Advisory Opinion #114

Parties: HJ Silver Creek, LP and Summit County

Issued: April 30, 2012

TOPIC CATEGORIES:
E: Entitlement to Application Approval (Vesting)

Vested rights to proceed with development arise when an application is submitted. All property is subject to land use control, and approval of a subdivision plat does not exempt property from local control. Uses identified on a subdivision plat should be considered advisory only, and not the equivalent of a zoning ordinance. In order to claim estoppel, a property owner must show significant expense due to reliance on government representations.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	HJ Silver Creek, LP
Local Government Entity:	Summit County
Applicant for the Land Use Approval:	HJ Silver Creek, LP
Type of Property:	Subdivision
Date of this Advisory Opinion:	April 30, 2012
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

Do land uses designated on a subdivision plat grant vested rights to lot owners?

Summary of Advisory Opinion

Vested rights in land use or development arise because a property owner submitted an application that complies with existing zoning ordinances. Without an application for land use approval, an owner cannot claim vested rights in the continued existence of any ordinance. All property is subject to zoning regulation, and approval of a subdivision plat does not remove or exempt that property from local government control.

A subdivision plat is not a zoning ordinance, and cannot grant vested rights in any particular use, even if that use is listed on the plat. Principles of sound governance, comprehensive planning, and public involvement dictate that plat language should not be elevated to the level of a zoning ordinance. Uses listed on a plat should be considered advisory only, and not binding on a local government, except as necessary to preserve established uses.

A property owner may invoke the doctrine of zoning estoppel when a local government has made a representation which the owner relies upon in good faith to make a substantial change in position. While mere ownership or purchase of property is not sufficient to invoke zoning estoppel, a substantial purchase price coupled with a significant investment for improvements

dedicated to construction is sufficient. Based on the information submitted for this Opinion, HJ Silver Creek has incurred extensive expenses to purchase and improve its property, relying upon representations made by the County that commercial development would be permissible. Thus, HJ Silver Creek may estop the County from denying that commercial development is allowed on the property.

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.

A Request for an Advisory Opinion was received from HJ Silver Creek, LP on January 31, 2012. A copy of that request was sent via certified mail to Bob Jasper, Summit County Manager, at 60 North Main, Coalville, Utah 84017.

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 Bradley R. Cahoon, attorney for HJ Silver Creek, LP received by the Office of the Property Rights Ombudsman, January 27, 2012.
2. Response submitted on behalf of Summit County, by David L. Thomas, Chief Deputy County Attorney, received February 14, 2012.
3. Reply letter from Bradley R. Cahoon, received February 23, 2012.
4. A Summit County "Appeal of a Decision Application Form," with attachments, prepared by HJ Silver Creek, dated January 12, 2012. (It is not clear whether this Appeal Form was submitted to the County).

Background

HJ Silver Creek, LP owns property in Unit I of "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. The plat for Unit I includes the following language:

> The following uses shall be permitted for designate [sic] lots.
>
> | | |
> |---|---|
> | Light Industry: | Block 1, Lots 1 thru 14, incl. (inclusive) & Parcel A |
> | Commercial: | Block 2, Lots 1 and 30 thru 45 incl. |
> | | Block 4, Lots 1 thru 16 incl. |
> | | Block 7, Lots 1 thru 14 |
> | | Block 8, Lots 1 thru 8 |
> | | All of Block 9 |
> | Multiple | Block 2, Lots 2 thru 29 |
> | Dwellings: | Block 5, Lots 1 thru 9 |
> | | Block 6, Lots 1 thru 4 |
> | Apartments and Professional: | Block 3, Lots 1 thru 7 incl. |

This language was evidently on the original plat, which was approved and signed by the Summit County Commission in February, 1965. Along with the subdivision plat, the original property owners created a "Declaration of Reservations and Protective Covenants" for Unit I ("Declaration"), which stated regulations for land uses.[2] This Declaration is essentially covenants, conditions, and restrictions ("CC&Rs") for Unit I, and it contains details governing development of that portion of the subdivision. The County was not a party to the Declaration, and did not approve its language.[3]

In 1977, several years after the Silver Creek Estates Plat was approved and recorded, Summit County adopted a comprehensive zoning ordinance. Under the County's current zoning, Silver Creek Junction is zoned "rural residential," which prohibits most commercial and industrial uses.

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[1] Silver Creek Junction is at the intersection of Interstate 80 and U.S. Highway 40. This Opinion only concerns Unit I (as in the letter "i") of the Silver Creek Estates Subdivision, which is located immediately north of Interstate 80. Other units within the subdivision are not affected by this Opinion.

[2] Declaration of Reservations and Protective Covenants, Silver Creek Estates Unit "I" (25 February 1965) (*hereafter* "Declaration.")

[3] The owner of the property in 1965 was Silver Creek Ranch Corporation, which filed the plat and the Declaration. That corporation was dissolved in 1980, and no materials have been submitted indicating if there was a successor corporation or owner appointed. It appears that all of the lots in Unit I have been sold. A special service district maintains roads in the area.

However, until recently the County stated that it would recognize uses specifically listed in the Declaration, but no others, even if they were similar to those which were listed.[4]

In the fall of 2011, the Office of the Property Rights Ombudsman was approached by two owners of property in Unit I. They both felt that the County was not letting them develop their property in a profitable manner, despite representations from the County that commercial uses were possible. One owner had not been able to build on the four lots he owned, and stated that potential buyers were discouraged by information obtained from the County. The other owner had constructed buildings suitable for commercial uses, but also stated that potential buyers were not willing to invest because the zoning regulation for the area was unsettled.[5]

One of the property owners requested an Advisory Opinion, to evaluate the status of the Declaration, and the County's policy that the Declaration would be recognized as creating some type of "grandfathered" uses.[6] The Office of the Property Rights Ombudsman issued an Advisory Opinion on December 6, 2011, which stated that the County is not bound by the Declaration, because it was a private contract amongst the lot owners. However, the County may be obligated to recognize uses under the doctrine of zoning estoppel.[7] The Opinion did not evaluate the question of whether the uses listed on the subdivision plat itself granted any vested rights to property owners.[8] Because of that Opinion, the County discontinued its policy of recognizing uses listed in the Declaration.

HJ Silver Creek, LP purchased property in Unit I in September 2005. HJ Silver Creek states that it met with County officials prior to completing the purchase, and that the County assured them that commercial development was possible on the property they were purchasing.[9] The company completed the purchase, and proceeded to prepare engineering studies, planning, environmental and geotechnical analysis, and facility design.

HJ Silver Creek further states that it sought a permit from the US Army Corps of Engineers, because development of the property would affect water resources or wetlands. The Corps of Engineers required installation of pipelines, trenches, monitoring wells, and a street culvert. HJ Silver Creek states that the cost of these improvements alone exceeded $300,000.00. The County acknowledges that in 2009, it granted an excavation or grading permit to HJ Silver Creek to install the improvements on the property.

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[4] The County analogized its policy as recognizing the uses listed in the Declaration as "grandfathered" or nonconforming. If any of the lots were changed, including consolidation or amendments to lot boundaries, the "grandfathered" rights were lost, and the property had to comply with the rural residential zoning regulations.

[5] Both owners accused the County of deliberately discouraging development on their properties.

[6] The Opinion was requested by George Mount, who owned four lots in Unit I. Jim Conway, the other owner, also provided information for the Opinion.

[7] *See* Mount Advisory Opinion, issued December 6, 2011 (The Office of the Property Rights Ombudsman). Under the zoning estoppel doctrine, if a property owner makes a substantial change in position because of representations made by a local government, the government cannot prevent the development.

[8] Copies of the Silver Creek Estates Unit I Plat were submitted to the Office for the Mount Advisory Opinion, but the Request for Advisory Opinion did not request evaluation of whether the uses listed on the plat granted vested rights to the property owners.

[9] HJ Silver Creek states that it received confirmation that commercial development was permitted from both the County Attorney's Office and the County's Planning Director.

HJ Silver Creek requested this Opinion to address whether they would be entitled to claim vested rights based on the uses listed on the original subdivision plat, and whether they could claim the right to commercial development based on a zoning estoppel theory.

Analysis

I. Vested Rights are Established When an Owner Applies for Land Use Approval

A vested right does not exist until a property owner submits an application seeking approval of a particular land use. A property owner "is entitled to a building permit . . . if his proposed development meets the zoning requirements in existence at the time of his application." *Western Land Equities v. City of Logan*, 617 P.2d 388, 396 (Utah 1980). The Utah Legislature codified that rule at § 17-27a-508 of the Utah Code:

> [A]n applicant is entitled to approval of a 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 when a complete application is submitted and all application fees have been paid, unless:
>
> (i) the land use authority, on the record, finds that a compelling, countervailing public interest would be jeopardized by approving the application; or
>
> (ii) in the manner provided by local ordinance and before the application is submitted, the county has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted.

UTAH CODE ANN. § 17-27a-508(1)(a).

In a case evaluating a vested rights claim, the Utah Court of Appeals explained that an approved subdivision plat grants some rights, although development would still be subject to local zoning regulation:

> Some courts have recognized that the filing of a subdivision plat gives a vested right to individual lot owners as to the lots' size . . . . Individual lot owners within an approved subdivision, however, generally have no vested right to build under a given zoning ordinance until the municipality has issued a building permit for that specific lot or the lot owner has incurred substantial expense in reliance on the current zoning ordinance.

Stucker v. Summit County, 870 P.2d 283, 288 (Utah Ct. App. 1994).[10] In other words, a subdivision plat establishes the size and configuration of lots, and the owner of a lot may rely on

[10] Despite the language in *Stucker* that a vested right does not arise until a building permit is issued, the rule from *Western Land Equities* (and in § 17-27a-508) states that a property owner may claim vested rights from the date a complete application is submitted. "[T]he date of application . . . fixes the applicable zoning laws." *Western Land Equities*, 617 P.2d at 391.

that configuration.[11] A plat, however, does not govern development aspects not shown, such as setback, building height, landscaping, etc. Those requirements are found in a locality's zoning and development ordinances, which may be changed by ordinance amendments.

A similar approach was adopted by the Utah Supreme Court in *Wood v. North Salt Lake*, 15 Utah 2d 245, 390 P.2d 858 (1964). In *Wood,* a city approved a subdivision plat with 60-foot wide lots, which was the minimum width allowed under the city's zoning ordinances. The property owner installed water mains and sewer lines to serve the subdivision. A few years after the subdivision was approved the city amended its ordinances, and required lots to be 70 feet wide. The city denied a building permit to an owner of a 60-foot wide lot, because the lot was too narrow under the amended ordinance. The court held that "enforcement of the ordinance would be unfair, inequitable, discriminatory and inconsonant with realistic concepts of affinitive and privileged use of one's property." The ordinance in *Wood* only affected the width of the lots, and did not impact any uses.

Although the *Wood* opinion did not use the term "vested rights," the analysis would be the same under the *Western Land Equities* rule. The property owners in *Wood* applied for and received approval of a subdivision plat at a time when the city's ordinances allowed lots to be 60 feet wide. After approval, the city changed that ordinance so that lots could not be less than 70 feet wide. If the vested rights rule from *Western Land Equities* had been in effect, the property owners could have created 60-foot wide lots, because that width was permitted when the subdivision application was submitted. The change in the width requirement did not void the subdivision or make the lots illegal.[12] The city had to recognize the size and configuration of the lots which had been duly approved.

Creating a subdivision, however, does not grant a vested right to *use* property in any particular way. Such a right would arise when a property owner submitted an application for approval of an allowed use, such as an application for a building permit. The lots would be subject to zoning regulations such as setback and height restrictions even if the lots were created when those restrictions were different. Subdivided property also remains subject to zoning ordinances governing uses. If uses on the property were prohibited by a zoning ordinance amendment, an owner cannot claim a vested right to that use simply because the subdivision was approved before that amendment was adopted.[13]

To conclude, a property owner may claim vested rights by submitting a development application, according to the *Western Land Equities* rule.[14] Otherwise, all property is subject to changes in

[11] A local government may approve an amendment to a subdivision plat. In essence, subdivision approval creates a new property description for a parcel. A subdivision may be defined by a "metes and bounds" description, or by reference to an approved subdivision plat. The Silver Creek Estates Plat created several lots which could be defined by reference to the plat.

[12] Lots created prior to a change in zoning ordinances could be considered as nonconforming or noncomplying.

[13] If a use was established when it was permitted, the owner could continue it as a nonconforming use. *See* UTAH CODE ANN. § 17-27a-510

[14] As has been discussed, a developer may invoke the zoning estoppel doctrine if a local government's representations induced a substantial change in position, and it would be inequitable to enforce the zoning ordinance against the developer.

local zoning regulations. The mere existence of a zoning ordinance does not confer a vested right upon any property owner. A subdivision creates a new property description, and an owner may rely upon the size and configuration of lots created by an approved subdivision. However, the mere act of approving a subdivision plat does not create vested rights in any property uses listed in a zoning ordinance.

II. Uses Stated on the Plat Do Not Grant Vested Rights.

The question posed for this Opinion does not concern lot configuration or description, but whether a list of uses included on a plat map grants vested rights for those uses. The appellants in *Stucker* sought an answer to that very question, but the Court of Appeals refused to address it, because it had not been raised before the trial court. *Stucker*, 870 P.2d at 286.[15] Nevertheless, the analysis from *Stucker* provides helpful guidance.

A. A Subdivision Plat is Not a Zoning Ordinance

A subdivision plat is not a zoning ordinance, and uses listed on a plat do not automatically grant an owner the right to carry out those uses. A property owner cannot claim a vested right to any type of development until an application which complies with local zoning regulation is submitted. *See Stucker*, 870 P.2d at 288.[16] This is the *Western Land Equities* rule. However, even if uses are listed on a subdivision plat, the property is still subject to zoning regulation by a local government. "Even final approval of a subdivision plot . . . does not place the lots beyond the authority of zoning changes." *Stucker*, 870 P.2d at 288 (citations omitted).[17]

As has been discussed, the *Western Land Equities* vested rights rule has been codified into the Utah Code. "[A]n applicant is entitled to approval of a land use application if the application conforms to the requirements of the county's land use maps, zoning map, and applicable land use ordinance[s] . . .." UTAH CODE ANN. § 17-27a-508(1)(a). Under this law, vested rights are established when a development application complies with land use ordinances and maps. "'Land use ordinance' means a planning, zoning, development, or subdivision ordinance of the county, but does not include the general plan." *Id.*, § 17-27a-103(28). A zoning map is "a map, adopted as part of a land use ordinance, that depicts land use zones, overlays, or districts." *Id.*, § 17-27a-103(62).[18]

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[15] The factual situation evaluated in *Stucker* was markedly similar to the one addressed in this Opinion. The Stuckers purchased a lot in the "Highland Estates Subdivision," which is also in Summit County. The subdivision was approved in 1964, and included a list of approved uses. The plat designated the Stucker's lot as commercial property. County ordinances adopted after 1964 imposed new zoning restrictions on the property. The Stuckers failed to argue to the trial court that the uses listed on the 1964 plat granted them the right to pursue a commercial use on the property, so the Utah Court of Appeals declined to consider that argument on appeal.

[16] The Utah Code also requires that all application fees be paid in order to establish vested rights. *See* UTAH CODE ANN. § 17-27a-508(1)(a).

[17] *See also Western Land Equities*, 617 P.2d at 390. "[A]n owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power."

[18] The term "land use map" is not defined in the Utah Code.

A subdivision plat is not a "land use ordinance" or "zoning map." A property owner may rely upon a local government's ordinances which govern the size and configuration of lots, and claim the vested right to create a subdivision plat which complies with those ordinances. However, the plat itself is not an ordinance or map, and vested rights for land uses cannot derive from it.[19] Although a local government would be obligated to recognize the size and configuration of parcels created by a valid subdivision process, they do not surrender the authority to amend zoning ordinances simply by approving a subdivision plat. This would, in effect, grant private property owners a share of the government's regulatory power, which is forbidden.[20]

Local governments may adopt zoning ordinances, following strict notice and public hearing requirements. UTAH CODE ANN. §§ 17-27a-501 to -502. Zoning ordinances may also be amended or changed, if the locality follows similar notice and procedural requirements established in the Utah Code. *Id.*, § 17-27a-503. Approving a subdivision plat does not satisfy these requirements. Consideration of proposed subdivision plats or amendments to existing plats do not need to follow the same notice and procedural requirements as ordinance adoption or amendment. Notice is required so that the public has ample opportunity to participate in the decision-making process.[21] Elevating plat language to a level equal to a zoning ordinance would allow planning decisions to be made without providing the public with the same opportunities to participate.[22]

B. The Subdivision Approval and Amendment Process Is Not a Substitute for Adopting and Amending Zoning Ordinances.

Because the process to approve or amend subdivision plats does not protect important public interests, it should not be used as a substitute for the process of adopting or amending zoning ordinances. The term "'[s]ubdivision' means any land that is divided, resubdivided or proposed to be divided into two or more lots, parcels, sites, units, plots, or other division of land for the purpose, whether immediate or future, for offer, sale, lease, or development either on the installment plan or upon any and all other plans, terms, and conditions." UTAH CODE ANN. § 17-27a-103(56)(a). Thus, subdivision refers to land; specifically, the term refers to land that is being divided for possible sale or development. It is not a regulation of land use, but a means to facilitate land development by altering property descriptions. The subdivision process is not intended nor authorized to be a means of creating land use regulation.

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[19] This illustrates the distinction between an approved subdivision plat, and the vested right to create a plat. A property owner may apply to subdivide property, and if the proposed subdivision complies with the subdivision ordinances in place when the application is filed, the owner may claim the vested right to have the subdivision approved. Approval, however, only creates new boundary descriptions for the property, and does not confer the right to carry out any particular use. A vested right to a land use is created when a property owner applies for approval to carry out the use, as long as the application complies with the land use ordinances in place when the application is filed.

[20] *See Busche v. Salt Lake County*, 2001 UT App 111, ¶¶ 7-15 (Some discretionary approvals may be delegated to government officials, but legislative bodies may not delegate authority to adopt or amend ordinances).

[21] *See Call v. City of West Jordan*, 727 P.2d 180, 183 (Utah 1986); *Hatch v. Boulder Town*, 2001 UT App 55, ¶ 12, 21 P.3d 245, 248-49.

[22] In addition, the public would most likely not realize that approval of an individual subdivision would entail long-term decisions on planning land uses. The public would thus be deprived of the opportunity to fully participate in the community's planning process that is guaranteed by the Utah Code.

It is not appropriate to treat uses listed on a plat as the equivalent of a zoning ordinance because a plat cannot have the same detail that is required of an ordinance. The Silver Creek Estates Plat demonstrates this problem. The plat merely assigns uses to the lots in Unit I, but contains no additional information about how those uses are to be regulated. Due process requires that regulatory language contain enough detail so that a person of common understanding would know what is required.[23] Simply assigning a use to a particular lot does not fulfill that obligation. A land use regulation, like any statute or ordinance, must contain enough information so that a land owner knows what can and cannot be done on the property. Designating a use on a subdivision plat does not provide the required specificity.[24]

A conclusion that language approved on a subdivision plat is not the equivalent of a zoning ordinance is bolstered by the fact that a subdivision may only be amended when requested by the owner of property within that subdivision. The Utah Code provides that "[a] fee owner of land . . . in a subdivision . . . may file a petition . . . to have some or all of the plat vacated or amended." UTAH CODE ANN. § 17-27a-608(1). Thus, the property owners control when plat amendments are considered, not the local government or the general public.

If suggested land uses on a plat are elevated to the level of zoning ordinances, the listed uses could only be changed if a property owner files a petition to amend the plat.[25] This would effectively give the property owners veto authority over any changes to the listed uses. If the owners did not want the uses changed, they would simply not file a petition for an amendment, thus preventing the local government from exercising its statutory duty to enact and amend land use ordinances.[26] In other words, by approving a subdivision plat the local government would be giving away its authority to make changes to zoning regulations. Government entities may not delegate the authority to approve ordinance changes. *Busche v. Salt Lake County*, 2001 UT App 111, ¶¶ 7-15.

Finally, allowing land uses to be controlled by language on individual subdivision plats would theoretically mean that every subdivision plat becomes a zoning ordinance unto itself. It would be impossible to carry out general plans, or to make community improvements if every change required amendments to dozens of subdivision plats.[27] Local governments are charged to

[23] *See e.g., Roth v. U.S.*, 354 U.S. 476, 491 (1956). ("The Constitution des not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the [expected] conduct when measured by common understanding and practices.")

[24] Furthermore, without the details adopted by ordinance, the uses listed on a plat become whatever the owner wants them to be, supplanting the authority of a local government.

[25] A petition to amend may be filed by any owner, as long as the property is within the plat. It is not necessary that all owners agree to the petition.

[26] It should also be noted that if land use regulation can be controlled by language on a subdivision plat, the plat amendment process would become an alternate means of zoning regulation, circumventing the requirements of the Utah Code. The importance of the public's right to participation, preservation of property rights, promotion of sound planning, and stability of governmental processes further justifies a conclusion that uses listed on a plat cannot be considered the same as a zoning ordinance.

[27] It is recognized that such a scenario is unlikely. However, the issue is whether language adopted on an individual plat should be considered as the equivalent of a zoning ordinance. Because of the potential to undermine the legitimate governmental objectives of sound planning and public involvement, this Opinion concludes that plat language must not be equal to a land use ordinance.

preserve the "health, safety, and welfare, and promote the prosperity, improve the morals, peace, and good order, comfort, convenience and aesthetics of [the public]" UTAH CODE ANN. § 17-27a-103(1). Fragmenting zoning regulation into individual subdivision plats would undermine a local government's authority to carry out those duties.

To conclude, uses listed on a subdivision plat cannot have the same effect nor grant the same rights as duly-enacted zoning ordinances. Even if uses are approved on a plat, they cannot supersede a local government's authority over land uses. A subdivision plat does not place the property beyond the authority of zoning changes.[28] The interests of sound governance and protection of the public's right to be informed and involved in the planning process dictate this conclusion. Moreover, the property owners may still develop their property, by working with the County to adopt new ordinances governing development of the Silver Creek Area.

C. The Use Designations on the Plat Should be Considered Advisory Only, and Do Not Regulate the Land Use of the Plat.

If the uses listed on the Silver Creek Estates Plat do not grant vested rights to the lot owners, what, if any, significance does the plat language have? Because a subdivision plat is still subject to land use regulation, this Opinion concludes that the language on the Silver Creek Estates Plat is advisory, and similar to language in a general plan.[29] The uses approved on the subdivision plat should not be completely ignored, and should help guide future regulation of the area.

It is recognized that this situation is extremely rare, and that when the Silver Creek Estates subdivision was created there was no comprehensive zoning ordinance in Summit County. The language on the plat was evidently an attempt to impose some control over development of that area. However, a comprehensive ordinance was adopted later, and the zoning for the area has been changed, pursuant to the County's authority to regulate land use. The plans envisioned when the Silver Creek Estates Plat was adopted may be used to help guide future development, but the County should not be obligated to those plans, except as necessary to preserve established uses.

III. Zoning Estoppel May Be Invoked When A Property Owner Makes a Substantial Change in Position.

Based on the information submitted for this Opinion, HJ Silver Creek may estop the County from denying that commercial development is allowed. "The Utah Supreme Court has stated that equitable [or zoning] estoppel applies only when 'the county has committed an act or omission upon which developer could rely on in good faith in making substantial changes in position or incurring extensive expenses.'" *Stucker*, 870 P.2d at 290 (*quoting Utah County v. Young*, 615 P.2d 1265, 1267 (Utah 1980)) (other alterations omitted). However, "something beyond mere ownership of the land is required before the doctrine . . . will apply, and in most cases the doctrine will not apply absent exceptional circumstances." *Id.*

[28] *Stucker*, 870 P.2d at 288.
[29] Local governments are required to adopt a "comprehensive, long-range general plan." UTAH CODE ANN. § 17-27a-401(1). A general plan is "an advisory guide for land use decisions." *Id.*, § 17-27a-405(1).

The change in position must be motivated by an act or omission from a local government.

> The action upon which the developer claims reliance must be of a clear, definite and affirmative nature. If the claim be based on an omission of the local zoning authority, omission means 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.

Utah County v. Young, 615 P.2d at 1267-68. "Furthermore, to successfully [invoke] equitable estoppel . . . exceptional circumstances must be present . . .." *Utah County v. Baxter*, 635 P.2d 61, 65 (Utah 1981).[30]

HJ Silver Creek states that it purchased the property after receiving assurances from County officials that commercial development was permissible. As has been stated, mere ownership of property, regardless of the property's value, is insufficient reliance to invoke zoning estoppel. However, HJ Silver Creek further states that, as required by the US Army Corps of Engineers, it designed and installed new wells, culverts, and pipelines on the property in anticipation of the commericial development. In order to complete this work, HJ Silver Creek obtained an excavation or grading permit from the County, again showing that the County was aware of and agreeable to the development plans. The cost for the improvements exceeded $300,000.00, and they were installed because the property owner was led to believe that commercial development was allowed.

Given these facts, it appears that HJ Silver Creek may estop Summit County from preventing the proposed commercial development. The County made affirmative representations to the owners, both prior to purchase, and by granting the excavation permit. HJ Silver Creek's reliance on those representations was reasonable, especially given the fact that the owners are experienced and knowledgeable, and not likely to make substantial investments in property development without confidence that the development can be completed. Although ownership of the property alone cannot be grounds for estoppel, the investment made for the improvements, along with the substantial purchase price, constitute extensive expenses sufficient to invoke the doctrine. To conclude, HJ Silver Creek should be allowed to complete its commercial development.

Conclusion

A right to develop or use property does not vest until the property owner submits an application for land use approval which complies with the zoning ordinances then in place. Until an application is submitted, no rights vest. All property is subject to zoning regulation, and approval of a subdivision plat does not place the lots beyond a local government's zoning authority. A subdivision creates new property descriptions, and establishes the size and configuration of property, but a plat does not grant the right to use property in any particular way.

Uses listed on subdivision plats do not grant vested rights. All property is subject to zoning regulation. A subdivision plat is not a zoning ordinance, and does not adequately promote the

[30] The court explained that "injunctive relief is available only when intervention of a court of equity is essential to protect against 'irreparable injury.' . . .." *Utah County v. Baxter*, 635 P.2d at 64.

public interests of community involvement and stability of the land use regulation process. Elevating plat language to the level of a zoning ordinance creates an unmanageable regulatory process, by allowing each subdivision to be a zoning law unto itself. Moreover, amendments to subdivision plats may only be initiated by lot owners, essentially giving them a veto over the duly constituted local authorities.

A local government may be estopped from enforcing a zoning ordinance if a property owner relies on representations made by the government, and incurs substantial expense because of that representation. There must be a significant change in position or extensive expense made because an owner relied upon a clear and definite representation from a local authority. Given the facts submitted for this Opinion, HJ Silver Creek may estop the County from denying that commercial development is allowed on the property

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 April, 2012, 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