Advisory Opinion #43

Parties: Duane Johnson, D & D Concrete, Inc and Morgan County

Issued: June 12, 2008

TOPIC CATEGORIES:

E: Entitlement to Application Approval (Vesting)
F: Complete Land Use Application
J: Requirements Imposed Upon Development

A land use applicant is entitled to approval if the application conforms to land use regulations in effect when a complete application is submitted. There was no evidence that the proposal failed to comply with the requirements in effect when the application was submitted. A zoning change enacted after the application did not alter the applicant's vested rights. The County's decision denying the application does not meet the "substantial evidence" test and is therefore arbitrary and capricious.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Duane Johnson D&D Concrete, Inc. Soderby, LLC by Melven E. Smith, Smith Knowles
Property Owner / Developer:	Duane Johnson
Applicant for the Land Use Approval:	Nilson Homes
Project:	Aspen Meadows Phase II Subdivision
Date of this Advisory Opinion:	June 12, 2008
Opinion Authored By:	Brent N. Bateman, Lead Attorney, Office of the Property Rights Ombudsman

Issues

Is the Developer entitled to approval of its land use application for the Aspen Meadows Phase II Subdivision under a zoning designation enacted by the County in December, 2006?

Summary of Advisory Opinion

Nilson Homes is entitled to approval of its application. On December 19, 2006, the Morgan County Council changed the zoning of the property from A-20 & RR-1 zoning to CD (Central Development). The record indicates that Nilson Homes submitted a complete land use application, which appears to conform to the requirements of the County's land use maps, zoning map, and applicable land use ordinance in effect. Therefore, as of that date, Nilson Homes became entitled to approval of its application by operation of UTAH CODE ANN. § 10-9a-509(1)(a)(i).

In addition, Morgan County's denial Nilson Homes concept plan application was arbitrary and capricious, because it was not supported by substantial evidence on the record.

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

The request for this Advisory Opinion was received from Melven E. Smith on May 22, 2008. A letter with the request attached was sent via certified mail, return receipt requested, to Jann L. Farris, Morgan County Attorney, at 48 Young Street, P.O.Box 886, Morgan, Utah 84050. The return receipt was signed and was received on May 27, 2008, indicating that Morgan County had received it. A response was received from Sherrie Christensen, Morgan County Community Development Director via email on June 6, 2008.

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 received May 22, 2008 at the Office of the Property Rights Ombudsman by Melven E. Smith, including exhibits.
2. Response email from Sherrie Christensen, Morgan County Community Development Director, received June 6, 2008.

Assumed Facts

For the purposes of the Opinion, it is assumed that there are no objections to approving the subdivision application other than the issues addressed herein. No objections have been identified by either party.

Background

On October 19, 2006, the Morgan County Council held a noticed public hearing to consider Duane Johnson/Nilson Homes' ("Nilson" or "Developer") petition to rezone approximately 112 acres (the "Property") from A-20 & RR-1 zones to the Central Development ("CD") zone. The Morgan County Planning Commission recommended that the County Council approve the zone change in conjunction with a "limited concept plan" application for a mixed use development. The record indicates that the limited concept plan application showed a "bubble-type" plan, generalizing areas of multi-family, single family and commercial uses, rather than showing specific uses, layouts, and densities. After the public hearing, the City Council approved the

rezone petition "in conjunction with a limited concept plan application for a mixed use development."

Throughout 2007, Morgan County sought and received assistance from American Institute of Architects for the professional design of the Mountain Green Town Center. This design process utilized the work of design professionals, architects and planners, and took several months to complete. The ultimate design had a direct effect on Nilson's potential development of the Property. It appears that the Mountain Green Town Center design remains in draft form and was not formally adopted into the County ordinances.

On January 3 and 17, 2008, the Morgan County Planning Commission reviewed a revised concept plan submitted by the Developer. The revised concept plan incorporated only 38 of the 118 acres included in the original December 19, 2006 "limited concept" plan. The revised concept plan no longer included the ambiguous "bubble" diagram, but included specific dwelling unit, street, and open space layouts, including a proposal for 260 town home units. The Planning Commission required that the Developer make certain revisions to the concept plan, some in consideration of the Mountain Green Town Center redesign. On March 6, 2008, the Planning Commission recommended approval of the revised concept plan to the County Council, finding that the concept plan was in accord with the General Plan, the land use ordinance, the Mountain Green Area Plan, and the draft redesign of the Mountain Green Town Center.

On March 18, 2008, the County Council denied Nilson Homes' Concept Plan Application based on findings that the concept plan was "significantly different from the limited concept approved in December of 2006 in the density and the types of units that were offered." Some members of the Council stated a belief that because a concept plan is only valid for one year, the zone change approved with the concept plan also expired.

The Developer has requested this Advisory Opinion to examine the legal status of its land use application, which it believes to be entitled to approval. The City has also raised issues regarding the ongoing validity of the zone change.

Analysis

I. Nilson Was Entitled To Approval of Its Concept Plan Application

A. The Vesting Rule under UTAH CODE § 17-27a-508

In Utah, a land use applicant is entitled to approval 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 fees have been paid. UTAH CODE ANN. § 17-27a-508(1)(a).[1] This rule, known as the "vesting rule," was adopted in Utah in 1980 in the case of *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 396 (Utah 1980), and later

[1] Statutory exceptions to this rule exist. None are relevant to this Advisory Opinion.

codified. According to *Western Land Equities*, the intent of the rule is to provide some reliability and predictability in land use regulation:

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

Id. at 396. This rule dictates how a county can control the land use activities within its boundaries. If restrictions or guidelines on development are desired, the County may adopt ordinances to impose such restrictions and guidelines. Such ordinances usually take the form of zoning designations. Once properly enacted, those ordinances must be followed by land use applicants. Applicants who do follow those enacted requirements are *entitled to approval* of their application. In other words, once an application that complies with the ordinance in effect has been submitted, the County has no discretion to deny the application. If the County adds new requirements or change the ordinance, those changes are not applicable to the application. Applicants have an appropriate expectation that their application will not be denied midway through the process by unstated rules.

B. The Record Indicates That the Application Was Entitled To Approval

The record in this case indicates that Nilson's application for Concept Plan approval conformed to the requirements of the Morgan County's land use maps, zoning map, and applicable land use ordinance in effect at the time that it was submitted. On March 16, 2008, the Morgan County Planning Commission made a specific finding of fact that the "application is in accord and consistent with the General Plan and with the policies and provisions of the PUD." In addition, County Planning Staff recommended approval of the application based upon its finding that the application was in accord with the General Plan, the land use ordinance, the Mountain Green Area Plan, and the draft redesign of the Mountain Green Town Center. No evidence to the contrary has been submitted. Most importantly, in denying Nilson's application, the County Council did not cite any aspect of the application which did not conform to the requirements of the Morgan County's land use maps, zoning map, and applicable land use ordinances. Rather, the only reason given for the denial by the County Council was that the revised concept plan was significantly different from the limited concept plan.[2] Those differences must be shown to violate the CD zone regulations to justify denying the application. Because the application conformed to the requirements of the Morgan County's land use maps, zoning map, and applicable land use ordinances, Nilson was entitled to approval of its concept plan application.

[2] According to the minutes of the Morgan County Council Meeting of December 19, 2006, the Council approved the following motion: "Motion by Member Sanders to approve rezone petition for 112 acres south of Old Highway Road from A-20 & RR-1 zoning to CD (Central Development) in conjunction with a limited concept plan application for a mixed use development."

II. The County's Denial of the Application was Arbitrary and Capricious

B. Administrative vs. Legislative Acts

In Utah, a land use decision is upheld on appeal unless it is arbitrary, capricious, or illegal. UTAH CODE ANN. § 17-27a-801. An examination into whether a land use decision is arbitrary and capricious must always begin by determining whether the decision is legislative or administrative. *Bradley v. Payson City Corp*., 2003 UT 16.[3] This distinction is vital for many reasons; primarily because the two types of decisions are entitled to varying deference when being reviewed on appeal. According to the Utah Code, a legislative decision such as a zoning change will almost always be upheld on appeal, along as it is reasonably debatable that the action promotes the general welfare. UTAH CODE ANN. § 17-27a-801(3)(b). Accordingly, the County has great deference to make such decisions. However, an administrative decision, such as subdivision approval or a conditional use permit, will be overturned if it is not supported by substantial and factual evidence, which must be included in a formal record. UTAH CODE ANN. § 17-27a-801(3)(c).

In the land use context, *substantial evidence* is defined as "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Bradley v. Payson City Corp.*, 2003 UT 16 (quoting *First Nat'l Bank of Boston v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990)). The "substantial evidence" must be located in the record in order to be considered. *Wadsworth Construction, Inc. v. West Jordan*, 2000 UT App 49.

The Nilson application involves two related but separate acts by the County. The first is the application to change the zoning on the property to the CD zone. The second involves approval of the concept plan application. Although it appears to be common throughout the state for a zoning application to be made and considered simultaneously with a subdivision application,[4] each of these land use matters must be approached independently. Two decisions must be made, and each decision must be made according to the procedures and standards applicable to that decision.

Approval of the zoning change, granted by the County in October, 2006, was a legislative decision. As a legislative decision, this zone change will not be arbitrary and capricious if it is

[3] Utah Courts have expended significant effort in clarifying the difference between legislative and administrative decisions by local governments. *See, e.g., Bradley v. Payson City Corp*., 2001 UT App 9 (vacated 2003 UT 16); *Harmon City, Inc. v. Draper City*, 2000 UT App 31; *Wadsworth Construction v. West Jordan*, 2000 UT App 49. To summarize, a legislative act is a decision by a local legislative body that results in the creation of a local law or rule. Legislative acts include the adoption of a new ordinance, amendment to an existing ordinance, changing zoning, adoption of an official policy, rule, or plan, or annexation of property. Conversely, an administrative act generally concerns not the creation of new law, but the interpretation or application of existing law. Administrative acts include granting conditional uses, granting variances, and approving subdivision applications. Zoning decisions are legislative acts, whereas subdivision application approvals are administrative acts.

[4] This approach has some merit. An understanding of the contemplated subdivision plan may greatly assist the County when considering a zone change request on a specific parcel.

reasonably debatable that the zone change served the public welfare. Because it is a legislative decision, it cannot be changed except through another legislative act by the County. *Bradley v. Payson City Corp.*, 2003 UT 16, ¶13. On the other hand, approval of the concept plan application, which does not create new law but instead applies the existing ordinances to the particular parcel, is an administrative act. A decision to deny a concept plan application is arbitrary and capricious if it is not supported by substantial evidence in the record.

B. The Record Does Not Contain Sufficient Substantial Evidence to Deny the Application

In denying the Nilson's application, the Morgan County Council's only finding was that "it is significantly different from the limited concept that was approved in December of 2006 in the density and the types of units that were offered." These findings are insufficient to justify denial of the application. The Council completely fails to indicate how the proposed density and types of units justify denial of the application. No evidence is provided to show that the proposed density and types of units are detrimental to the community or are otherwise undesirable. Most importantly, the Council did not indicate any respect to which the proposed density and types of units are noncompliant with the policies and requirements of the CD zone. By enacting the CD zone, the County established the development parameters that it considered desirable within that zone. Assuming that the proposed density and types of units comply with the CD zone, the differences between the present and previous applications are irrelevant. The fact that the new Concept Plan is different from the previous concept plan does not provide sufficient relevant evidence to convince a reasonable mind that denial of the application is justified. Therefore, in light of the foregoing, County Council's decision to deny Nilson's concept plan application was not supported by the evidence and was therefore arbitrary and capricious.

C. The CD Zoning Designation Remains Valid

The County questions whether the December, 2006 zone change remains valid. There seems to be two reasons why this has arisen. The first involves an apparent question by members of the County Council regarding whether the zone change expired after one year with the expiration of the previous limited concept plan approval. As discussed above, a zone change and a subdivision application approval are different decisions, made under different authority, subject to different rules of approval and review standards. As such, the rules applicable to one (concept plan approval) cannot be used to invalidate the other (zone change). Moreover, once a zoning designation is enacted, it can only be changed or terminated by another legislative act. *See* UTAH CODE ANN. § 17-27a-503; *Bradley v. Payson City Corp.*, 2003 UT 16. A zoning designation cannot expire without a legislative enactment that it do so.[5]

The second question concerning the validity of the zoning designation concerns the apparent failure to record the zoning change at the time that it occurred. According to the County's submission, the policy by the County is "to approved [sic] and record the ordinance at the same

[5] Even if the zoning designation were to expire, the vesting rule would prevent the expiration from having any effect on a submitted land use application. Such an application would still be entitled to approval under the expired zoning designation.

time the development agreement/final plat are approved and recorded." As a result, "the ordinance enacting the zone change to the CD zone was not recorded in December of 2006." The lack of recording does not invalidate the zone change. In a recent case, *Bissland v. Bankhead*, 2007 UT 86, the Utah Supreme Court held that an ordinance is enacted when the Council votes to approve it. According the *Bissland*, the failure of a ministerial formality does not invalidate a passed ordinance:

> Petitioners thus essentially ask us to construe the statutory term "passage" as an event marked by the last ministerial formality that must be bestowed on a legislative act. This interpretation is contrary to the commonly understood meaning of passage as the event at which a legislative body conducts a vote favorable to a piece of proposed legislation. Even if we were to include within our definition of passage action by the executive branch of government, not relevant here, that might be necessary before legislation can take effect, we conclude that the plain meaning of passage contemplates events that do not include ministerial matters.

Id. at ¶9. Therefore, an ordinance is valid as of the date it is voted upon by the Council. Ministerial acts, such as recording, are not necessary to validate the ordinance. Conversely, the failure to perform a ministerial act cannot keep an ordinance from taking effect. Otherwise, the vesting rule would be impotent. A developer would not be able to rely on the zoning change, and continue investing in the development, if the developer could not count on the ongoing validity of the zone change that the County has kept in limbo by failing to record it. Accordingly, the failure to record the zone change does not render the zone change invalid. The zone change remains valid.

Conclusion

A land use application becomes entitled to approval when it conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect when a complete application is submitted and all fees have been paid. Nothing has been provided in the record to indicate that Nilson Homes' Concept Plan application did not fully conform to the ordinances. Therefore, the application has vested, and Nilson Homes in entitled to approval. In addition, the denial of the application is not supported by substantial evidence on the record. Therefore, the County acted in an arbitrary and capricious manner when it denied the application.

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

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, §13-43-205. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are 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

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

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

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

Jann L. Farris
Morgan County Attorney
48 Young Street
P.O.Box 886
Morgan, Utah 84050

On this 12th Day of June, 2008, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

_____
Office of the Property Rights Ombudsman