Advisory Opinion 259

Parties: Safe Harbor Storage LLC / Laketown

Issued: August 31, 2022

TOPIC CATEGORIES:

Complete Land Use Application

Entitlement to Application Approval (Vested Rights)

Review for Application Completeness

Substantive Land Use Review

Temporary Land Use Ordinances

The date at which a land use application is considered complete is important for purposes of vested rights. A municipality's obligation to timely determine whether a submitted application is complete or otherwise deficient is a simple, initial form review of application materials that precedes any review of the substance of the land use proposal. The town's acting on the substance of the application attests to the application's completeness for purposes of substantive review, and the town's attempt to then subject the proposal to newly enacted legislation violated the applicant's vested rights by changing the basic ground rules midstream.

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ADVISORY OPINION

Advisory Opinion Requested By:	Wade Budge
Local Government Entity:	Laketown
Applicant for Land Use Approval:	Safe Harbor Storage LLC
Type of Property:	Commercial
Date of this Advisory Opinion:	August 31, 2022
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUES

Did Laketown appropriately reject Safe Harbor's building permit application as incomplete? Did the town err in denying the application because of Laketown's Road Ordinance?

SUMMARY OF ADVISORY OPINION

Safe Harbor's submitted building permit application was complete at the time it was submitted, and Laketown acted improperly by (1) determining the application to be incomplete months after having discussed the substance of the proposal with the applicant, and (2) denying the application by reviewing it under new requirements enacted after a complete application had been submitted.

The date at which a land use application is considered complete is important for purposes of vested rights. A municipality's obligation to timely determine whether a submitted application is complete or otherwise deficient is a simple, initial form review of application materials that precedes any review of the substance of the land use proposal. The town's acting on the substance of the application attests to the application's completeness for purposes of substantive review, and the town's attempt to then subject the proposal to newly enacted legislation violated the applicant's vested rights by changing the basic ground rules midstream.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for Advisory Opinion submitted by Wade R. Budge, on behalf of Safe Harbor Storage, LLC, on March 17, 2022.
2. Letter from Andrew Lillywhite, Attorney for Laketown, on April 6, 2022.
3. Letter from Wade R. Budge, Attorney for Safe Harbor Storage, LLC, on April 19, 2022.
4. Letter from Wade R. Budge, Attorney for Safe Harbor Storage, LLC on May 19, 2022.
5. Letter from Andrew Lillywhite, Attorney for Laketown, dated June 29, 2022.
6. Letter from Wade R. Budge, Attorney for Safe Harbor Storage, LLC dated June 30, 2022.

BACKGROUND

Safe Harbor owns real property along Bear Lake Boulevard in Laketown, approximately two miles from the shore of Bear Lake, which it acquired to construct storage units for boaters to store their boats close to the lake. In 2017, at the request of Safe Harbor, the Laketown Town Council rezoned Safe Harbor's property to the Commercial/Residential 200 buffer zone (which allows for permitted uses of either the Laketown's residential or commercial zones), and also amended Laketown Code to add storage units as a permitted use within Laketown's commercial zone. Laketown then issued Safe Harbor a zoning clearance letter acknowledging the zone change and confirming that storage units were a permitted use.

In 2020, Safe Harbor applied for building permits to construct the storage units. For purposes of this advisory opinion, the relevant facts are presented in the following timeline:

- July 12, 2020 – Safe Harbor submitted a building permit application to Laketown for its project, and paid the application fee.

- July 29, 2020 – The proposal was discussed at a scheduled Planning Commission meeting where there was, according to Town minutes, a "lengthy discussion regarding the setbacks, access, future roads, in-lets, out-lets and the positioning of the units themselves."[1]

- August 5, 2020 – At the regularly scheduled Town Council meeting, the proposed project came up in discussion of the City's Future Roads Master Plan. Following these meetings, Safe Harbor alleges that it continued to work with the Town to voluntarily try to reconfigure certain aspects of the project to accommodate a future road anticipated by the Town that would otherwise conflict with several of the proposed storage units. However, Safe Harbor ultimately reached a point of impasse once it determined that any plausible reconfigurations rendered its project economically unfeasible.

[1] Minutes, Laketown Planning & Zoning Commission Meeting Wednesday, July 29, 2020, available at https://www.utah.gov/pmn/files/634057.pdf.

- June 11, 2021 – After some time of inaction, Safe Harbor sent the Town a letter requesting that it approve the application (assumedly as it had been proposed), and initially received no response.

- July 16, 2021 – Safe Harbor made a formal written request for substantive review and final action on the application citing to Utah Code Section 10-9a-509.5(2), which requests that the land use authority take final action within 45 days of the request.

- August 12, 2021 – Laketown adopted Resolution 2021-03, which placed a moratorium on land use applications, which included the "filing and approving of any application filed before or after the date of adoption of [the moratorium]" (this moratorium remained in effect until February 12, 2022).

- August 30, 2021 – Laketown responded to Safe Harbor's July 16th request and rejected Safe Harbor's application "as incomplete," alleging several deficiencies including "failure to provide sufficient plans and specifications" according to Town code, and "failure to submit the required signatures of approval." The letter stated that Safe Harbor could elect to complete the application and resubmit, and once accepted and recommended by the planning commission, it would be presented to the Town Council, who would consider the application and would "accept or reject" it at that time.

- December 30, 2021 – Safe Harbor renewed its request for substantive review of the application, asserting it had worked to "supplement" the application over several months following the rejection letter.

- February 2, 2022 – Laketown adopted Ordinance 2021-21 ("Road Ordinance") prior to the end of the moratorium, which provided that any property overlaid by a future road on the Town's Zoning and Roads map must dedicate the property to the town and construct the future road thereon. Safe Harbor's property is overlaid by a future road according to theses maps, making these provisions substantively applicable to information in Safe Harbor's application.

- February 12, 2022 – Laketown's moratorium on land use applications, Resolution 2021-03, expired (at which point the Town enacted a new moratorium for another prospective six months).

- March 17, 2022 – Safe Harbor made another written request to the Town requesting final action on its application within 45 days. Safe Harbor also submitted a Request for an Advisory Opinion to determine whether the Town appropriately rejected Safe Harbor's building permit application as incomplete, whether Safe Harbor had a vested right to construct storage units on its property according to the ordinances in effect at the time it applied, and whether the Town otherwise followed applicable law in its handling of Safe Harbor's building permit application.

- April 6, 2022 – Laketown responded to Safe Harbor by letter stating that due to Safe Harbor's December 30, 2021 supplement, the Town considered the application to be complete as of February 12, 2022, based on the expiration of its moratorium on that date.

The letter provided written findings on the substance of the application, concluding that it did not comply with the Town's Roads Ordinance by proposing to build units on top of an identified future road, and concluded that the application was substantively denied.

ANALYSIS

I. Availability of Advisory Opinion Under Utah Statute.

As a threshold matter, Laketown initially requests that the Office of the Property Rights Ombudsman ("Office") decline to issue an opinion based on traditional court justiciability doctrines of ripeness and mootness, and citing to Utah Code Section 13-43-204(3)(b), which states that the Office shall issue a written statement declining to mediate or arbitrate when "(i) the issues are not ripe for review . . . [or] (ii) assuming the alleged facts are true, no cause of action exists under United States or Utah law . . . ." However, this citation relates to other statutory duties of the Office unrelated to our advisory opinions on land use disputes.[2]

Advisory opinions serve as a quasi-mediation tool for particular disputes—including those involving land use law—that may later be listed as a cause of action in litigation if unresolved. However, the authority of this Office differs slightly from that established for courts. The authority for Advisory Opinions is outlined in the Property Rights Ombudsman Act, Utah Code § 13-43-205-206. Section 205(1)(b) stipulates that "a request for an Advisory Opinion may be filed at any time before a final decision on a land use application" has been made. In this case, as will be discussed herein, the Advisory Opinion Request is timely as filed before the Town had taken final action on Safe Harbor's application. Safe Harbor is therefore entitled to an opinion on the issues.[3]

II. Vested Rights.

Under Utah law, once an applicant submits a completed application, including related fees, the applicant is entitled to have the application reviewed by the ordinances in place at the time the application is submitted. The development "vests" in the rules in place at that time, and is typically also entitled to approval if the proposal complies with the applicable rules. This vested rights doctrine establishes a definite date at which a property owner may rely on the local ordinances in place, and is rooted in the principle of zoning estoppel—an equitable remedy that estops the government's use of the zoning power to prohibit a proposed land use where the property owner, relying in good faith on some governmental act, 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 [their] right to complete [the] proposed development."[4]

Initially expounded by the Utah Supreme Court in the case of *Western Land Equities v. Logan*, the doctrine of vested rights is intended to "strike a reasonable balance between important, conflicting public and private interests in the area of land development."[5] As later codified in Utah's Land Use

[2] Namely, Section 204 directs our Office to arrange for arbitration or mediation of disputes between property owners and condemning entities involving taking or eminent domain issues, which is not applicable here.
[3] Unlike the provisions previously discussed regarding our discretion to decline to mediate or arbitrate takings issues under appropriate circumstances. *See* UTAH CODE § 13-43-204(3)(b).
[4] *Western Land Equities v. Logan*, 617 P.2d 388, 391 (Utah 1980).
[5] *Id.*, at 396.

Development and Management Act (LUDMA), and as further explained below, state law provides two aspects of vested rights: (1) a vested right to receive substantive review of a complete land use application under the laws in place at the time of application, and (2) a vested right to approval of a substantively compliant land use application. These two aspects of vested rights correlate to a two-stage application review process under state law.

1. *Form review for application completeness*

When the municipality receives a land use application, it is obligated to, in a timely manner, make an initial determination of whether the application is complete for the purpose of subsequent, substantive land use authority review.[6] A land use application is considered submitted and complete when the applicant "provides the application in a form that complies with the requirements of applicable ordinances and pays all applicable fees."[7] This provision identifies only two criteria an applicant must satisfy to submit a complete application: 1) the applicant must submit whatever "form" of information local ordinances require for a particular land use request, and 2) the applicant must "pay all applicable fees" associated with the application submittal.

This initial determination by the municipality is intended to be a simple and straight-forward "form review" which simply evaluates whether "all objective, ordinance-based *application criteria* have been met."[8] In essence, it answers whether the applicant has at least provided enough information to identify what kind of land use approval is being sought under local ordinances, so that planning officials can then do their job to review the *substance* of the request for any compliance concerns.

Laketown's "objective, ordinance-based application criteria" can be found at Section 9-1-3(A) of the Laketown Code, which provides as follows:

> Application And Plans: A building permit shall be secured from the town clerk on written application accompanied by plans and specifications in duplicate, which must state the specific nature of the construction or alterations to be made. The plan must be verified by the person who will perform or be in charge of the construction or alteration.

The distinction between initial form review and the subsequent substantive review for code compliance is apparent in the Laketown Code, which suggests that the application and plans undergo initial form review by the town clerk, and are then "forwarded from the town clerk to the building inspector, who shall review the plan to determine whether the proposed construction or alteration *conforms to the building codes and ordinances of the town*" (read—substantive review).[9]

Here, Safe Harbor submitted a "written application" on July 12, 2020 when it returned the completed form titled "Application for Building Permit – Rich County and Town of Laketown," which was provided by the town and made available on its website. As for the "accompan[ying] plans and specifications," Safe Harbor submitted "a site plan and construction details of the Project

[6] UTAH CODE § 10-9a-509.5(1)(a).
[7] UTAH CODE § 10-9a-509(1)(c).
[8] UTAH CODE § 10-9a-509.5(1)(b) (emphasis added).
[9] LAKETOWN CODE § 9-1-3(A) (emphasis added).

with its Application," and alleges that these plans "show the project's layout, the building's foundation details, and how the buildings will be assembled."

It is therefore our opinion that Safe Harbor's application was objectively complete on the date it was submitted with the application fee, inasmuch as the application reasonably identified the proposed land use, and met the "objective, ordinance-based application criteria" by providing accompanying plans and specifications required by the Laketown code that would allow planning officials to then review that request in light of relevant land use ordinances—which the Town appears to have done in the weeks and months following the application submission, without any initial contention that the application was lacking necessary information for such review.

2. *Vesting of complete application for further substantive review*

The date on which an application is considered complete is important, because a complete application is then "entitled to substantive review…under the land use regulations:

> (A) in effect on the date that the application is complete; and
> (B) applicable to the application or to the information shown on the application."[10]

This vesting event allows a property owner to "be able to plan for developing [the owner's] 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."[11]

For this reason, after a reasonable period of time to allow the municipality diligently to evaluate whether all objective ordinance-based application criteria have been met, the applicant may request that the municipality provide a written determination that the application is either (1) complete for purposes of allowing subsequent, substantive review, or else (2) is otherwise deficient with respect to a specific, objective, ordinance-based application requirement.[12]

If the municipality fails to timely respond to this request within 30 days, the application "shall be considered complete, for purposes of further substantive land use authority review."[13] However, just as this provision treats the inaction of a municipality as resulting in an application being considered complete for purposes of substantive review, we believe certain affirmative actions of the municipality also have the same effect. If the purpose of this initial form review is simply to ensure that planning officials have sufficient application information to "allow[] [for a] subsequent, substantive review," it stands to reason that a municipality affirmatively moving forward with such substantive review is sufficient for the application to "be considered complete" for that purpose.

As discussed, it is our opinion that Safe Harbor's submitted application was objectively complete on July 12, 2020. Even assuming, for argument's sake, that it wasn't complete for some reason on July 12, 2022, the application would have otherwise been considered complete no later than July

[10] UTAH CODE § 10-9a-509(1)(a)(i).
[11] *W. Land Equities*, 617 P.2d 388, at 396.
[12] UTAH CODE § 10-9a-509.5(1)(b).
[13] UTAH CODE § 10-9a-509.5(1)(d).

29, 2022, when the application was discussed at length at the scheduled Planning Commission meeting. The very fact that Town reviewed the substance of the application at town meetings and suggested changes to the project illustrates that the application was considered "complete for the purpose of allowing subsequent, substantive review," and is inconsistent with the Town's later position that the application was suddenly "incomplete." The application is therefore entitled to review under the land use ordinances then in effect. The Town deciding—after substantive review of the proposal—that the application was not considered complete until after the Town had enacted legislative changes applicable to the application, flies in the face of Utah's vested rights doctrine, which, as stated above, enables a property owner "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."[14]

3. *Substantive review and vested right to approval for compliant applications that conform with applicable land use regulations*

Once considered complete, an applicant is entitled to approval of a land use application when the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards in effect.[15]

Similar to the written request for a determination of application completeness under the first step of application review, if a land use authority has had a reasonable amount of time to substantively review a complete land use application, the land use applicant may make a written request for final action on the application within 45 days, in which case the land use authority must take final action and approve or deny the application.[16]

According to its submittals for consideration of this Advisory Opinion, Laketown's initial argument appeared to be that as it did not consider Safe Harbor's application to be complete until February 12, 2022 – the expiration of the moratorium it had enacted just prior to its rejection letter determining the application to be incomplete, and it was not until its April 6, 2022 letter that it "now provided a substantive review" and had "now substantively denied the application." However, the Town's position appears to have somewhat evolved over the course of the parties' submissions, and Laketown subsequently took a broader position to conclude that, in addition to the April 6, 2022 denial, the Town likewise substantively denied Safe Harbor's application in its August 30, 2021 rejection letter, which came in direct response to a request by Safe Harbor for "final action" pursuant to Utah Code Section 10-9a-509.5(2).

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[14] *W. Land Equities*, 617 P.2d 388, at 396.

[15] UTAH CODE § 10-9a-509. This section does contain two exceptions: (1) if the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application and specifies the compelling, countervailing public interest in writing; or (2) before the applicant submits the application, the municipality formally initiates proceedings to amend the municipality's land use regulations in a manner that would prohibit approval of the application as submitted. Neither is relevant here, as we conclude that the application vested as complete prior to the Town enacting its Road Ordinance, and while the "compelling, countervailing public interest" standard is the very same standard needed to enact a temporary land use regulation (such as a moratorium), this was also not the Town's basis for denying Safe Harbor's application, so no discussion on that point is needed.

[16] UTAH CODE § 10-9a-509.5(2).

While we agree that as Safe Harbor made a written request for final action, the appropriate response of the Town should have been a substantive approval or denial by the land use authority, the August 30, 2021 rejection letter does not appear to do that. First, the final action required in response to the applicant's request is to come from the land use authority, who is the person or body designated to act on a land use application.[17] Laketown's ordinances very clearly designate the building inspector as the land use authority with regards to building permit applications.[18] The August 30, 2021 letter, however, was signed by the mayor. Second, while the letter does contain some reference to the application being "denied" for failing to meet certain identified code provisions,[19] the letter overall is presented as a "rejection" of an "incomplete" application, which proceeds to welcome the applicant to complete the application and resubmit for review. Based on this, Safe Harbor did just that, and supplemented the application with additional materials and thereafter "renewed" its request for a decision.

Overall, the August 30, 2021 letter does not serve to put the applicant on notice that the application was denied with any finality, and there is no evidence in the record that Safe Harbor started over by submitting a new application form or paying an additional application fee.[20] Considering that Safe Harbor's application was objectively complete when it was initially submitted, the Town's August 30, 2021 letter therefore serves as little more than another step in the substantive review process that had already been underway since the application was first considered complete and thereafter discussed at public meetings in 2020 and the months that followed.

Just prior to the Town's August 30, 2021 rejection letter, the Town enacted a moratorium on "land use applications" on August 12, 2021.[21] The Town argues that when Safe Harbor supplemented its application on December 30, 2021, this served to make the application complete as of the end of the existing moratorium, or February 12, 2022.

A moratorium, in this case, is a temporary land use regulation that may be enacted by the legislative body under certain circumstances. It is, nonetheless, a land use regulation, and because Safe Harbor's application vested as a complete application back in 2020, it was entitled to be reviewed under the "land use regulations[] in effect on the date that the application is complete." While

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[17] *See* UTAH CODE § 10-9a-103(30).
[18] *See* LAKETOWN CODE §§ 9-1-2(C)(3), 10-3-2.
[19] One of which was concluding that storage units "are neither a permitted nor a conditional use of the commercial zone," a position that the city has since acknowledged was incorrect, according to the prior rezone and zoning clearance letter Safe Harbor obtained from the Town before submitting its application. Otherwise, the letter mentions, without providing any further detail, "Failure to meet all requirements including setbacks, frontage, water system connections, electrical power, septic system set up etc. *to ensure the infrastructure is installed properly according to town and state code*." (emphasis added). Again, without further detail, it seems unclear whether the Town was saying that the proposed plans were simply lacking details as to these requirements, or that a sufficiently detailed plan did not substantively comply with these requirements.
[20] Additionally, as discussed below, the Town had also enacted a moratorium some days prior to this rejection letter, which also specifically prohibited the "filing" of any land use applications before the expiration of the moratorium. *See* infra, note 21. This only further supports that the Town's rejection letter should not be viewed as a final denial of the submitted application, and that the invitation to "complete your application and resubmit it" did not refer to starting over by filing a new land use application, which would have apparently been in violation of the standing moratorium.
[21] Laketown Resolution 2021-03 (Aug 12, 2021), available at https://img1.wsimg.com/blobby/go/3ddf9026-f081-44f4-a46c-b781152956e5/downloads/20210812%20Resolution%202021-03%20Moratorium%20on%20Subd.pdf?ver=1659587604759.

Laketown's resolution expressly stated that it prohibited approval of applications "filed before or after the date of adoption," this cannot be said to affect the application's vesting, and otherwise subjecting a vested application to a subsequently enacted moratorium contravenes state law.[22]

The same applies for other legislative standards enacted subsequent to Safe Harbor's vested application. Laketown's April 6, 2022 letter states as reasons for its denial that the application does not conform to its Roads Ordinance as it proposed to build storage units on top of an identified future road pursuant to the Town's Zoning and Roads map. However, this Roads Ordinance was enacted in consequence of the town's moratorium—intended to allow the town to overhaul its land use ordinances that it viewed as "antiquated and inadequate." However, with regards to a vested application, a change in policy positions between current and former city officials is not a sufficient basis for changing the rules that apply to the application. "It is incumbent upon a city…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."[23]

Safe Harbor's application vested in 2020, and the town did not take final action on the application until April 6, 2022, at which point it denied the application as not conforming with legislative standards that were enacted by the city following the submission of Safe Harbor's complete land use application. The application has a vested right to be reviewed under the ordinances in effect at the time the application was complete, and approved or denied on that basis pursuant to state law. The town's denial was therefore improper because it violated Safe Harbor's vested rights and was not based on the land use ordinances in effect at the time the application was complete.

CONCLUSION

For purposes of vested rights, Safe Harbor's building permit application is considered complete, if not at the time of submission, then no later than when Laketown undertook a public discussion of the substantive details of the proposal on July 29, 2020. The application has a vested right to be reviewed under the ordinances in effect at the time the application was complete, and approved or denied on that basis pursuant to state law. The Town acted improperly when it determined the application to be incomplete over a year after reviewing the substance of the application, and thereafter wrongfully denied the application as noncompliant with development standards the Town had enacted after the application became complete.

Jordan S. Cullimore

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

[22] This is because state law provides other grounds to ensure that a complete, and even compliant, land use application does not have to be approved in the face of a compelling, countervailing, public interest that may be jeopardized by approving the application. *See* Utah Code § 10-9a-509(1)(a)(ii)(A).
[23] *W. Land Equities*, 617 P.2d 388, at 396.

NOTE:

This is an advisory opinion as defined in Section 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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees and civil penalty provisions, found in Section 13-43-206 of the Utah Code, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.