

# Advisory Opinion #228

Parties: Recycled Earth LLC and Ogden City

Issued: August 27, 2020

## TOPIC CATEGORIES:

**Pending Ordinances**  
**Substantive Land Use Review**

A land use applicant who has submitted a complete land use application is entitled to substantive review under the land use regulations in effect at the time and applicable to the application, or, to the information shown on the application. Where an application is for a defined land use, all regulations relevant to that defined use are applicable for purposes of substantive review, regardless that the information shown in the application may be more limited. If, prior to substantive review of the application, pending legislation is introduced that would affect the categorical use applied for, review of the application must continue to be based on all applicable land use standards in effect at the time of the application and not on what information may have been included—or excluded—in application documents. After receiving a complete land use application that was categorically a request for a defined land use under city code, the city introduced pending legislation to eliminate that land use from the applicant's zone. The city thereafter reviewed the application but wrongfully limited the scope of its review to only those activities reflected by the information shown in the application as opposed to all land use regulations applicable to the application as a defined land use.

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The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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### ADVISORY OPINION

Advisory Opinion Requested By: Recycled Earth, LLC

Local Government Entity: Ogden City

Applicant for Land Use Approval: Recycled Earth, LLC

Type of Property: M-2 Manufacturing and Industrial

Date of this Advisory Opinion: August 27, 2020

Opinion Authored By: Richard B. Plehn, Attorney  
Office of the Property Rights Ombudsman

### ISSUE

Is the scope of vested rights in a complete land use application for a conditional use permit, as it relates to later pending ordinances, limited to the information shown in the application, or does it include the categorical land use identified in the application?

### SUMMARY OF ADVISORY OPINION

Recycled Earth submitted a complete land use application to Ogden City requesting approval of a waste transfer station—a defined land use under Ogden City Code that was allowed as a conditional use in the M-2 zone at the time the application was submitted. The information shown in Recycled Earth’s application, as submitted, identified certain proposed activities related to a waste transfer station, but excluded the handling of municipal solid waste, specifically.

Subsequently, Ogden City initiated proceedings to remove waste transfer stations as conditionally permitted uses in the M-2 zone altogether, and thereafter reviewed the application refusing to consider any handling of municipal waste as a waste transfer station due to the ordinance change, and based upon the information in the application. Because Recycled Earth’s application was categorically a request to operate a waste transfer station, Recycled Earth has a vested right to substantive review of its application under all land use ordinances applicable to waste transfer stations in effect when the complete application was submitted.

## 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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 Marie Bradshaw Durrant, counsel for and on behalf of, Recycled Earth, LLC, on June 24, 2019. A copy of that request was sent via certified mail to Tracy Hansen, Ogden City Recorder, 2549 Washington Blvd, Suite 210, Ogden Utah 84401 on July 1, 2019.

## EVIDENCE

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

1. Request for an Advisory Opinion, submitted by Marie Bradshaw Durrant, counsel for Recycled Earth, LLC, received on June 24, 2019, and together with attached memorandum and accompanying attachments labeled Exhibit A through Exhibit P.
2. Ogden City Response to Recycled Earth's Advisory Opinion Request, received August 25, 2019, with accompanying attachments labeled Exhibit 1 through Exhibit 17.
3. Recycled Earth LLC's Reply In Support of Request for Advisory Opinion, received October 29, 2019.
4. Ogden City Response to Recycled Earth's Reply, received November 15, 2019.
5. Additional documents from Ogden City, received by email April 6, 2020.
6. Recycled Earth's Supplemental Brief, received June 6, 2020.
7. Ogden City Response to Ombudsman Email Request and Recycled Earth's Supplemental Brief, received June 22, 2020.

## BACKGROUND

Recycled Earth LLC is a Utah company with its principal operation at property located in Ogden City ("City") zoned M-2 for manufacturing and industrial use. Recycled Earth began its operations in May 2010 when it received a conditional use permit from Ogden City to operate a "recycling center/salvage yard". In the M-2 manufacturing zone, a Junk or Salvage Yard (or Recycling Processing Center)<sup>1</sup> is listed as a conditional use.<sup>2</sup> Recycled Earth described the

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<sup>1</sup> While Ogden City Code Section 15-22-2 lists Recycling Collection Center and Junk or Salvage Yard in its table of uses, there is no mention of Recycling Processing Centers as a use in any zone. Reading the Ogden City Code as a harmonious whole, "Recycling Processing Center" is synonymous with "Junk or Salvage Yard" for purposes of

intended use as a concrete/asphalt recycling operation to recycle demolition material such as wood, shingles, glass and sheetrock.

One of the conditions imposed in the 2010 permit indicated that the types of material must be limited to “basic construction and demolition materials considered non-hazardous by the EPA,” based on the intended use as presented. Over the next few years, Recycled Earth received an amended conditional use permit in January 2012 to install weighing scales and a scale house on site, and again in November 6, 2013 for the construction of a baling building and a storage building for baling of plastic, paper/cardboard, and light metals.

In March 2014, the City had become aware that Recycled Earth’s operations had assumedly began acting as a waste transfer station for recycled items by receiving residential recycle collections from Roy City. The City sent the company a letter stating that if this was true, receiving these household type items was outside of the permissions of the company’s 2010 approval for recycling basic construction and demolition materials, and the company was operating as a waste transfer station under Ogden City zoning code which required a conditional use permit and was subject to other code requirements specific to waste transfer stations.

The City asked the company to clarify its future plans so that its permissions could match up with actual activities on site, and asked the company to provide a list of items that will be recycled and those that will be transferred. Recycled Earth responded by providing a list of recyclable items to be recycled, baled, and transferred to a refiner or more specialized recycler. The company also identified a list of handled, non-recyclable items/materials that would be rejected and transferred, which included certain normally recyclable items that weren’t recovered through the current recycling process for reasons that they are heavily mixed or contaminated by soil, as well as other non-recyclable materials.

In August 2014, Recycled Earth submitted a conditional use permit application, but failed to include a formal site plan and accompanying fee for site plan review, as required by city code. Recycled Earth followed up on the application in October, and the City explained the application was deficient. On October 30, 2014, Recycled Earth submitted a new application with the required site plan, and paid all applicable fees.

The October 2014 application was labeled as “Ogden Recycling and Transfer Station,” and described the site as intended to be used to “dump, process, and transfer nonhazardous material.” The application included a site plan depicting two proposed buildings, respectively described as “Transfer Building” and “Bailing [sic].” The title of the site plan was *Recycled Earth Transfer Station*. In an attached letter, the operation is described as desiring to be a one-stop recycling center, as in the course of dealing with construction and demolition waste, Recycled Earth found

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Section 15-22-2. See OGDEN CITY CODE § 15-2-19 (defining Recycling Processing Center to include junk or salvage yard where processing recyclable material is included). See also OGDEN CITY CODE § 15-23-2(G)-(H) (providing for special regulations for “Junk Or Salvage Yards And Recycling Processing Centers,” jointly, while regulating “Recycling Collection Centers” separately).

<sup>2</sup> OGDEN CITY CODE § 15-22-2 (Ord. 2015-4, 2-24-2015). This Office has only been provided with a historical version of this code section dating back to February 2015, but will assume that the prior ordinance in effect at the time of Recycled Earth’s 2010 conditional use application was unaltered in that it provided for this use as a conditional use.

it encountered material that cannot be recycled, and considered itself necessarily a transfer station to handle both recyclables and unrecyclables from construction waste.

In November 2014, city planning officials met with Recycled Earth regarding the application to discuss an issue with existing code requirements for waste transfer station queuing lanes for scales that could not be met by the current site. The parties discussed that a zoning amendment was needed to allow the application to move forward. In December 2014 the company submitted a petition to amend the City's zoning ordinance to shorten the queuing distance for waste transfer stations.

In reviewing the ordinance change petition, the City's planning commission described the petition as a request from Recycled Earth to "expand [its] recycling operation to include waste transfer of certain materials" to operate as a "transfer station that would run in conjunction with the 'Recycled Earth' recycling center." The review identified Recycled Earth's proposed waste transfer station as the only such use within city limits, with the only comparative example being the Weber County Transfer Station in unincorporated Weber County. While the petition before the planning commission was limited to changing the ordinance on queuing distance generally, it discussed Recycled Earth's operation at length being the only relevant property subject to the ordinance change, including discussion that a waste transfer station was a conditional use and permissions could be revoked in the case of public impact from queuing-related issues. The City Council heard the petition on February 17, 2015, and passed the ordinance change unanimously.

While the City had noted that the conditional use permit application had been waiting for the zoning amendment to move forward, once the ordinance change passed, the City alleges that Recycled Earth represented that it was holding off on further activity on the 2014 conditional use permit application due to lack of funding to provide additional plans to build the proposed buildings.

In early 2017, Recycled Earth started handling Weber County's residential and commercial recycling and began handling different types of materials in residential single stream, including municipal solid waste, which brought unforeseen issues. The company realized that it needed to move forward with its master plan and in March 2017 applied for a building permit for "New Bailing [sic] Building" and a "New Transfer Building," which it received in May 2017, and in August 2017 applied for a permit to finish the interior of the baling building, granted in October 2017.

At this point, Recycled Earth appears to have mistakenly interpreted the City's granting the ordinance change and approving its building permits as an approval of its 2014 conditional use application. Believing it now had the City's approval to operate as a waste transfer station, in January 2018 Recycled Earth updated its state recycling permit to include transfer activities with the Utah Division of Solid and Hazardous Waste, citing the City's approval of its operation.

In May 2018, following citizen complaints received about Recycled Earth's operations, the City investigated unpermitted property uses on site and issued a Notice of Code Violation. In response to the violation notice, on May 31, 2018, Recycled Earth sent a letter to the City stating it was unaware that approval of its October 2014 application was unresolved. The letter further

explained that while originally it did not want to deal with wet food waste, once it started handling residential single stream recycling, it found that it by nature began receiving municipal solid waste which initially caused some unforeseen issues, but that it was working to mitigate the problems. The letter noted that with modern technology, it had been researching advanced processes that would allow it to turn wet waste, plastics, paper and food waste into compost. The letter therefore made clear that Recycled Earth intended to include the handling of these additional waste materials in moving forward with the unresolved 2014 conditional use application as a waste transfer station.

Days after this letter, on June 5, 2018, the City sent a Cease and Desist Letter re: Operation of Unapproved Waste Transfer Station. The letter stated that Recycled Earth's prior conditional use permissions did not allow it to operate as a waste transfer station, in that the company has never received any permission to handle general solid waste. The City additionally noted, however, that "[a]lthough a conditional use permit application for a waste transfer station was submitted in October 2014, that application was never approved."<sup>3</sup> Included with the letter was a Notice of Pending Ordinance, also dated June 5, 2018, to remove waste transfer station as a conditional use in the M-2 zone.

The City's planning commission finally met on July 11, 2018 to consider the 2014 application, and described the request as being limited to expanding the current permitted uses to receive additional recyclable materials, and that accepting waste as a transfer station would not be a valid conditional use based on the pending June 5, 2018 regulations removing waste transfer stations from the M-2 zone. On August 1, 2018, the planning commission reviewed and approved an amended conditional use permit for Recycled Earth to expand its recycling operation from a construction and demolition ("C&D") collection and recycling center to a full recycling collection and processing center, excluding vehicle-related materials and mixed commercial waste or municipal waste. The City imposed a condition that the building proposed as a transfer building could not be approved and used for any waste transfer as per city definition.

The proposed ordinance change to remove waste transfer stations was scheduled to be heard by the Ogden City Council in November 2018. Prior to the hearing, Recycled Earth sent the City Council a letter, through counsel, asking it to deny the change to the waste transfer station ordinance, and asserted Recycled Earth's vested rights to operate a waste transfer station under its 2014 application. The Ogden City Council approved the ordinance change removing waste transfer stations as a conditional use in the M-2 zone.

Recycled Earth LLC has requested that the Ombudsman provide an Advisory Opinion to determine whether it has vested rights to operate as a waste transfer station according to its conditional use application.

## ANALYSIS

Utah's Municipal Land Use Development and Management Act (LUDMA) grants land use applicants certain entitlements through the land use application process. These entitlements

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<sup>3</sup> Ogden City Letter to David Rawson, dated June 5, 2018.

create vested rights against subsequent changes to the law that might directly affect the proposed land use prior to a final decision on the application.<sup>4</sup>

The parties agree that Recycled Earth submitted a complete land use application in October 2014, and therefore triggered vested rights, but disagree as to the nature of those rights. Since submitting its request for an Advisory Opinion, Recycled Earth has had a number of changes to legal counsel, and its legal position has somewhat evolved over the course of its submissions. However, overall, Recycled Earth asserts it has secured a vested right to operate a Waste Transfer Station as an entitlement.<sup>5</sup> The City, however, believes that Recycled Earth's vested rights were limited to the information shown in the 2014 application, which the City alleges merely proposed limited transfer-related activities as an expanded recycling operation, so no vested rights to operate a waste transfer station may be established, and the City properly reviewed the application and approved a permit for an expanded recycling operation only.

Recycled Earth appears to overestimate the vesting effect of its 2014 application. It does not automatically entitle the application to approval. Rather, it serves to entitle the application to substantive review under the ordinances in place at the time of the application without regard to the City's later introduction of pending legislation that would affect the application.<sup>6</sup> If the application vests for being complete, the City must still substantively review Recycled Earth's request to operate a waste transfer station as a conditional use pursuant to applicable land use regulations and development standards. If reasonable conditions are imposed or can be proposed to substantially mitigate its detrimental effects, it then must be approved.<sup>7</sup>

The City, on the other hand, artificially narrows its ordinances to the detriment of Recycled Earth's vested rights, and with a certain measure of mental gymnastics, attempts to interpret the 2014 application to be something other than what it is—an application to operate a waste transfer station as a conditional use within in the M-2 zone. Not only does the City concede that the application was complete in October 2014, but the City's current argument that Recycled Earth's 2014 application was limited to a request for an expanded recycling operation is a sudden reversal from the many prior instances up until June 2018 where the City referred to and considered the application as a request for a waste transfer station.

Recycled Earth is entitled to substantive review of its 2014 application as to all land use permissions applicable to waste transfer stations pursuant to the ordinances at the time of submittal, including the handling of municipal waste. Any aspect of denial of Recycled Earth's proposed use needs to be based on applicable land use standards and not on what information may have been included—or excluded—in application documents that otherwise sufficiently identified the categorical land use to be substantively reviewed.

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<sup>4</sup> UTAH CODE ANN. § 10-9a-509(1)(b).

<sup>5</sup> Recycled Earth has gone so far as to argue that the City should be estopped from denying the use and that to do so constitutes a constructive taking. However, the taking argument was not sufficiently briefed, and appears to be a nonstarter in that it is clear that Recycled Earth continues to have economic use of its land despite Ogden's denial of its use as a waste transfer station. *See e.g., Diamond B-Y Ranches v. Tooele County*, 2004 UT App 135, 91 P.3d 841.

<sup>6</sup> UTAH CODE ANN. § 10-9a-509(1).

<sup>7</sup> UTAH CODE ANN. § 10-9a-507.

## I. Recycled Earth's 2014 Application Proposed A Waste Transfer Station

As this dispute depends on whether Recycled Earth's 2014 application adequately proposed to operate a waste transfer station, it is important to understand what a waste transfer station entails.

Ogden City Code defines waste transfer station as “[t]he use of any lot, portion of a lot, or tract of land for the receiving, processing and immediate off site disposal of *solid waste* to a permanent disposal site. This may include the temporary collection of recyclable materials and household hazardous waste as an accessory use.”<sup>8</sup> The main distinction, then, of what constitutes a waste transfer station involves the handling of solid waste, specifically.

“Solid waste” is broadly defined by Ogden City Code to include “spent, useless, worthless or discarded materials or materials stored or accumulated for the purpose of discarding; materials that have served their original purpose . . . It is not intended to include recyclables as long as such materials are being properly contained, collected, disposed, or reused.”<sup>9</sup> Solid waste is therefore contrasted with recyclable materials, which is defined as material intended for reuse.”<sup>10</sup>

Recycled Earth's 2010 conditional use permit allowed it to operate as a Recycling Processing Center which, by definition, is a “facility that accepts, stores or processes recyclable materials.”<sup>11</sup> While “recyclable materials” is defined to include a wide range of materials, Recycled Earth's 2010 conditional use permit was limited to “basic construction and demolition materials considered non-hazardous by the EPA.” It follows, then, that any expanded use by Recycled Earth to handle materials other than basic construction and demolition materials would require an amended conditional use permit.

The City became aware in 2014 that Recycled Earth was not limiting its operation to basic construction and demolition materials. It was the City's assessment that Recycled Earth's then existing operation required approval as a waste transfer station, specifically, and it was the City's suggestion that Recycled Earth submit an application for a conditional use permit for the expanded use so that its activities matched the approvals granted.

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<sup>8</sup> OGDEN CITY CODE § 15-2-24 (Ord. 2011-2, 1-4-2011) (emphasis added).

<sup>9</sup> Solid Waste is defined as: “Garbage, refuse, trash, rubbish, community waste, trade waste, hazardous waste, industrial waste, market waste, construction and demolition waste, dead animals, sludge, liquid or semiliquid waste; other spent, useless, worthless or discarded materials or materials stored or accumulated for the purpose of discarding; materials that have served their original purpose; or waste material resulting from industrial, manufacturing, mining, commercial, agricultural, residential, institutional, recreational or community activities. It does not include solid or dissolved materials in domestic sewage or in irrigation return flows, or discharges from which a permit is required under Utah Code Annotated title 26, chapter 11, as amended, or its successor, or under the federal water pollution control act, 33 USC section 1251 et seq., or successor sections. It is not intended to include recyclables as long as such materials are being properly contained, collected, disposed, or reused.” OGDEN CITY CODE § 12-1-1 (Ord. 2002-73, 12-17-2002).

<sup>10</sup> Recyclable Material includes, but is not limited to, “glass, plastics and synthetic materials, paper products such as newspaper, stationery, scrap paper, computer paper and corrugated cardboard, rubber, batteries, ferrous and nonferrous metals, concrete, asphalt, wood, building materials, or any “junk or salvage material”, as defined herein, which are intended for reuse, remanufacture, or reconstitution for the purpose of using in altered form. Recyclable material does not include refuse or hazardous materials nor does it include coins, precious metals or commercial grade precious metals if they are the sole recyclable material.” OGDEN CITY CODE § 15-2-24 (Ord. 2011-2, 1-4-2011).

<sup>11</sup> OGDEN CITY CODE § 15-2-19 (Ord. 2011-2, 1-4-2011).



At the time of Recycled Earth’s 2014 application, it had informed the City that it intended to handle both recyclable and non-recyclable materials. Recyclable materials were to be recycled, baled, and transferred to a refiner or more specialized recycler. However, Recycled Earth intended to also receive some non-recyclable materials, which would be temporarily stored for transfer off-site to be discarded. For this reason, Recycled Earth considered itself a transfer station.

The introduction of handling non-recyclable materials as “solid waste” excludes Recycled Earth’s proposed use from the definition of Recycling Processing Center, and requires permission as a waste transfer station under Ogden City Code, as was suggested by the City. It was therefore appropriate and necessary that Recycled Earth submit a land use application for a conditional use permit to operate a waste transfer station. Recycled Earth’s 2014 application did exactly that, and the City’s contention that the application was merely a request for an expanded recycling operation is without support.

## **II. Recycled Earth is Entitled to Substantive Review Under All Ordinances Applicable to Waste Transfer Stations**

Ogden City concedes that Recycled Earth has vested rights, but alleges that only the specific activity described in the application is vested. Recycled Earth’s 2014 application materials specifically stated that it did not want to deal in “mixed wet garbage, only in, business, construction or presorted reusable waste.”

The City makes an argument that the plain language of the 2014 application served to unilaterally limit the scope of Recycled Earth’s vested rights, and that by excluding any request to handle what the City terms municipal or single-stream solid waste, Recycled Earth’s application can establish no vested right to handle that type of material against the City’s 2018 ordinance to remove waste transfer stations from the M-2 zone—without having first amended the application to clarify the additional activities of handling solid waste. As solid waste runs the gamut of all types of trash, garbage, rubbish, sludge, and other landfill-destined materials, the types of material proposed to be handled by a waste transfer station makes a difference as to its potential detrimental impacts, and it is certainly understandable why a municipality would be concerned about just what activity exactly is vested by an application.

However, Section 10-9a-509(1) of LUDMA provides that a land use applicant who has submitted a complete land use application is entitled to substantive review of the application under the land use regulations “(A) in effect on the date that the application is complete; and (B) *applicable to the application or to the information shown on the application.*”<sup>12</sup>

The plain language of Section 10-9a-509 does not support the City’s limitation argument. The semantic canon of statutory construction followed by Utah courts provides that the use of the word “or” in subsection (B), above, is disjunctive.<sup>13</sup> This means that an applicant vests as to land

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<sup>12</sup> UTAH CODE ANN. § 10-9a-509(1)(a)(i) (emphases added).

<sup>13</sup> See, e.g., *Mike’s Smoke, Cigar & Gifts v. St. George City*, 2017 UT App 20, ¶ 22, 391 P.3d 1079 (Finding no ambiguity in Analog statute because the use of “or” in a subsection list of elements was disjunctive); see also,

use regulations applicable *either* to the application or the information shown therein. It does not anticipate that an applicant vests only as to regulations “applicable to the application” *unless otherwise limited* by “information shown on an application.” Such a conjunctive reading runs the risk of causing ambiguity between the *type* of application and *information shown* in an application resulting in different land use regulations being applicable to the proposed use for purposes of vesting. Inasmuch as zoning laws are in “derogation of a property owner’s common-law right to unrestricted use of his or her property . . . [and] provisions permitting property uses [are therefore] liberally construed in favor of the property owner,”<sup>14</sup> a disjunctive reading of the vesting statute is also consistent with important constitutional avoidance principles.<sup>15</sup>

Recycled Earth’s 2014 application, categorically, was a request to operate a waste transfer station, as it proposed to handle certain unrecyclable materials. A waste transfer station, as defined, handles a variety of solid waste material. Where a land use application is a request for a defined land use, any provision of relevant regulations regarding that use are *applicable to the application* for purposes of vesting.

### **III. Subjecting the Application to Pending Legislation Introduced After Submission of a Complete Application Changed the Rules of the Application Midstream**

The vested rights rule aims to accomplish fairness in balancing public and private interests.<sup>16</sup>

It is well established that an owner of property holds the property subject to zoning ordinances enacted pursuant to a state’s police power.<sup>17</sup> LUDMA affords cities significant authority to regulate land use by ordinance and zoning districts. Those zoning districts and the laws governing land use within those districts changes from time to time according to the evolving needs and desire of the area and larger community, and it is understood that a property owner “has no vested right to ‘continuity of zoning.’”<sup>18</sup>

In light of changing public interests, the vested rights rule ensures some predictability to allow property owners to be able to plan to develop property “in a manner permitted by existing zoning regulations with some degree of assurance that the basic ground rules will not be changed in midstream.”<sup>19</sup> Prior to an application being submitted, a municipality’s legislative body will have had enacted land use ordinances after weighing broad policy concerns. Once an application is submitted to use land according to those regulations, the existing land use ordinances and

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*Caster v. W. Valley City*, 2001 UT App 220, ¶ 6, 29 P.3d 22 (Using the disjunctive word “or,” rather than the conjunctive word “and,” permitted mere storage or keeping of motor vehicles as a use under a statutory definition).

<sup>14</sup> *Patterson v. Utah County Bd. of Adjustment*, 893 P.2d 602, 606 (Utah Ct. App. 1995).

<sup>15</sup> “The canon of constitutional avoidance is an important tool for identifying and implementing legislative intent. Its premise is a presumption that the legislature ‘either prefers not to press the limits of the Constitution in its statutes, or it prefers a narrowed (and constitutional) version of its statutes to a statute completely stricken’ by the courts.” *Mike’s Smoke, Cigar & Gifts*, 2017 UT App at ¶ 20 (disjunctive reading of statute did not run afoul of constitutional avoidance canon).

<sup>16</sup> *Western Land Equities v. Logan*, 617 P.2d 388, 391 (Utah 1980).

<sup>17</sup> *Id.* at 390-391 (citing *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926)).

<sup>18</sup> *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 258 n.19 (Utah Ct. App. 1998) (quoting 1 KENNETH H. YOUNG, ANDERSON’S LAW OF ZONING § 4.28, at 325, 327 (4<sup>th</sup> ed. 1996)).

<sup>19</sup> *Western Land Equities*, 617 P.2d 388 at 396.

development standards must be applied to the application. A municipality is not at liberty to make land use decisions in derogation of its enacted ordinances.<sup>20</sup> Therefore, it is incumbent on a city “to act in good faith and not to reject an application because the application itself triggers zoning reconsiderations that result in a substitution of the judgment of current city officials for that of their predecessors.”<sup>21</sup>

When Recycled Earth applied for a conditional use permit in 2014, a waste transfer station was listed as a conditional use within the M-2 zone, though prior to Recycled Earth’s application, no waste transfer station actually existed in the M-2 zone, or anywhere else in Ogden City limits for that matter. Waste transfer stations, by City definition, handle solid waste, which spans various items and substances from household garbage to dead animals, to sludge and hazardous waste.<sup>22</sup> Having enacted a zoning scheme that allowed waste transfer stations as conditional uses, Ogden City had previously made the determination that this activity was, at least hypothetically, desirable in the designated zone subject to reasonable conditions.

The City issued a violation notice in May 2018 and reminded Recycled Earth that the handling of municipal solid waste was only allowed upon a conditional use permit for a waste transfer station, and that the company’s October 2014 “conditional use permit application for a waste transfer station” had never been approved. The City therefore seemed to fully acknowledge that Recycled Earth’s unpermitted activity *could* be remedied with the approval of the conditional use permit application that was already submitted.

Recycled Earth responded on May 31, 2018 that it had been unaware that approval had never been granted, and wanted to finish processing the application as needed, but made clear that it intended to include the handling of municipal waste as part of that approval, according to changing business needs since the application had been submitted. Days later, on June 5, 2018, Ogden City issued notice of pending legislation to remove waste transfer stations as a conditional use in the M-2 zone.

Considering there existed no other waste transfer station within the City at the time, the City’s move to eliminate waste transfer stations appears to be a clear attempt to stop Recycled Earth’s request to handle municipal waste as part of its application to operate a waste transfer station, perceivably based on a changed attitudes toward this use in the M-2 zone. Because Recycled Earth’s 2014 application categorically was a request to operate a Waste Transfer Station, the City’s subsequent move to introduce pending legislation to eliminate the use applied for changed the rules of Recycled Earth’s application midstream. This was done in derogation of Recycled Earth’s vested right to substantive review for the land use applied for under the applicable land use regulations then in existence.

## CONCLUSION

Recycled Earth submitted a complete land use application in 2014 to operate a waste transfer station. Prior to substantive review, the City initiated pending legislation to change the land use

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<sup>20</sup> *Thurston v. Cache County*, 626 P.2d 440, 444-45 (Utah 1981).

<sup>21</sup> *Western Land Equities*, 617 P.2d 388, at 396 (Utah 1980).

<sup>22</sup> OGDEN CITY CODE § 12-1-1 (Ord. 2002-73, 12-17-2002).

ordinance applicable to the application and wrongfully reviewed Recycled Earth's application under the new regulations. Recycled Earth is entitled to have its application substantively reviewed under the land use ordinances in place at the time of the application, and applicable to the application, which allowed waste transfer stations—including the handling of municipal waste—as a conditional use in the M-2 zone.

Jordan S. Cullimore, 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.**

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

## 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 § 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:

Tracy Hansen, City Recorder  
City of Ogden  
2549 Washington Blvd, Suite 210  
Ogden, Utah 84401

On this 28<sup>th</sup> Day of August, 2020, 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.

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Office of the Property Rights Ombudsman