Advisory Opinion #45

Parties: Mike Gabel and Summit County

Issued: November 3, 2008

TOPIC CATEGORIES:
E: Entitlement to Application Approval (Vesting)
H: Compelling, Countervailing Public Interests
R(v): Other Topics (Interpretation of Ordinances)

A Developer may claim vested rights in the density, or number of units that can be built, but standards and conditions expressed elsewhere in zoning ordinances may affect the maximum allowable number of units. The total number of units to be built is a factor of the maximum allowable density adjusted by other standards and conditions expressed in the zoning ordinance.

The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION (REVISED AND RESTATED)

Advisory Opinion Requested by:	Mike Gabel
Local Government Entity:	Summit County
Applicant for the Land Use Approval:	Summit Hollow, LLC
Project:	Residential Subdivision
Date of this Advisory Opinion:	November 3, 2008
Opinion Authored By:	Brent N. Bateman, Lead Attorney, Elliot Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

May a local government modify the density allowed within a proposed subdivision from the maximum allowed by the applicable zoning ordinance in order accomplish development standards expressed in other ordinances?

Summary of Advisory Opinion

Where a land use application conforms to all applicable zoning ordinances, the developer is entitled to approval of the application under those ordinances. Density is a component of a land use ordinance. Therefore, upon submission of a complete and conforming land use application, a developer will vest in the permitted density at the time of the application.

The developer must also comply with ordinances regarding the preservation of the rural, agricultural, and small town nature of eastern Summit County. However, the County cannot impose requirements upon development that are not expressed. Mere statements of purpose, without accompanying requirements designed to effectuate those purposes, cannot be used to justify a reduction in density.

Review

A request for an advisory opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE § 13-43-205. The opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

The request for this Advisory Opinion was received from Craig M. Call, attorney for Summit Hollow, LLC on April 24, 2008.[1] A letter with the request attached was sent via certified mail, return receipt requested, to Ken Woolstenhulme, County Commission Chair, Summit County, at 60 North Main, Coalville, Utah 84017. Mr. Woolstenhulme's name was listed on the State's Governmental Immunity Database, as the contact person for the County. The County submitted a response, which was received by the Office of the Property Rights Ombudsman on May 29, 2008. The Office of the Property Rights Ombudsman issued an Advisory Opinion on July 15, 2008.

On August 5, 2008, Kevin E. Anderson, Anderson, Call, & Wilkinson, attorney for Summit Hollow, LLC, submitted a letter requesting that the OPRO reconsider or clarify the previous Advisory Opinion. On August 20, 2008, the Office of the Property Rights Ombudsman sent a letter to Jennifer Strader, Summit County Planning, informing her of Summit Hollow LLC's request, and informing her that reconsideration or clarification of the Advisory Opinion may be appropriate. On September 19, 2008, Helen Strachan, Deputy Summit County Attorney sent a letter responding to Summit Hollow LLC's reconsideration request.[2] On October 7, 2008, Kevin

[1] In the Spring of 2007 Summit Hollow requested an advisory opinion to address issues associated with the same subdivision application. The current request concerns some, but not all of the issues raised in the 2007 request. This Request has been treated as entirely new, although some of the relevant materials submitted in 2007 have been referenced.

[2] In its letter, Summit County questioned the authority, or at least the appropriateness, of reconsidering or clarifying an Advisory Opinion. Summit County correctly points out that UTAH CODE ANN. § 13-43-205 does not contain any provision for reconsideration of an Advisory Opinion. The nature and purposes of the Advisory Opinion process necessitate consideration of requests to reconsider or clarify an Advisory Opinion. The Advisory Opinion is a dispute resolution tool. The Advisory Opinion is intended to provide both parties with a neutral third party examination of a potential dispute. This information is intended to lead the parties to settle the matter in accordance with the prevailing law. Where reconsideration of an Advisory Opinion will advance that dispute resolution objective, it ought to be available. Additionally, the Advisory Opinions process is designed to be informal, inexpensive and unburdensome. Formal briefing is not required. Many parties to Advisory Opinions are not represented by counsel. Where such informality exists, an important fact or argument can sometimes be brought to light after an Advisory Opinion is first issued. Consideration of such information can increase the accuracy of the Opinion. For these reasons, the Office of the Property Rights Ombudsman accepts and reviews requests for consideration or clarification from any involved party.

E. Anderson sent a response to Summit County's letter, with a copy to both Ms. Strachan and Ms. Strader.

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 filed April 24, 2008 with the Office of the Property Rights Ombudsman by Summit Hollow, LLC, with attachments.
2. Response from Summit County, submitted by Jennifer Strader, County Planner.
3. Reply letter from Summit Hollow, sent via email on June 23, 2008.
4. Previous Request for Advisory Opinion, submitted by Summit Hollow, LLC, on June 25, 2007.
5. "Eastern Summit County General Plan," adopted May 1996.
6. "Eastern Summit County Development Code," adopted May 1996, as amended, July 2001.
7. Letter from Kevin E. Anderson, dated August 5, 2008,requesting reconsideration or clarification of the Advisory Opinion.
8. Response from Helen Strachan, Deputy Summit County Attorney, dated September 19, 2008.
9. Reply letter from Summit Hollow dated October 7, 2008.

Revisions to Advisory Opinion

This Revised and Restated Advisory Opinion supersedes in its entirety the previously released Advisory Opinion in this matter dated July 15, 2008. The previous Advisory Opinion is withdrawn in its entirety and of no force or effect.

Background

Summit Hollow, LLC proposes to develop a residential subdivision, entitled "Indian Hollow," located on "Democrat Alley" in an unincorporated area near Kamas. The original subdivision application was filed in 1998, but actual construction has not occurred.[3] Over the past ten years the application was reviewed "off and on," but various issues arose which prevented further

---

Summit County also raised concerns regarding a potential conflict of interest, due to the former employment of Craig Call, whose law firm is counsel to a party in this matter, by the Office of the Property Rights Ombudsman. In the opinion of this Office, Mr. Call's involvement in this matter does not call the current Advisory Opinion into question. As of the date of this Opinion, Mr. Call has had no affiliation with this Office for more that one year and a half. He has no involvement with this Office, its operations or procedures. More importantly, although Mr. Call requested the original Advisory Opinion in this matter, he has not personally been involved in the present reconsideration. Nevertheless, if the County still has concerns regarding any potential conflict of interest with respect to the present Advisory Opinion, they are urged to contact this Office and we will reconsider those concerns.

[3] It appears that the original application was submitted by different owners than are involved now.

action. Both the developer and the County agree that the ordinances in place in 1998 govern the application, despite the passage of time, as well as changes to the original application.

The property proposed for development consists of 228 acres, with about 41 acres in the "Highway Corridor" (HC) zone, 144 acres in the "Agriculture Protection" (AP) zone, and 43 acres in the "Agricultural Grazing" (AG-100) zone. According to the County, as many as 92 residential lots would be possible on the property, based on the allowable lot sizes and densities.[4] The proposed development is outside any municipal boundaries, but is within the Kamas City Annexation Declaration Area. Because of the proximity to the municipal boundary, infrastructure and site layout should follow Kamas City standards.

The original 1998 application requested 37 lots, and involved a total of 160 acres, but due to various issues such as water service, septic system requirements, wetlands, and possible groundwater contamination, the application did not proceed very far. In 2002, the owners proposed 85 residences, with a large amount of open space surrounding the homes. The number of residences was based on ½ acre lots, or the density allowed in the HC zone. The application contemplates that this density will be transferred to the AP zone. It appears that the residences would be located in several small "clusters," rather than 85 units concentrated in one location.[5]

The County evaluated the proposal, and expressed concern over the number of homes that would be built, and the impact that the development would have on the rural character of the area. The County cited sections of the "Eastern Summit County Development Code" as well as the "Eastern Summit County General Plan." These ordinances repeatedly refer to the County's policy to preserve the area's rural character, promote agricultural activities, and protect natural habitats and scenic features. The County states that the proposed subdivision fails to meet these policies, because the number of homes detracts from the rural nature of the area, does not adequately protect existing agricultural production, and adversely impacts the scenery and natural habitat.

Summit Hollow maintains that it is entitled to a maximum allowable density of at least 85 homes, and that the policies referred to in the development code must yield to allow that maximum density. The County does not dispute the maximum number of homes that could be built under the ordinances, but argues that density is one of the factors that are considered by the County when it determines how development is to proceed. Summit Hollow requested this Opinion to address whether the County may "impose a density standard . . . that differs from the density allowed by the applicable ordinance. . . ."[6]

---

[4] The HC zone allowed for a minimum of ½ acre lots (a maximum density of two units per acre), the AP zone requires lots to be a minimum of 40 acres, and the AG-100 zone requires lots to be a minimum of 100 acres. The HC zone was located along Democrat Alley, and extended 500 feet from the roadway. (There are a few existing homes along that road.) In 2004, after this application was submitted, all of the property was rezoned to AP.

[5] The information made available for this Opinion does not include a specific site plan. Summit Hollow also states that the proposal is still being "refined." The lots are proposed to range from ½ acre to two acres in size.

[6] The development has other issues that must be resolved before approval is granted, including sewer service, water, road standards, etc. This Opinion focuses solely on the questions related to how the allowable density is interpreted

Analysis

I. Vesting of Density Rights

A. The Utah Vesting Rule

In Utah, a land use applicant is entitled to approval of a complete land use application if the application conforms to the requirements of the county's land use maps, zoning map, and applicable land use ordinance in effect.[7] This rule, sometimes known as the "vesting rule," was adopted in Utah in 1980 in *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 396 (Utah 1980), and later codified at UTAH CODE ANN. § 17-27a-508(1)(a)(i).[8] The intent of the rule is to provide some reliability and predictability in land use regulation:

> It is intended to strike a reasonable balance between important, conflicting public and private interests in the area of land development. A property owner should be able to plan for developing his property in a manner permitted by existing zoning regulations with some degree of assurance that the basic ground rules will not be changed in midstream.

Western Land Equities, 617 P.2d at 396.

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

B. An Applicant Vests in the Permitted Density within a Zone

The "right" that is granted by the vesting rule is approval of a proposed development under existing ordinances. Accordingly, if an existing ordinance allows for a certain density, and the application conforms to that density requirement and all other land use ordinances, then the applicant is entitled to approval of the application. Conversely, if a land use application requests densities exceeding those allowed within a zone, then the applicant is not entitled to approval.

Summit County acknowledges that the Developer has vested rights in the applicable provisions of the 1998 Summit County Ordinances. It further acknowledges that those ordinances entitle the

---

and applied. All other issues must be satisfactorily resolved, and approved by the appropriate authorities, before approval may be granted.

[7] UTAH CODE ANN. § 10-9a-509(1)(a)(i). Exceptions to this rule exist. None are relevant to this Advisory Opinion.

[8] There is a corresponding section applicable to municipalities, found at § 10-9a-509(1).

developer to build up to 92 lots. However, the County argues that the developer has not vested in that density, because the developer has not complied, in the opinion of the County, with County ordinances regarding the preservation of the rural and agricultural nature of the area. Therefore, the County argues, the County is entitled to require that the developer reduce the density.

If applicants vest in anything, they vest in density levels. Ordinances concerning density are land use ordinances. UTAH CODE ANN. § 17-27a-508(24) defines "Land use ordinance" as "a planning, zoning, development, or subdivision ordinance of the county, but does not include the general plan." Density ordinances appear in most local land use ordinances, as they do in Summit County. *See, e.g.*, Eastern Summit County Development Code, 11-3-5(B). Accordingly, density provisions are land use ordinances, and are subject to the vesting rule.

The amount of density that vests is determined by examination of the applicable ordinances and expressed requirements. The starting point for a calculation of vested density is usually lot size provisions in the zoning code. The Summit Hollow property, for example, includes 41 acres within the HC zone. That zone allows ½ acre parcels, so the maximum "density" allowed in that 41 acres would be 82 lots. This number can, however, be modified by other applicable laws, ordinances, or expressed requirements. Some land use ordinances may permit bonus densities if certain requirements are met. Other ordinances may impose restrictions on available densities to meet certain objectives.[9] All ordinances, restrictions and expressed requirements must be considered in order to calculate the actual vested density.[10]

Utah law mandates that restrictions and requirements upon land use applications must be expressed, or they cannot be imposed:

> A county may not impose on a holder of an issued land use permit or approved subdivision plat a requirement that is not expressed: (i) in the land use permit or subdivision plat documents on which the land use permit or subdivision plat is based, or the written record evidencing approval of the land use permit or subdivision plat; or (ii) in this chapter or the county's ordinances.

UTAH CODE ANN. § 17-27a-508(h). Accordingly, restrictions or requirements that adjust density must be expressed, as set forth in this statute. A county may not impose requirements that adjust density upon a land use application that are not expressed.

C. The Rural Preservation Provisions of the Eastern Summit County Ordinances

The Eastern Summit County Development Code contains multiple statements and references concerning the County's purpose to maintain the rural and agricultural nature of Eastern Summit

[9] For example, a 100 acre parcel in the HC zone will not necessarily accommodate 200 lots at ½ acre per lot. It may be necessary to construct several acres of access roads and other required amenities upon the parcel. The 100 acre parcel may be left with only have 90 acres of buildable area. Since density is expressed in terms of minimum lot size, the parcel may be able to accommodate only 180 ½ acre lots.

[10] This Advisory Opinion does not attempt to delineate the actual density, if any, that has vested in Summit Hollow.

County. This code governs all development in that area, and like the ordinances regarding density, these provisions, as land use ordinances, must be followed and cannot be disregarded by a land use applicant.

However, a land use ordinance's mere statements of purpose are not equivalent to expressed requirements or conditions, and cannot be used to overrule those requirements that are expressed. The purpose of the vesting rule, as expressed in *Western Land Equities*, is to provide predictability in land use development. Such predictability cannot be achieved where the land use authority can use a mere statement of purpose to impose an unstated restriction upon development that, in its judgment, furthers that purpose, without regard to expressed conditions.

A County is entitled to further its purposes, and if Summit County desires to preserve its rural and agricultural nature, the County should do so. However, this is done by adopting ordinances that impose requirements and restrictions that a land use applicant must follow. Statements of mere purpose, however, do not achieve the same ends. If the County would like to minimize the population in an area, it does by adopting density provisions in the zoning ordinance. Once those are adopted, the developer and the County must abide by them. Utah law is clear that a County cannot adopt a particular ordinance, such as the density provisions in its zoning code, and then disregard that ordinance and impose a different standard to serve its present purposes. "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." *Western Land Equities*, 617 P.2d at 397. Developers are entitled to rely on the ordinances in place. Statements of purpose, subject to new interpretation by new County Officials every time a development application is submitted, cannot provide that predictability. A County can effectuate its purposes by adopting specific ordinances and standards that meet its ends but provide the necessary predictability.

The Eastern Summit County Development Code does provide a means to maintain the rural and agricultural character of Eastern Summit County while preserving vested density rights:

> For the purpose of locating development, density can be transferred between commonly owned property in the HC and abutting zone district to protect agriculture lands and open space based upon the findings of a site specific agricultural plan.

Eastern Summit County Development Code, 11-3-5(F). Accordingly, the Summit County Ordinances permit the transfer of density within the HC zone to an abutting zone.[11] The stated

[11] The transfer of development rights is a deceptively complicated practice, and inherently requires some flexibility. For example, the transfer of development rights may not entitle a developer to simply take a development plat that works within the sending zone, and build the same development within the receiving zone. Circumstances may arise where a transfer of development rights from one zone to another will require a modification of development design from that contemplated in the sending zone. Characteristics of the receiving property, such as elevation, terrain, road frontage, preexisting population distribution or availability of services may necessitate adjustments to development configuration and perhaps density. However, such adjustments must be based upon expressed requirements and conditions, and should be carried out in a manner to preserve the vested development rights of the transferor.

purpose of this density transfer is to "to protect agriculture lands and open space." Therefore, where a land use applicant is entitled to a certain density within the HC zone, that density may be transferred to an abutting zone in order to protect agricultural lands and open space.

The applicant has taken advantage of this provision. Therefore, the developer has, at least in part, complied with the County's statement of purpose regarding the rural and agricultural nature of the County. The applicant has taken advantage of the very provision whose stated purpose is to maintain the rural and agricultural nature of the County. If, in the County's judgment, that is not sufficient to meet the county's stated purposes, other legal and expressed means must be found to meet those purposes, such as compensating the developer. However, absent an expressed requirement, the County cannot adjust the developers vested density.

Conclusion

Density is a land use ordinance. Therefore, if Summit Hollow has vested development rights, it has vested in density. The Eastern Summit County Ordinance does contain statements regarding the preservation of the rural and agricultural nature of the County, and those statements must be regarded by developers. However, mere statements of purpose, without more, cannot be used to eviscerate the developer's vested density rights and reduce its density. Restrictions and requirements upon development must be expressed in order to be imposed. Summit County cannot, therefore, reduce the developer's vested density based solely on statements of purpose. Moreover, Summit Hollow has taken advantage of the means established by the County to preserve open space and agricultural areas by transferring density from the HC zone to an abutting zone.

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

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Ken Woolstenhulme
Summit County Commission
60 North Main
Coalville, UT 84017

On this _____ Day of November, 2008, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

_____
Office of the Property Rights Ombudsman