Advisory Opinion #109

Parties: George Mount and Summit County

Issued: December 6, 2011

TOPIC CATEGORIES:
E: Entitlement to Application Approval (Vesting)
R(v): Other Topics (Interpretation of Ordinances)

Covenants, conditions, and restrictions created by private property owners are essentially a contract binding those owners. Since the local government was not a party, it is not bound by the agreement, and may regulate the property as it sees fit. Some property owners may possibly claim equitable estoppel, if significant expenses were incurred due to reliance on the government's representations.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	George Mount
Local Government Entity:	Summit County
Applicant for the Land Use Approval:	George Mount
Type of Property:	Commercial Development
Date of this Advisory Opinion:	December 6, 2011
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

Is a local government legally obligated to recognize uses listed in a private declaration of covenants, conditions, and restrictions for a subdivision development, if the government is not a party to the declaration, and if the zoning for the undeveloped property will not allow the uses?

Summary of Advisory Opinion

The Declaration was created by private property owners, and is essentially a contract amongst the property owners in the subdivision. The County is not a party to that Declaration, and is not bound by its terms. Private property is subject to reasonable land use regulation. Private covenants do not obligate local governments.

Although the Declaration is not binding, the County may nevertheless bind itself through the doctrine of equitable estoppel. If a property owner incurs significant expense, or makes substantial changes based on the County's representation that a use may be allowed, the County cannot deny that use. Mere ownership of property is not a significant expense or a substantial change in position. However, improvements to property, if based on reasonable reliance of representations that use may be allowed, may bind the County to accept that use.

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. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A request for an Advisory Opinion was received from George Mount on August 25, 2011. A copy of that request was sent via certified mail to Bob Jasper, County Manager for Summit County, at 60 North Main, Coalville, Utah 84017. The return receipt was signed and delivered on August 30, 2011, indicating it had been received by the County.

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, with attachments, submitted by George Mount, received by the Office of the Property Rights Ombudsman, August 25, 2011.
2. Response submitted on behalf of the County by Jami Brackin, Deputy County Attorney, received September 16, 2011.
3. Reply submitted by George Mount, received September 30, 2011.
4. Material submitted by Jim Conway, received November 16, 2011.

Background

George Mount owns four contiguous lots in Silver Creek Estates, a subdivision located at Silver Creek Junction in Summit County.[1] The subdivision was created in 1965, and was originally intended to be a type of planned development, mixing residential, commercial and light industrial uses. When the subdivision was created, the County did not have a comprehensive zoning ordinance, although it approved the subdivision plat. In the absence of zoning ordinances, the property owners adopted declarations which governed uses, densities, heights, set backs, and other development matters for the subdivision. In particular, Unit "I" of the subdivision, where Mr. Mount's parcels are located, consists of parcels near the intersection of two major highways, had a declaration allowing a mixture of residential, commercial, and light industrial uses.[2] This Declaration is essentially covenants, conditions, and restrictions

[1] Silver Creek Junction is at the intersection of Interstate 80 and U.S. Highway 40.
[2] Declaration of Reservations and Protective Covenants, Silver Creek Estates Unit "I" (25 February 1965) (*hereafter* "Declaration.")

("CC&Rs") for the property, although it contains enough detail to govern development of that portion of the subdivision.

Based on the information provided for this Opinion, it appears that the subdivision was to be managed by the Silver Creek Ranch Corporation, which had filed the plat and created the Declaration. However, that corporation was dissolved in 1980, and no evidence has been submitted that there is or was ever a successor corporation or owner appointed. It also appears that the lots of the subdivision have all been sold.[3] A special service district has been created to maintain the roads for the area.

Several years after the subdivision was created, the County adopted and implemented a comprehensive zoning ordinance. Under the County's current ordinances, the Silver Creek Estates area is zoned "rural residential." Despite this zoning, the County states that it recognizes the Declaration as governing development of Silver Creek Estates Unit I, but the Declaration cannot be expanded beyond its express terms. Thus, commercial and light industrial uses specifically listed in the Declaration are allowable, even though the County's "official" zoning for the area is residential. The County maintains that the Declaration created "vested" rights in the plat, and it treats the Declaration as analogous to a nonconforming, or "grandfathered" use. Moreover, if there are any changes to individual lots, including amendments to lot boundaries, the County's policy is that the Declaration would no longer apply, and the property would need to comply with the underlying zoning ordinances.

According to the County, the grandfathering analogy supports its position that the uses should be limited to only those listed in the Declaration. The County Code provides that nonconforming uses may not be enlarged or expanded. The Declaration, however, includes a provision allowing commercial uses similar to those listed. (*See* Declaration, "C-I Land Use Regulations," A.1.c) Despite this language, it appears that the County would not allow similar commercial uses, but only those specifically listed.

Although there has been increased development and growth in Summit County, there has been little development at Silver Creek Junction. Mr. Mount's parcels are undeveloped, and he has sought opportunity to consolidate the lots to develop them for commercial uses allowed under the Declaration. He has contacted potential buyers, promoting the property for commercial development. Mr. Mount claims that potential buyers are discouraged when they discuss zoning and development regulations with the County.[4] He also claims that he purchased the property anticipating commercial development, but his plans and his investment have been stymied by the County.

Jim Conway also owns parcels in Unit I. He constructed commercial-style buildings on his parcels, but has not been able to find buyers.[5] He also claims that the County has discouraged

[3] This Opinion only concerns the properties located in Unit "I", and not the other areas of the subdivision. Jim Conway, a property owner in Unit I, stated that he believed that all lots had been sold.

[4] Mr. Mount states that a company recently expressed interest in a storage unit business on the parcels, but chose another location. Mr. Mount believes that the company selected another site because of the County's representations concerning the Silver Creek area.

[5] Mr. Conway states that his property has been proposed for use as a fitness center, bicycle shop, and plant nursery.

potential buyers. Both Mr. Conway and Mr. Mount contend that the County's decision to maintain the rural residential zoning for Unit I is unreasonable, and stifles development of the area.

The original Declaration created a three-member "Committee of Architecture," to oversee the maintenance and construction of properties in Unit I. The members of the Committee were selected by the Silver Creek Ranch Corporation, which was the original owner of the property.[6] The Committee was to approve plans for new construction, and was specifically authorized to waive conditions and grant some exceptions, although it is not clear whether that authority included approving uses not listed in the Declaration.[7] The Declaration named the original members of the Committee, but it did not function for several years. In 2010, a group of property owners proposed reorganizing the Committee, and submitted a list of candidates to the property owners in Unit I. Three members, including Mr. Conway, were approved by the voters. The County was notified that Committee had been reconstituted. The County acknowledges receiving the notice, but it does not recognize the Committee as having any authority other than as an advisory body.

Mr. Mount requested this Advisory Opinion to evaluate the nature and extent of the County's authority to regulate land uses within Unit I. Mr. Conway became aware of the Advisory Opinion request, and submitted a letter explaining the reinstitution of the Committee of Architecture, along with his own concerns about development of Silver Creek Estates.

Analysis

I. Since The Declaration Is Not a County Ordinance, it Does Not Legally Obligate the County or Grant Vested Rights.

A. The County Has Broad Authority to Regulate Land Uses.

The County may regulate land uses within Unit I, and is not legally obligated to abide by the Declaration. Private property is subject to local government regulation. "It is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a [local government's] police power." *Western Land Equities v. City of Logan*, 617 P.2d 388, 390 (Utah 1980); *see also Smith Investment Co. v. Sandy City*, 958 P.2d 245, 252 (Utah Ct. App. 1998). Zoning ordinances "must be reasonably related to serving the public health, safety, or general welfare." *Smith Investment*, 958 P.2d at 252. An ordinance will be upheld as valid if it could reasonably promote the public welfare. *Id.*

[6] *See* "Declarations of Reservations and Protective Covenants, Silver Creek Estates Unit 'I'" by Silver Creek Ranch Corporation, dated 25 February 1965, at ¶ A.1. The Declaration provides that the Corporation (or its successor owners) could nominate members of the Committee.

[7] *Id.*, Declaration at ¶ A.2-3. The Committee can approve exceptions if they do not detract from the appearance of the premises, and are not detrimental to the public welfare.

Local governments are given very broad discretion to make decisions regarding regulation of land use. "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* (citation omitted). Zoning ordinances restrain the use of land, interfere with planned development, and affect the value of land. These impacts, however, do not invalidate the ordinance or entitle a property owner to compensation. A local government is authorized to:

> regulate and restrain the use of private property when the health, safety, morals, or welfare of the public demands it; . . . the exercise of proper police regulations may to some extent prevent enjoyment or individual rights in property or cause inconvenience or loss to the owner, [but that] does not necessarily render the . . . law unconstitutional, for the reason that such laws are not considered as appropriating private property for a public use, but simply as regulating its use and enjoyment . . ..

Bountiful City v. DeLuca, 77 Utah 107, 120, 292 P. 194 (Utah 1930); *see also Colman v. Utah State Land Board*, 795 P.2d 622, 627-28 (Utah 1990). Thus, even a significant impact on a property's value will not invalidate a zoning ordinance.

B. The Declaration Itself Does Not Establish any Vested Rights to Develop, and the County Should Not "Recognize" the Declaration as Granting Development Rights.

The Declaration was created by the original property owner of Silver Creek Estates, and is essentially a contract amongst the current property owners. "Restrictive covenants that run with the land and encumber subdivision lots form a contract between subdivision property owners as a whole and individual lot owners . . . ." *Swenson v. Erickson*, 200 UT 16, ¶ 11; 998 P.2d 807, 810-11. The County is not a party to that Declaration, and it has not been adopted or approved through any official procedure.[8] Thus, the Declaration does not establish vested rights for any property owner, and it does not legally obligate the County to adopt any particular zoning scheme, or approve any type of development other than what is consistent with its zoning regulations.

The County's "recognition" of the Declaration as granting vested rights is troubling. The County must follow its own ordinances. "A county is bound by the terms and standards of applicable land use ordinances and shall comply with mandatory provisions of those ordinances." UTAH CODE ANN. § 17-27a-508(2). The County should therefore comply with its own ordinances, and cannot ignore or modify them by administrative fiat. Restrictive covenants adopted by private property owners cannot supersede the County's authority.[9] The material submitted for this Opinion indicates that the County's staff unilaterally determined that the Declaration allows commercial and industrial development in Unit I, even though the zoning ordinance regulates

[8] There are zoning mechanisms, such as a Planned Unit Development (PUD) or an overlay zone, which allow a local government to adopt "tailor made" zoning ordinances incorporating restrictive covenants. These mechanisms would thus obligate the locality, not by contract, but by ordinance.
[9] *See Western Land Equities*, 617 P.2d at 390.

that area as residential. In effect, the County is improperly ignoring its own land use ordinance.[10]

If the County wants to recognize the uses listed in the Declaration, the County Council may adopt them in the ordinances which regulate land use in Unit I. However, because the Declaration's language has not been adopted as an ordinance, the County is not entitled to treat the Declaration as binding. This violates § 17-27a-508(2), discourages reliability and consistency in land use regulation, and leads to the possibility that land uses for Unit I will be determined on an *ad hoc* basis without regard for ordinances enacted by the County Council. The County should not treat the Declaration as legally-binding, unless it adopts the listed uses as part of a land use ordinance.

The County's broad authority to regulate land uses must recognize vested rights in existing development. If a property owner submits an application for development approval, and that application complies with existing zoning ordinances, the property owner has a vested right to proceed with that development. *See* UTAH CODE ANN. § 17-27a-508(1)(a) Once a complete and compliant application is submitted, the development must be approved.[11] However, a property owner cannot claim vested rights in planned or anticipated development. *See Western Land Equities*, 617 P.2d at 391.[12]

The Declaration suggests possible plans for Unit I, but cannot grant vested rights, because it is not a zoning ordinance and the County is not legally bound to recognize it. Instead, the Declaration outlines acceptable uses and restricts some activities within Unit I. For example, property owners may not raise livestock or undertake "noxious or offensive activities." *See* Declaration, "Land Use – General" ¶¶ 4 & 5. If a property owner's use violates the Declaration, other property owners may pursue an action to curb or eliminate the violating use. However, the County's zoning ordinances take precedence, so a property owner's legal rights under the Declaration must operate within the framework of those ordinances.

II. The Property Owners in Unit I may Amend the Declaration, and Select a Committee to Administer it.

The property owners in Unit I have the right to amend the Declaration, and may also select a Committee of Architecture to administer the Declaration. As was already discussed, the Declaration is a type of CC&Rs for Unit I, and the property owners may amend its terms. *See*

[10] As is discussed more fully below, the County would be obligated to recognize any vested right from development that has been initiated.

[11] A local government may deny the application if there is a compelling, countervailing public interest, or if an ordinance change is pending when the application is submitted. *See* UTAH CODE ANN. § 17-27a-508(1).

[12] *See also Stucker v. Summit County*, 870 P.2d 283, 287 (Utah Ct. App. 1994) (rejecting a claim of vested rights when development had not been initiated, but was only anticipated).

Declaration, "General Provisions."[13] It stands to reason that a majority of the property owners may also repeal the Declaration in its entirety.[14]

The Committee of Architecture created by the Declaration was to be nominated by the Silver Creek Ranch Corporation (or its successor). *See* Declaration, "Committee of Architecture," ¶ A.1. The Silver Creek Ranch Corporation was dissolved in 1980, and apparently, no successor corporation has been created. In the absence of a successor, the property owners could possibly act to appoint a Committee, or the owners could amend the Declaration to provide that the Committee be approved by a vote of the property owners.[15] However, the Declaration is not binding upon the County, so the administration of the Declaration does not affect the County's authority. The owners may choose to continue the Declaration amongst themselves, insofar as it would govern activity in Unit I under regulations imposed by the County.

The Declaration provides that the Committee of Architecture has authority to approve applications, and it may allow reasonable deviations from the terms of the Declaration, or approve uses similar to those listed. Declaration, "Committee of Architecture," ¶ A.2. Since the members of the Committee would also be property owners, they could initiate actions against property owners who violate the Declaration. *Id.*, "General Provisions."

III. The County may be Estopped From Denying Development Applications on Some of the Lots in Unit I.

It appears that since some property owners have acted in reliance on official representations concerning uses in Unit I, the County may be estopped from denying applications for commercial development on those parcels. A local government may be estopped from enforcing its zoning ordinances if it has "committed an act or omission upon which [a] developer could rely in good faith in making substantial changes in position or incurring extensive expenses." *Utah County v. Young*, 615 P.2d 1265, 1267 (Utah 1980); *see also Stucker*, 870 P.2d at 290. Estoppel (also called zoning estoppel) recognizes a property owner's rights and investment interests if the circumstances call for fairness. "A court has discretion in the exercise of its equitable powers and may deny injunctive relief against the violation of a zoning ordinance. If the granting of an injunction [*i.e.*, enforcement of zoning regulations] would be inconsistent with basic principles of justice and equity, it may denied . . . ."[16] *Young*, 615 P.2d at 1267. If a property owner has incurred expense based on reliance from the County's representation that commercial development is allowed, the County cannot deny an application for commercial development.

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[13] A majority of the owners in Unit I may change the terms of the Declaration.

[14] *But see Swenson v. Erickson*, 2007 UT 76, ¶ 11; 171 P.3d 423, 425 (*Swenson II*). *Swenson II* interpreted a provision in a restrictive covenant, which is fairly similar to that of the Declaration. The Utah Supreme Court held that the language allowed an amendment to the covenant only on the date in which the restrictions were automatically renewed, which occurred every ten years.

[15] Another possibility is creating a business entity to serve as the successor owner of Silver Creek Estates.

[16] It should be remembered, however, that zoning estoppel may only be invoked if there are "exceptional circumstances" which warrant estoppel. *Utah County v. Baxter*, 635 P.2d 61, 65.

The County has stated officially that it recognizes the uses listed in the Declaration as "vested rights." There is evidence that County officials made this representation to its Planning Commission in 2001. Thus, the County's official position is that the commercial uses listed in the Declaration are allowable. If a developer relied upon that statement, and incurred significant expenses because of that reliance, the County should be estopped from denying that the listed commercial uses are not allowed. Changes to the parcels within the subdivision would not impact an owner's vested rights under the estoppel doctrine, because those rights arise because of a change in position due to reliance on the County's representations, and would apply to any configuration of the affected property.

The expenses must be more than merely purchasing property. "[S]omething 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*, 870 P.2d at 290. Construction of commercial buildings and other related expenses may obligate the County to approve commercial uses, despite the current zoning.[17] This obligation would arise because of the expense, and the County could not deny a use, nor could it excuse itself because of alleged technical noncompliance.[18] Although the Declaration does not bind the County, it may nevertheless bind itself to the Declaration because of representations made by County officials.

The County argues that the Declaration should be treated in the same manner as a nonconforming use, and intimates that the Declaration has been abandoned by non-use. However, this argument should not apply, because the County has repeatedly committed to recognizing the uses in the Declaration. In other words, the County cannot consistently state that it recognizes the uses in the Declaration, while it simultaneously argues that the Declaration has been abandoned through non-use.[19] If a developer incurs expenses in reliance of the County's representation, estoppel applies, and the County cannot claim that a right to develop was lost through non-use.

Conclusion

The County may regulate land uses within Unit I, in the manner that it may regulate land uses in other areas. The Declaration does not bind the County to recognize any uses or commit to any land use plans. The County is obligated to follow its own ordinances, and County officials do not have authority to ignore or modify ordinances without action from the County Council. The

[17] Mr. Conway reports that he constructed commercial buildings, but that the County discouraged potential buyers. One of the proposed uses for his buildings was a bicycle shop. Retail shops are specifically listed in the Declaration as a permitted use.

[18] For example, the County's position is that any alteration in the subdivision plat (such as combining lots) negates the Declaration. (This policy was not adopted by the County Council, but was imposed administratively). However, if a developer relied upon the County's representation, and incurred significant expenses, the County is bound to its representations, despite any alteration to the plat.

[19] In addition, a nonconforming use theory does not logically apply, because nonconforming use status arises when a *use* is established while allowed, but has subsequently become illegal due to a zoning change. In Silver Creek Estates, very few uses have been established, so the nonconforming use analysis would not apply. The Declaration itself is not a "land use," but a list of uses permitted by the original land owners. Nonconforming use analysis would not apply to potential uses, but only to those that have been established.

County may adopt an ordinance which incorporates the language of the Declaration, but otherwise, the County must obey its own zoning regulations.

Although the Declaration is not binding, the County may nevertheless be bound if property owners make substantial changes or incur expenses in reliance on the County's representations that the uses listed in the Declaration are allowed. The County may be bound under the doctrine of equitable estoppel, but only if property owners have made substantial changes. Mere ownership of property is not sufficient, even if the owner plans or anticipates commercial development.

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:

Bob Jasper, County Manager
Summit County
60 North Main
Coalville, UT 84017

On this _____ Day of December, 2011, 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