Advisory Opinion #19

Parties: Scott Webber & Patrick Hayes and City of Washington Terrace
Issued: August 9, 2007

TOPIC CATEGORIES:

Entitlement to Application Approval (Vesting)
Pending Ordinances
Compliance with Mandatory Land Use Ordinances

A city may deny a land use application if there is an ordinance change pending when the application is made. An ordinance is considered pending when a formal proceedings have been initiated, such as publication on an agenda for a public meeting. Zoning estoppel cannot be based on a City's failure to notify developers of possible ordinance changes.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Zoning Estoppel

Advisory Opinion Requested by:	Scott Webber & Patrick Hays
Local Government Entity:	City of Washington Terrace
Applicant for the Land Use Approval:	PFS, LLC
Project:	Proposed Apartment Complex
Date of this Advisory Opinion:	August 9, 2007
Advisory Opinion Prepared By:	Elliot R. Lawrence, Office of the Property Rights Ombudsman

Issue

Is Washington Terrace estopped from denying an application for an apartment complex because a City employee did not inform the owners that the City was considering a change in its zoning ordinances?

Summary of Advisory Opinion

Washington Terrace had formally initiated proceedings to amend its zoning ordinance by the time PFS would have submitted its application. Section 10-9a-509 of the Utah Code provides that a city may deny a land use application if formal proceedings to amend an ordinance have been initiated when an application is submitted. The City announced the changes to its zoning ordinance no later than October 13, 2007, when a notice was published in the *Ogden Standard Examiner*. Thus, by the time PFS had prepared its application in November, the zoning ordinance change had been formally initiated.

The City is not estopped from amending its zoning ordinance, and prohibiting the proposed use, because a City employee did not inform PFS of a pending ordinance change. The City was not obligated to inform PFS of the potential change, even if the City had knowledge of PFS's plans

for the parcel. Utah cases discussing zoning estoppel indicate that a mere knowledge of a proposed use or condition is not sufficient to estop a government entity from exercising its zoning powers and rights. Furthermore, imposing a duty to disclose upon the City deviates from the policy established by Utah case law and statutes which discourage individualized "case-by-case" determinations in vested rights matters in favor of well-defined rules applicable in all situations.

Review

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

The request for this Advisory Opinion was received from Scott Webber on July 12, 2007. A letter with the Request attached was sent via certified mail to: Laura Gamon, City Treasurer, City of Washington Terrace, 5249 South Pointe Dr., Washington Terrace, Utah 84405. The return receipt was signed and was received on July 18, 2007, indicating that Ms. Gamon had received it the request on behalf of the City. On July 19, the City requested an extension of time to respond. PFS did not object, so the extension was granted. The City's response was received on August 6, 2007.

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 July 12, 2007 with the Office of the Property Rights Ombudsman by Scott Webber and Patrick Hays
2. A seven-page letter from Scott Webber
3. A two-page letter from Patrick Hays
4. A two-page letter from Judy Webber, Sales Agent with Coldwell Banker
5. A five-page letter from Paul C. Anderson, P. E., Great Basin Engineering
6. A one-page letter from Eric R. Tuttle, Architect, Tuttle and Associates, Inc.
7. Real Estate Purchase Contract, property located at 468 W. 5000 South, Washington Terrace, Utah, dated August 28, 2006
8. Email correspondence between Scott Webber and Eric Tuttle, regarding proposed design of apartment buildings, October 2006 to January 2007
9. Letter from Scott Webber to Mark Christensen and Bill Morris, dated February 1, 2007
10. Letter from Scott Webber to Robert Reeder, dated March 26, 2007
11. Response from Washington Terrace, prepared by William Morris, dated August 3, 2007
12. Minutes, agendas, and other documents related to proposed zoning change.

Statutes and Ordinances

1. Utah Code Ann. § 10-9a-509
2. Chapter 17.24 of the Washington City Code, "R-4 Residential Zone"
3. Ordinance 06-11, City of Washington Terrace, adopted November 14, 2006

Background

Scott Webber, along with Patrick and Frances Hays (PFS, LLC), acquired the parcel located at 468 West 5000 South in August of 2006. The parcel is approximately 2.19 acres, and had been an orchard with a residence. The previous owners had passed away, and the property was being marketed by Robert Reeder. PFS intended to build an apartment complex on the property, and the purchase price reflected that use. At the time PFS entered the purchase agreement, they were told by the sellers and their realtor that the property was zoned "R-4," which allowed apartments. The sellers also lived near the property, and they discussed the proposed project with the owners of PFS.

The "R-4" zone allowed apartment buildings, along with other residential uses. An apartment complex with 24 or fewer units was a permitted use under that zoning designation, while a larger complex (25 or more units) was a conditional use.

I. Meetings between City Staff and PFS Representatives.

PFS stated that its representative met with Jeff Monroe, Washington Terrace's Chief Building Official on at least three separate occasions. Scott Webber stated that he met with Mr. Monroe on August 31, and explained that he was purchasing the property. Mr. Monroe confirmed that the property was zoned R-4, and provided a copy of R-4 zoning regulations (which were still in effect at that time). According to Mr. Webber's recollection, Mr. Monroe explained that zoning provisions for a Planned Residential Unit Development (PRUD) had recently been repealed, and that Washington Terrace had hired an attorney to review and update the City's general plan.

On September 13 or 15, Mr. Webber stated that he and his engineer, Paul Anderson, met with Mr. Monroe to discuss questions related to setback requirements.[1] Mr. Monroe did not comment on the proposal, and recommended that Mr. Webber contact William Morris, the attorney who had been hired by the City to consult on land use issues. On September 20, Judy Webber, the realtor for PFS, met with Mr. Monroe to discuss a site plan. She stated that Mr. Monroe informed her that he would review the plans and contact Mr. Webber.

The City states that Mr. Webber met with Mr. Monroe on September 21. At this meeting, Mr. Webber presented a concept drawing for a 60- to 64-unit apartment complex, and asked for an estimate of filing fees. Mr. Monroe provided this information, but Mr. Webber did not submit an

[1] Mr. Anderson recalls that the meeting occurred on September 13, a different date than Mr. Webber.

application, and did not pay any fees. The City stated that Mr. Webber left telephone messages on September 25 and 26, and that there was no contact with Mr. Webber or PFS until November.

Mr. Webber, however, stated that he again met with Mr. Monroe on October 11. At that meeting, Mr. Webber stated he confirmed that a three-story building could be built under the R-4 regulations. Mr. Webber did not state whether his proposed apartment complex was discussed. Mr. Monroe gave him the name of the architect who designed an apartment complex near the City's offices, Eric Tuttle. PFS retained his services, and over the next few weeks, Mr. Tuttle completed plans for the proposed apartment complex.

On November 8, 2006, Mr. Monroe informed Eric Tuttle that the application for the proposed apartment complex could not be processed because the City had repealed the "R-4" zoning, and the property had been rezoned for single family residences only. The PFS owners, Paul Anderson, and Eric Tuttle met with Mr. Monroe on November 13. At that meeting, Mr. Monroe again explained that the zoning was being changed, and that the sellers and their real estate agent were aware of the proposed changes when the property was sold. Because the zoning had been changed, PFS did not submit a formal application for the apartment complex.

Through the remainder of 2006 and into the spring of 2007, PFS continued to meet and negotiate with the City. There was a possibility that the City might amend its zoning ordinance to allow the apartment complex, but this proposal was not approved.

II. The Zoning Amendment Process

The City indicated that citizen comments and long-standing problems with multi-family developments prompted a review of its zoning ordinances, beginning in early 2006. In July of that year, the "Planned Unit Residential Developments" (PRUD) provisions were repealed from the City Code.[2] Over the summer of 2006, the City Council discussed ideas for changes to the City's zoning ordinances and general plan. The City scheduled a "Neighborhood Revitalization Open House" for August 31. The purpose of the open house was to solicit comments and ideas from citizens about the future residential land use in the City. This meeting was discussed by the City Council in June and July of 2006, was announced in the City's newsletter, and was featured in a story published by the *Ogden Standard Examiner*.

It is significant that the sellers of the PFS property and their realtor both attended the August 31 meeting, and both commented on the impact that a zone change might have on the property. [3] According to Mr. Webber and PFS, neither the sellers nor their agent indicated to them that a zoning change was being discussed.

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[2] PRUDs were a type of multi-family development.

[3] Barbara Worth, a realtor, stated that she had a parcel that was under contract, and asked whether that parcel would be "grandfathered" in under the old code. Ms. Worth did not identify the parcel, the sellers, or the buyers. Bob Reeder, the seller, commented that he had requested a zone change on the parcel, but was denied.

The comments and ideas generated at the August 31 meeting were discussed at a Planning Commission meeting held on September 28, 2006. A staff report for that meeting shows that "the out come [sic] of the public open house and the comments given" were to be discussed, along with how those comments might be incorporated into amendments to the City code. No formal amendment to the City's zoning ordinance was proposed at that meeting, and no action was taken.

The changes in the City's general plan and zoning ordinances were considered by the Washington Terrace Planning Commission in a public hearing conducted on October 26, 2006, and were approved by the City Council on November 14, 2006. Notices of the proposed zoning changes were published in the *Ogden Standard Examiner* on October 13 and November 1, 2006. The notices announced public hearings for proposed amendments to Title 17 of the City's code, and specifically stated that the proposal included repeal of the R-4 provisions.

Analysis

I. Washington Terrace had formally initiated a zoning amendment that prohibited the used proposed in the PFS application.

Washington Terrace had formally initiated proceedings to amend its zoning ordinances before PFS submitted its application. When a local government has formally initiated proceedings to change a zoning ordinance, an application may be denied if it would be prohibited under the amended ordinance.

> 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:
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> . . ..
>
> (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.

UTAH CODE ANN. § 10-9a-509(1)(a) (2007) (municipalities); *see also* § 17-27a-508(1)(a) (counties).[4] This statute codifies the Utah Supreme Court's ruling in *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980):

> [A]n 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. Furthermore, if a city or county has initiated

[4] These sections were amended by the 2007 Utah Legislature, but the language of subsection (1) was not changed. This language was in effect in the summer and fall of 2006, when PFS began discussions with the City.

> proceedings to amend its zoning ordinances, a landowner who subsequently makes application for a permit is not entitled to rely on the original zoning classification.

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

Neither the Utah Code nor published cases define what the phrase "formally initiated proceedings" means in relation to proposed zoning ordinances. However, the statutory language seems to indicate something more than merely brainstorming ideas or gathering comments. The statute requires that the pending ordinance "would prohibit approval of the application as submitted." This contemplates that the pending ordinance must have advanced beyond a mere idea so that it is certain that an application would be denied. In addition, identifying a specific date when a zoning change is "formally initiated" is important, because if the proposed amendment is not enacted within 180 days of that date, an applicant is entitled to rely upon the existing zoning requirements.[5]

It is the opinion of the Office of the Property Rights Ombudsman that a proposed zoning change is "formally initiated" when a specific change first appears as an item on a publicly-released agenda for a planning commission or legislative body, or is announced in a public notice.[6] In other words, if a proposal to amend a zoning ordinance is placed on an agenda which is then made available to the public (including via Internet posting), or is announced through a public notice, the local government has "formally initiated proceedings" to amend its zoning ordinances. Prior to that date, the provisions of § 10-9a-509(1)(a)(ii) (or § 17-27a-508(1)(a)(ii)) should not apply.

The proposed changes to the Washington Terrace zoning ordinances were formally announced no later than October 13, 2006, when a notice was published in the *Ogden Standard Examiner*. This notice announced a public hearing before the City's Planning Commission. The notice also specifically stated that the proposed amendments included repeal of the "R-4 Zone" provisions. The Planning Commission hearing was conducted on October 26, where the proposed amendments were approved. Another notice was published on November 1, announcing the public hearing before the Washington Terrace City Council. This notice also specifically stated that the "R-4 Zone" provisions were proposed to be repealed. The City Council conducted its public hearing on November 14, and the amendments were approved.

It should be noted that public records show there were discussions related to the proposed changes prior to October 13. A public meeting was held on August 31, 2006 to solicit public comments on planning and growth. On September 28, the Planning Commission discussed proposals for amendments to the zoning ordinances. Although these meetings included the discussions as agenda items, no specific amendments were announced until the October 13 agenda and public notice. Thus, the zoning changes were formally initiated no later than October 13, 2006.

The proposed amendments repealed the "R-4 Zone" provisions relied upon by PFS, and also changed the zoning for the parcel in question. Because PFS did not submit an application and the

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[5] *See* Utah Code Ann. § 10-9a-509(1)(b) (municipalities); § 17-27a-508(1)(b) (counties).

[6] This position is basically the same as that of Provo City. *See* Provo City Code, § 14.02.130(1)(a).

zoning changes were enacted, § 10-9a-509(1)(a)(ii) allows the City to deny the application for the apartment complex.

II. Washington Terrace is not estopped from denying the PFS application.

A. Elements of Zoning Estoppel

The theory of zoning estoppel does not require the City to process the PFS application. Utah case law recognizes that "there are circumstances where it is inequitable to enforce a zoning ordinance." *Xanthos v. Board of Adjustment of Salt Lake City*, 685 P.2d 1032, 1037 (Utah 1984). Such circumstances are referred to as "zoning estoppel" or "equitable estoppel."

> [Zoning estoppel prevents] a government entity from exercising its zoning powers to prohibit a proposed land use when a property owner, relying reasonably and in good faith on some governmental act or omission, has made a substantial change in position or incurred such extensive obligations or expenses that it would be highly inequitable to deprive the owner of his right to complete his proposed development.

Western Land Equities, 617 P.2d at 391. This doctrine protects property owners and developers who rely upon acts or representations of government entities or their employees.

> Utah courts have . . . carved out an exception [allowing estoppel] in unusual circumstances where it is plain that the interests of justice so require. . . . In cases where such an issue arises, the critical inquiry is whether it appears that the facts may be found with such certainty, and the injustice suffered is of sufficient gravity, to invoke the exception.

Eldrege v. Utah State Retirement Bd., 795 P.2d 671, 675 (Utah Ct App. 1990) (internal quotations omitted). Estoppel has been raised as a defense against enforcement of zoning regulations,[7] and has also been invoked in efforts to require approval of proposed development.[8]

Zoning estoppel requires a good faith reliance on a governmental act or omission which leads a developer to incur significant expense or make substantial changes:

> To invoke the doctrine [of zoning estoppel,] the [government entity] must have committed an act or omission upon which the developer could rely in good faith in making substantial changes in position or incurring extensive expenses. . . . If the claim be based on an omission of the local zoning authority, omission means a negligent or culpable omission where the party failing to act was under a duty to do so. Silence or inaction will not operate to work an estoppel. Finally, and perhaps

[7] *See, e.g., Salt Lake County v. Kartchner*, 552 P.2d 136 (Utah 1976); *Xanthos*, 685 P.2d at 1037.
[8] *See Utah County v. Baxter*, 635 P.2d 61, 65 (Utah 1981); *Stucker v. Summit County*, 870 P.2d 283, 290 (Utah Ct. App. 1994).

> most importantly, the landowner has a duty to inquire and confer with the local zoning authority regarding the uses of the property that would be permitted.

Utah County v. Young, 615 P.2d 1265, 1267-68 (Utah 1980). Purchasing property, even in reliance on a governmental representation, does not constitute an extensive expense.

> [T]he mere purchase or actual ownership of land [is] inadequate to establish a substantial change in position or the incurrence of extensive expenses. Rather, something beyond mere ownership of the land is required before the doctrine of equitable estoppel will apply, and in most cases the doctrine will not apply absent exceptional circumstances.

Stucker v. Summit County, 870 P.2d 283, 290 (Utah Ct. App. 1994).[9]

B. When an "Act or Omission" of a Local Zoning Authority Results in Estoppel

As discussed above, a local government may be estopped from imposing its zoning ordinances if a property owner relies upon an "act or omission" of a government employee. No Utah case has determined when a government is under a duty to disclose the existence of a pending amendment to a zoning ordinance.[10] There are, however, examples where representations were not sufficient to constitute zoning estoppel that are useful in this analysis.

In *Stucker v. Summit County, supra*, property owners claimed that a statement by the director of the Summit County planning office prevented the county from enacting a rezoning proposal that would have prohibited commercial development. The Stuckers proposed an auto repair shop on a parcel in the Snyderville Basin. Under an older code, the parcel was zoned for commercial development, and the repair shop could have been built.

Among other arguments, the Stuckers cited to a letter from the county planning director to previous owners, which stated that the planning director was opposed to rezoning the parcel in question. This letter, they argued, was part of the reason they had decided to purchase the parcel, and so the county should be estopped from changing the zoning. The Utah Court of Appeals rejected that argument, in part because the letter from the planning director was a personal opinion, and not sufficient to bind the county. *See Stucker*, 870 P.2d at 290.

In *Utah County v. Young*, *supra*, property owners built a "barn" on property that was zoned for agricultural uses only. The owners intended to use the building for a commercial business, and the building was designed as such, including public restrooms and commercial-quality electrical and audio equipment. The county prosecuted the property owners for operating a business in violation of the county's zoning code. The owners maintained that the county's building inspector had

[9] The Utah Supreme Court also indicated that preconstruction activities, such as preparation of architectural drawings, may not be sufficient to constitute substantial reliance. *See Western Land Equities*, 617 P.2d at 392.

[10] Section 10-9a-509 of the Utah Code provides that a local government may dismiss an application if there is a pending ordinance change, but does not impose a duty to disclose pending changes.

represented to them that the building was approved for commercial use. Furthermore, they argued that the county knew that the building was for commercial purposes, because they informed the inspector of their intent when the inspections were conducted.

The Utah Supreme Court rejected that argument, holding that the county was not estopped because of any representations made by its building inspector, or because the county was made aware of the planned use. The court cited to cases from other states, and concluded that mere knowledge of the proposed use was not sufficient to estop the county. *See Utah County v. Young*, 615 P.2d at 1267-68.

Of particular interest in the *Young* decision is the court's reliance on a Georgia case, *Maloof v. Gwinnett County*.[11] In *Maloof*, the property owner planned to construct and operate a commercial dog kennel and breeding business. He stated that the local authority had granted permission when he informed them that he wished to build a dog kennel. However, after he had completed construction and opened business, the county began legal action to prevent the use. The Georgia Supreme Court sided with the county, stating that the local officials were not bound because they were made aware of the landowner's intended use. *See Utah County v. Young*, 615 P.2d at 1268.

In *Xanthos v. Salt Lake City Board of Adjustment*, *supra*, the property owner argued for zoning estoppel because the city was aware of how he was using his property for some time prior before the city sought a restriction on the use. The property owner constructed a duplex on a lot that had an existing single-family home. The city took action to force him to tear down the existing home, because the property no longer met zoning regulations. The property owner argued that the older home had been in existence for over 50 years, and had been identified on all of the plans he had submitted for approval of the new duplex.

The Utah Supreme Court ruled in favor of the city, primarily because the property owner had misled the city about the nature of the older building. However, the court did note that simply because city officials were aware that the building existed did not estop them from enforcing the city's zoning ordinances. *See Xanthos*, 685 P.2d at 1037-38.

The more recent case of *Grand County v. Rogers* is instructive on what the term "reasonable reliance" means. In that case a property owner subdivided his property without proper approval from the county. He recorded deeds that conveyed the property, and argued that since the county accepted and recorded the deeds, the county could not argue that the property division was illegal. The Utah Supreme Court held in favor of the county, stating that simply accepting and recording a deed was not a sufficient representation to justify reliance by the property owner to invoke zoning estoppel. *See Grand County*, 2002 UT 25, ¶¶ 24-25, 44 P.3d at 739-40.

Finally, in *Alta v. Ben Hame Corp.*, 836 P.2d 797 (Utah Ct. App. 1992), a city was not estopped from enforcing its zoning ordinances, even though the property owner had received three business licenses to operate a business that was not allowed under the zoning ordinances. The property owner began using its building as temporary lodging, and was given business licenses from the

[11] 200 S.E.2d 748 (Ga. 1973).

city for nearly two years. The city then discovered that the lodging business violated the city's zoning ordinances, and so it obtained an injunction. The Court of Appeals held that mistakenly granting the business licenses did not justify good faith reliance by the property owner. *See Alta*, 836 P.2d at 803.

These cases help define the parameters of estoppel based on a representation or omission from a government employee. Given these guidelines, the building official of Washington Terrace was not obligated to inform PFS or any other property owner of the potential zoning changes, other than through the notice provisions established by statute. Like the owners in *Xanthos* and *Young*, PFS could argue that the City was aware of its proposed development, and should have notified them of a potential conflict with the City's zoning regulations. However, that argument was rejected in *Xanthos* and *Young*, which held that a local government is not obligated to inform property owners even if the government is made aware of a potential conflict with zoning ordinances. [12]

C. Policy Considerations

Imposing a duty to disclose pending ordinance changes as argued by PFS would be inconsistent with the policy established by the Utah Supreme Court and the Utah Legislature. A policy of clear, simple, and consistent rules, applicable to all property owners and all local government entities is favored over individualized "case-by-case" determinations. Otherwise, every zoning ordinance change would invite litigation by disgruntled property owners who claim they should have been told about the change so they could have avoided monetary loss.

The Utah Supreme Court rejected those kinds of individualized analyses in *Western Land Equities* in favor of a clear rule applicable to all situations. In that landmark case, the Court considered various approaches used to determine when a land use applicant is entitled to proceed with development, such as the "set quantum test," "proportionate test," and the "balancing test." The Court also considered various approaches to "vested rights" rules, and rejected those which included activity beyond submitting an application. The Court recognized that such individualized tests are fact intensive, and do not provide predictable guidelines for applicants or government agencies. *See Western Land Equities*, 617 P.2d at 391-395. Instead, the Court adopted a bright line vested rights rule: An applicant is entitled to approval (with some exceptions) if the proposed development meets the zoning requirements in existence on the date of the application. *Id.* 617 P.2d at 396. As was discussed above, this rule was later codified by the Utah Legislature.

PFS argues that the Washington Terrace Building Official should have been obligated to inform them of potential zoning changes when the official became aware that PFS planned to build an apartment complex. The building official, Jeff Monroe, should have been aware of any proposed

[12] It must also be remembered that PFS was placed on notice of possible ordinance changes when Mr. Monroe indicated to them that the City had hired a specialist to review and update the City's general plan. In addition, the sellers of the parcel were also on notice of the potential changes. Finally, the City complied with its statutory obligation to notify the public. For these reasons, the facts are not certain enough to constitute a significant injustice requiring estoppel. *See Eldredge*, 795 P.2d at 675.

zoning changes, and his name does appear on nearly all of the minutes, agendas, and other documents associated with the proposed changes. However, given the posture of the decisions cited herein, and the policies those decisions espouse, no employee of Washington Terrace was obligated to inform PFS of the potential zoning changes, beyond the already-existing obligation to notify the public.

Imposing an obligation to inform on local governments and local officials moves away from the "bright line" vested rights rule adopted by *Western Land Equities*, and instead requires a fact-intensive analysis and decision every time a zoning change interferes with a property owner's hoped-for but unformulated plans. To conclude that such an obligation exists would require local governments to endlessly investigate every property owner's future plans before any zoning changes could be considered. Such a policy would be impractical, burdensome, and unwieldy, and is not envisioned in Utah law.

In sum, this Opinion concludes that Washington Terrace is not estopped from denying PFS's application to construct an apartment complex. The City's building official did not have a duty to inform PFS that the City might change its zoning ordinances.[13] Nothing in Utah law requires such a duty. Additionally, imposing such an obligation is inconsistent with the policy of *Western Land Equities* discouraging individualized, unpredictable analyses. Finally, from a practical standpoint, a duty to inform could not be applied fairly or universally, and could thus result in greater inequity than if the duty were imposed.

Conclusion

Washington Terrace had formally initiated proceedings to amend its zoning ordinance by the time PFS would have submitted its application. Section 10-9a-509 of the Utah Code provides that a city may deny an application if an ordinance change is pending when an application is submitted. The City announced the changes to its zoning ordinance no later than October 13, 2007, when a notice was published in the *Ogden Standard Examiner*. Thus, by the time PFS had prepared its application in November, the zoning ordinance change had been formally initiated.

PFS cannot force the City to accept and process its application, because a City employee did not inform them of a pending ordinance change. The City was not obligated to inform PFS of the potential change beyond the requirement to notify the general public, even if it had knowledge of the plans for the parcel. Utah cases discussing zoning estoppel indicate that a local government's mere knowledge of a proposed use or condition does not estop the government from exercising its zoning powers and rights. Furthermore, imposing a duty to disclose deviates from policy established by *Western Land Equities* discouraging individualized, "case-by-case" determinations in vested rights matters.

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[13] In addition, PFS has not demonstrated that it substantially changed its position in reliance on the act or omission of the City, simply because it purchased the parcel and prepared architectural plans. As has been discussed, those activities do not necessarily constitute "substantial changes in position." *See Western Land Equities*, 617 P.2d at 392; *Stucker*, 870 P.2d at 290.

This Opinion only evaluates whether PFS should be able to submit and process its land use application under laws applicable to property use and development, and does not address any other possible theories of liability. This Opinion should therefore not be read as imposing or excusing any duty or right upon PFS, Washington Terrace, or any individual other than what is discussed herein.

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 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 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:

Laura Gamon
City Treasurer
Washington Terrace City
5249 S. South Pointe Dr.
Washington Terrace, UT 84405

On this _____ Day of August, 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