop their property quickly before a comprehensive plan can be enacted, thereby fostering inefficient and ill-conceived growth.

* * * * *

It may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism. But given the fact that the District Court found that the 32 months required by TRPA to formulate the 1984 Regional Plan was not unreasonable, we could not possibly conclude that every delay of over one year is constitutionally unacceptable. *Formulating a general rule of this kind is a suitable task for state legislatures . . .*

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U. S. 302 (2002). (emphasis added). The bottom line with this statement by the Court is that moratoria are an appropriate, necessary part of good planning, but each state legislature, not the court (or the writers of advisory opinions) should be the source of guidance as to the appropriate use of moratoria. Despite this commonly held belief, and despite the common practice of using moratoria (temporary land use ordinances) to call a "time out" so new land use ordinances can be reviewed without undue development pressure, our legislature has made that difficult. In Utah, the legislature adopted very restrictive language requiring that a "compelling, countervailing public interest" be found on the record before a temporary land use ordinance can be enacted. The instant issue is whether Ogden's justifications rise to that level.

In the body of Ordinance No. 2007-2, the Ogden City Council lists the justifications for its actions. They can be paraphrased as follows:

1. The Ogden City Redevelopment Agency's Ogden River Redevelopment Project Area Plan has been adopted in a process that included review and approval by the Planning Commission and City Council.
2. There exists a need to establish higher density mixed use housing and retail development opportunities.
3. The Mountain View Community Plan envisions "mixed use quality development" that would require new zoning regulations.
4. The current zone allows inconsistent development, including single family housing and manufacturing uses.
5. The current zoning does not provide adequate standards and requirements that would disallow inappropriate land uses according to the plans cited.

6. Significant investment by existing owners that is inconsistent with the plans will hinder the goals and objectives of the plans.
7. New zoning standards are needed to prevent inconsistent development.
8. Development must be restricted because no zoning regulations are now in existence that would provide for the development the plans envision.
9. Inconsistent interim development would result in significant and permanent impacts to the community.

The ordinance also includes a provision providing an effective date of approximately two weeks prior to the date of the council's action in order to be sure that any applications submitted after December 19, 2006 would not be processed. According to the audio recording made of the council meeting held January 2, 2007, that date was selected as the date that a "pending ordinance" was effective. On that date a memo was prepared and circulated among the staff of the city and an email was sent to the staff directing them not to accept land use applications within the river project area.

It is to be noted that "The Ogden River Redevelopment Project Area Plan" provided by the City is the "Final Project Area Plan" and is dated June 20, 2002. The Mountain View Community Plan provided by the City for this review indicates that it was "Adopted August 2004." The river project plan was therefore four and a half years old as of the effective date of the temporary land use ordinance, although the urgent need for implementation of the river project plan was cited through the text of the ordinance and the presentations made before the City Council when the temporary land use ordinance was adopted.

The Mountain View Community Plan was adopted two years and four months before the temporary land use ordinance. This delay between the time the vision was set for the area and the temporary land use ordinance would seem to blunt a claim that there was a compelling, countervailing public interest in abruptly stopping any potential development that might be contrary to these plans. But development has apparently been allowed for more than four years after the river plan was adopted in final form.

It is also of note that Greg Montgomery, the planner who commented before the City Council when the temporary land use ordinance was adopted, mentioned that potential inappropriate development had been controlled in the past by the idea that the City (the RDA) could use eminent domain to assemble property for projects. That power was revoked by the 2005 Utah Legislature. The temporary land use ordinance was passed almost two years later. Again, the question before us is whether there is sufficient urgency to meet the statutory standards.

There is an accepted principle in Utah law, that "because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner." *Patterson v. Utah County Bd. of Adjustment,* 893 P.2d 602, 606 (Utah Ct. App. 1995).

We will apply the same standard for interpretation of the state statute in this case. If the state statute is strictly construed, the justification for a temporary land use ordinance must be significant. As defined above, a "compelling" interest is a significant issue, though it is hard to imagine that the legislature intended the language to be so strictly interpreted as to prohibit moratoria altogether. Indeed, the legislature has specifically stated that a temporary ordinance is justified to avoid the building of homes in the path of planned highway projects (U.C.A. § 10-9a-504(3)), and no doubt would support an effort to avoid construction in the face of soil subsidence or newly-discovered geological risks. These interests are higher and more compelling than economic considerations or compatibility matters, the typical issues in run-of-the mill land use cases.

There is no such compelling interest in this case.

While it is true that Ogden's long term vision for the future of its downtown neighborhoods is an important goal, the incremental benefit of a total freeze on development and building activities for six months does not seem compelling when considered in light of the fact that the City somehow survived four and a half years of development activity under the current zoning after the river project plan was adopted in final form.

Item 10 in the list of findings indicates that inconsistent interim development would result in significant and permanent impacts to the community. Even if this is true, this principle is one of the basic premises for the entire regulatory structure of local land use controls. Any time a building is built, the result can be significant and permanent. Local government has been granted broad power to regulate land use in any manner where it is found to be "reasonably debatable" that the regulations advance the general welfare. Under that standard, at least one court has stated that there is "no Utah case, nor a case from any other jurisdiction, in which a zoning classification was reversed on grounds that it was arbitrary or capricious." *Harmon City, Inc. v Draper City*, 2000 UT App 31 at par. 18. There is hardly any restraint at all on the decisions of local government under such a standard.

But by using the term "compelling" the legislature meant to include as a fundamental right the ability of a property owner to improve or develop property under those existing zoning rules. Even the courts have said it is not a compelling interest for one group of civic leaders to substitute their current judgment about land use for the past judgment of their predecessors. *Western Land* at 617 P.2d 396. In order to be "compelling", the interest involved must "seriously threaten public health, safety, or welfare." *Id.*

This matter does not involve the kind of situation cited in the *Western Land* case where "an application would for the first time draw attention to a serious problem that calls for an immediate amendment to a zoning ordinance." *Id.* Indeed the river project plan had been adopted four and a half years before this temporary zoning ordinance was put into effect and had been under consideration for a year before that, according to Ogden City documents.

Much of the discussion before the Ogden City Council on January 2 was about the goal of having residential development in the river project area rather than industrial projects. But the *Western Land* case specifically states that the City of Logan did not raise a compelling, countervailing public interest in its goal to disallow subdivisions in an M-1 zone and permit residences by special permit. Since *Western Land* holds that land use preferences similar to those driving the Ogden temporary land use ordinance do not constitute compelling interests, Ogden's preferences about whether property develops with residential or industrial uses specifically do not meet the compelling interest standard.

Again, to quote *Condemarin:* "If the substantive right is deemed to be 'fundamental,' statutory restrictions will be examined very closely under the strict scrutiny test; only the presence of a compelling state interest will justify the restriction or denial of access to the courts." The courts have consistently held in the cases above that if a right is fundamental, a compelling reason must be found to countervail that right. By the same token, if the legislature decreed that the finding of a compelling interest is necessary to restrict a property right, then we must conclude that the legislature has also deemed that property right to be fundamental, and must look carefully at the justification provided to interfere with that right.

The interests cited to support the Ordinance were not compelling, countervailing public interests. They were the stuff of typical zoning decisions – the choice of uses – and were not so urgent that a temporary zoning ordinance was deemed necessary for the first four and a half years after the river project plan was adopted. Based on the statutory standard of review, the Ordinance was illegally enacted by the Ogden City Council.

Pending Ordinance

Utah statute also provides that a pending ordinance can be enforced during the time that it is being considered for adoption, but not for a period longer than six months. See U.C.A. § 10-9a-509, the text of which is provided above. The last sentence of this section of the code states the "pending ordinance" exception to the general rule that if a person submits a land use application it must be considered under the law in place when the application is submitted in complete form and all the fees are paid unless "the municipality has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted."

Utah Code Annotated § 10-9a-509(1)(a)(ii). The City claims that there was a pending ordinance under consideration at the time that Moyal says he tendered an application for site plan approval. The Ordinance says "this regulation" (the temporary land use ordinance) had been pending since December 19, 2006.

The issue is rendered irrelevant, however, by the fact that the ordinance once adopted was illegal and thus unenforceable. Since it was adopted on January 2, 2007, the temporary land use ordinance is no longer "pending" today. Since it was illegally adopted, it was not legally pending in December of 2006. Whatever application Moyal filed in December can be considered and approved if it meets the standards of the then-applicable ordinances.

In our review of the current status of these matters we inquired about any subsequent ordinance that might now be pending and applicable to BMI's application. We were told that there was no text of an ordinance available for review. This would lead us to conclude that in January and February of this year there was also no new, second "pending ordinance" that was under formal consideration in a form that would "prohibit approval of the application as submitted" in December.

Conclusion

Utah law requires the finding of a "compelling, countervailing public interest" to support the enactment of a temporary land use ordinance. These temporary land use ordinances (some of which could be styled as a "moratorium") are enacted without any of the notice and due process requirements typically required of land use statutes. They have the ability, such as in this case, to completely deny all changes in the use of developed private property, or any use at all of vacant land, for a period of time of six months or less. Because of the intrusive nature of such temporary ordinances, adopted without the same due process, there is a higher duty imposed on local municipal officials to justify them. Ogden's findings cite a preference for one land use over another as justification for the temporary ordinance, and suggested that the matter is urgent although the river project plan, which is the basis for the temporary ordinance, was adopted four and a half years ago. These findings did not meet the higher threshold of a compelling, countervailing public interest. Ogden Ordinance No. 2007-2, the temporary land use ordinance for the River Project, was therefore illegally enacted. Since it was not legally enacted, it also does not and did not constitute a "pending ordinance" that could be relied upon to deny the application for a restaurant at 1875 Washington Boulevard. If that application was complete and in a form that the City would normally proceed to review and act upon, the City must do so.

Brent N. Bateman, Lead 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

U.C.A. §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. §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:

Cindi Mansell
Ogden City Recorder
2549 Washington Blvd. Suite #210
Ogden, UT 84401

On this _____ Day of April, 2007, 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