

Advisory Opinion #11

Parties: Michael Pierce, Utah Valley Real Estate, LLC and Pleasant Grove City

Issued: March 1, 2007

TOPIC CATEGORIES:

D: Exactions on Development

The applicant has no duty to provide land to extend a street through its subdivision. The City could impose a condition upon approval of the subdivision which would require the applicant to demonstrate that it has good and marketable title to a “gap” in the property description before selling lots. The City’s requirement of a larger 33-foot half width was not adequately supported by substantial evidence.

DISCLAIMER

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.



The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov



JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

Advisory Opinion

Advisory Opinion Requested by: Michael Pierce
Utah Valley Real Estate, LLC

Local Government Entity: Pleasant Grove City

Applicant for the Land Use Approval: Utah Valley Real Estate, LLC

Project: Olsson Subdivision
Approx. 2000 North 600 West
Pleasant Grove City

Date of this Advisory Opinion: March 1, 2007

Issue

Are the street dedication and improvement requirements proposed by the City of Pleasant Grove for the Olsson Subdivision legal conditions and exactions?

Summary of Conclusions

The applicant Utah Valley Real Estate LLC has no duty to provide land to extend 2100 North Street through its subdivision to 600 North Street. It may negotiate with the City to trade land for that purpose if the pending quiet title action concludes that the City has an interest in the disputed "gap" property and the City wishes to participate in a trade. The City could impose a condition upon approval of the subdivision which would require the applicant to demonstrate that it has good and marketable title to the "gap" before selling lots.

The City standard for residential streets is 50 feet of road width. The City's requirement of a 33 foot half width pavement of 600 West has not been adequately

supported by substantial evidence in the record that justifies a requirement higher than a normal residential street half width.

Review

The request for an advisory opinion in this matter was received by the Office of the Property Rights Ombudsman on November 13, 2006. A letter with the request attached was sent by certified mail, return receipt requested, to Pleasant Grove City on November 20, 2006. The letter was addressed to Amanda R. Fraughton, City Recorder, at the address shown on the Governmental Immunity Act Database at the Utah State Department of Commerce, Division of Corporations and Commercial Code as required by statute. A receipt for delivery of the certified letter was dated November 27, 2006.

Representatives of the City of Pleasant Grove did not respond with a preference as to who should prepare this advisory opinion, but did provide a response to the request for an advisory opinion and a number of documents and materials related to the issues on January 5, 2007. The Office of the Property Rights Ombudsman then proceeded to prepare the opinion without objection by either party, that decision by the Office being effective on January 8, 2007.

During the preparation of this opinion, I discussed the matter several times with Michael Pierce, representative of the applicant. I also discussed the matter several times with Christina Peterson, Pleasant Grove City Attorney and on one occasion with Don McCandless, attorney for Michael Pierce.

Evidence

The following documents were reviewed prior to completing this advisory opinion:

1. Request for an Advisory Opinion, filed with the Office of the Property Rights Ombudsman by Michael Pierce on November 13, 2006.
2. Letter from Craig Call, Office of the Property Rights Ombudsman, to Mike Pierce, dated June 20, 2006, together with excerpts from the Pleasant Grove City Ordinances, sections 11-3-1, Purpose of Chapter; 11-3-4, Street Standards; and 11-3-5, Block Standards. A copy of this letter was provided via facsimile to Gary Fry at Pleasant Grove City with a written request that he provide a copy to Christina Peterson.

3. Letter of December 29, 2006 from Christine M. Peterson, Pleasant Grove City Attorney to Craig Call, received January 5, 2007.
4. Engineering Review Comments – Olsson Subdivision, apparently prepared by the Pleasant Grove City Engineer and dated July 27, 2006.
5. Olsson Subdivision Zoning Map, undated. Provided by Pleasant Grove City.
6. Olsson Subdivision Aerial, undated. Provided by Pleasant Grove City.
7. Olsson Subdivision Plat A. Undated 8 ½ by 11 inch reduction. Provided by Pleasant Grove City.
8. Pleasant Grove Ordinances, Title 11, Chapter 3, Street Standards and Improvements Required and Chapter 4, Development Improvements.
9. Pleasant Grove Public Works Standard Specifications and Drawings, Chapter 2, Section 1.06 Responsibility for Public Improvements.
10. Development Agreement. Unexecuted and undated. Provided by Pleasant Grove City.
11. Cost estimates for 2100 North Extension to 600 West, Prepared by J-U-B Engineers, Inc. Undated. Provided by Pleasant Grove City.

Assumed facts

1. The individual who requested this advisory opinion represents an applicant for approval of the Olsson Subdivision within the city limits of Pleasant Grove City.
2. The proposed Olsson Subdivision consists of five lots fronting on 600 West Street at approximately 2000 North.
3. The existing 2000 North Street exists to the West of the location of the Olsson Subdivision, and currently extends from 820 West to the West boundary of the proposed subdivision, but does not continue through the parcel where the subdivision is proposed and does not therefore connect to 600 West. See exhibit “A”, Olsson Subdivision Zoning Map, attached.
4. Along the frontage of the proposed Olsson Subdivision, 600 West Street currently is paved, but not to the full 66 foot width anticipated in Pleasant Grove’s Master Street Plan. There are no curb, gutter, or sidewalk improvements.
5. There is no defined and recorded right of way for 600 West Street along its frontage with the Olsson Subdivision. The land occupied by the street is part of a “gap” left between legal descriptions as conveyances were

- recorded in historic times. The County Recorder's records do not show that the "gap" is owned by any person or entity.
6. The "gap" is wider than 66 feet, and thus includes land that is not needed by Pleasant Grove City for street purposes.
 7. Some of the land area within the "gap" has been enclosed by fences and otherwise treated as part of the real property owned and controlled by Utah Valley Real Estate LLC and its predecessors.
 8. Some of the land area has clearly been used for street purposes without interruption for a period of time exceeding ten years and is thus permanently burdened by prescriptive road rights that are in favor of the public and owned and controlled by the City.
 9. Some of the land area in the "gap" has been included within the borders of the platted lots of the Olsson Subdivision. Part of the land area within the "gap" must be included in these lots or the lots would not be of sufficient size to meet the minimum square footage required by the City ordinances for approval of the plat as proposed.
 10. Utah Valley Real Estate LLC has filed a quiet title action to formally resolve its ownership of the portion of the "gap" which is included within the subdivision plat.
 11. The proposed Olsson Subdivision received conditional approval by the Pleasant Grove Planning Commission. Among the conditions imposed as part of that approval were that the property owner work out an agreement for the extension of 2100 North through the subdivision property so that it would connect to 600 West and that variances be obtained which would allow two lots of the subdivision to be smaller than allowed by the strict terms of the relevant ordinances.
 12. Variances have been obtained from the Pleasant Grove City Board of Adjustment to allow two lots to be created in a manner consistent with the preliminary plat approval. The City applied for these variances and which were granted on September 1, 2006.
 13. In order to comply with the condition of the preliminary subdivision approval related to 2100 North, the property owner and representatives of the City have attempted to negotiate an arrangement that will provide for street improvements and the extension of 2100 North to 600 West.
 14. The proposed development agreement provides:
 - a. That the developer will dedicate land for the extension of 2100 North to 600 West Street.

- b. That the City will pay for the cost of all street improvements for the extension of 2100 North, which is estimated to cost \$36,982.38.
 - c. That the City will abandon any interest in that portion of the “gap” which lies within the boundaries of the lots shown on the subdivision plat.
15. The City’s preliminary approval of the subdivision also provided that the developer must replace the asphalt surface of 600 West to the centerline, thus requiring that it provide 33 feet of street improvements on that street.

Analysis:

Right to Approval:

According to Utah Code Annotated, Section 10-9a-509(1)(a):

An applicant is entitled to approval of a land use application if the application conforms to the requirements of an applicable land use ordinance in effect when a complete application is submitted and all 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 municipality has formally initiated proceedings to amend its ordinances in a manner that would prohibit approval of the application as submitted.

In approving the preliminary plat that was proposed by the applicants for the Olsson Subdivision, the Planning Commission is deemed to have concluded that the proposed plat conforms to the requirements of the applicable land use ordinances, as conditioned in the approval process.

Conditions:

The applicant disputes two conditions imposed on the subdivision approval. First, the requirement that it dedicate land for the extension of 2100 North Street through the property to 600 West Street and second, that it pave or otherwise improve a 33 foot half width of 600 West Street.

Dedication of Land for 2100 North Street:

Real estate dedication requirements as a condition of approval for land use applications are given the most scrutiny by the courts and held to higher standards of review than other conditions and exactions on land use approvals. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994), requiring the dedication of land for flood control and a bike path; and *Nollan v. California Coastal Comm.* 483 U.S. 825 (1987), requiring the dedication of an easement for public access across beach property to the state in order to obtain a building permit for a residence. A recent Utah case, *BAM Development v. Salt Lake County*, 2004 UT App. 34 and 2006 UT 2, reemphasized the need for individualized determinations of fairness in a situation where the county demanded land to widen a busy street to accommodate future county road needs.

A property owner can refuse to dedicate private land to public use unless there is an individualized determination by the municipality involved that the dedication is both appropriate and proportionate. The relevant state statute provides:

A municipality may impose an exaction or exactions on development proposed in a land use application if:

- (1) an essential link exists between a legitimate governmental interest and each exaction; and
- (2) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

U.C.A. 10-9a-508. If a land use approval does require a dedication without proof of uniformity and proportionality, the land demanded must be compensated for. Since the creation of a new city street across lands adjoining the proposed development requires the acquisition and dedication of land to the City, it would be subject to special scrutiny by the Courts if challenged. There is no substantial evidence in the record that the proposed Olsson Subdivision creates the need for the extension of 2100 North to 600 West Street. My conclusion is that the extension of 2100 North is for public purposes and does not offset burdens created by the proposed Olsson Subdivision.

The requirement to extend 2100 North can only be imposed, therefore, if just compensation is paid to the property owner. The City has agreed to pay the cost of street improvements for 2100 North, but has indicated that it will require the

dedication of .14 acres of land for 2100 North without paying any compensation for that land. As an incentive to encourage that dedication the City has offered to abandon any claim to that portion of the "gap" property alongside 600 West Street (approximately .21 acres) which lies within the platted lots of the proposed subdivision.

If the applicant agreed with the proposed negotiated settlement to accommodate the dedication of land for 2100 North, it would certainly resolve the issue. There would be no illegality involved in such a voluntary agreement. The applicant claims, however, that the City has no color of title or interest in the "gap" property to trade, and that the City is obligated to pay just compensation for the land needed to extend 2100 North.

It is to be noted that the City need not approve a subdivision plat where part of the minimum square footage of land needed for any lot is not clearly owned by the applicant, and also that if the owner of a subdivision lot does not have good and marketable title to all of the property within that lot, it cannot convey clean title to retail purchasers. For these reasons the City is justified in not granting final approval for the Olsson Subdivision until clear title to the "gap" property is established. That can be accomplished by the quiet title action that is currently proceeding, where it is likely that the only parties to the action will be the applicant and the City. The Court will resolve the issue and determine the relative interests of the City and the applicant in the "gap" property.

If the applicant obtains clear title from the court, the City has nothing to trade for the property needed to extend 2100 North Street. To require the dedication of land at that point would be an illegal exaction unless just compensation is paid to the applicant. The City could not then deny final approval of the subdivision plat that was submitted for preliminary approval if that denial was based on an issue related to the ownership of the land within the "gap".

If the City prevails in the quiet title action, then the City has .21 acres of land that it can trade to the applicant for the 2100 North property if it wishes to. The City can also deny the subdivision application in the form previously submitted and require the plat to be amended to show only the property that is owned by the applicant within the boundaries of each platted lot. The City could also obtain the needed property for 2100 North Street through an action in eminent domain which would provide for the payment of just compensation for the land taken.

City officials may be understandably frustrated by the legal conclusions arrived at here in light of the efforts made by the City to obtain a variance for the applicant which allowed for the creation of the 2100 North Extension without the loss of a building lot by the applicant. Perhaps some may conclude that the variance should have been obtained after the other issues involved in the proposed development agreement were resolved and the agreement was signed. In any event, the variance granted benefited both the applicant and the City, because if just compensation is eventually paid in this matter, it would likely have been in a higher amount without the variance.

Under Utah law, the amount of just compensation must include an analysis of “severance damages”, which might have been due in this case if the city eliminated a building lot and thus imposed a more significant financial burden on the property owner than just the loss of .14 acre of land. The variance benefited both the City and the applicant because it minimized the impact of the extension on the property owner and the amount of just compensation that the City might have had to pay if the developer lost a building lot in the process.

Street Improvements to 600 West Street:

The applicant also has raised a question about the required improvements to 600 West Street imposed by the City in its review of the Olsson Subdivision. The City is demanding the improvement of a half width of 600 West at its projected ultimate 66 foot width. This would require the applicant to provide 33 feet of street improvements. This is provided for in the Pleasant Grove “Public Works Standard Specifications and Drawings” (PWS) at Section 1.06 “Responsibility for Public Improvements” where the standard provides minimum sizes that are “the responsibility of the Developer.” In a table provided in that section of the standard, a “street (residential)” is noted to include a “minimum size developer is responsible to pay for” of “50’ right-of-way”. In the same table, a developer is responsible to pay for improvements to a “street (non-residential)” of “66’ right-of-way”.

The Olsson Subdivision is a residential development. The City claims that 600 West is a “non-residential street” but the applicant’s uses are residential and the aerial photos provided show residential development in the area. There do not appear to be commercial or industrial land uses adjacent to 600 West in this location. Even if there were such uses, the applicant’s uses are single family residential, and it would

not be appropriate to impose commercial or industrial burdens on his residential use. Based on the residential standards, the applicant here is required to pay for 50' of street improvements, not 66 feet. The text of the standard provides "In residential zones, when streets wider than 66' are required (except for large scale subdivision), the City will reimburse the Developer the cost of road base and surfacing for any additional asphalt width required in excess of 50'."

The City is requiring the improvement of a half-width of 33 feet of 600 West Street in this instance, not 50 feet. The Pleasant Grove City Ordinances (PGCO) at 11-3-4 (K) "Street Dedications and Paving" provide that "The full width (described above) of all streets within a subdivision shall be dedicated and the roadway paved. No half streets will be permitted." 600 West Street is not "within a subdivision", so this provision would not apply, thus implying what the City's actions in this case also support – the conclusion that improvements to a half width of a city street are allowed for streets that are "without" a subdivision.

PGCO at 11-4-1 (D) "Curbs, Gutters and Sidewalks" requires "Curbs, gutters and sidewalks on both sides of the streets, except along the outer side of a street which borders on a subdivision . . ." It appears that 600 West Street is a street which "borders on a subdivision". This provision also supports the conclusion that requirements for the improvement of half of the street area are appropriate under the City's ordinances.

In a recent and similar case, the Utah Supreme Court has described the manner in which street dedications and improvements can be mandated through the development approval process.

A requirement to widen and/or to improve a street is a development exaction as defined by the Utah Supreme Court:

Exactions are conditions imposed by governmental entities on developers for the issuance of a building permit or subdivision plat approval. (citation omitted). They may "serve more than a single development" and "may take the form of: (1) mandatory dedication of land for roads, schools or parks, as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees."

BAM Development v. Salt Lake County, 2006 UT 2, P34. The Utah Legislature has imposed limitations on the imposition of exactions on development in the Utah Land Use Development and Management Act:

A municipality may impose an exaction or exactions on development proposed in a land use application provided that:

- (1) an essential link exists between a legitimate governmental interest and each exaction; and
- (2) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

Utah Code Annotated, Section 10-9a-508. These requirements relate to individual conditions and exactions imposed on approval of a land use application as well as to exactions that are required by the general provisions of the land use ordinance. *BAM Development*, P46.

Generally, issues involving development exactions do not arise from general requirements imposed by ordinance that provide for minimum standards of health and safety. For example, the City has requirements in its development standards that provide that any development must be served by a minimum 8 inch water line. (See the City's PWS at Section 1.06) This requirement would be upheld by a court because it provides a reasonable minimum standard for fire flows and pressure and is uniformly imposed on all development. The exactions analysis would not apply, nor would it apply for the imposition of the 50 foot wide residential right of way that is provided in the same section as the minimum needed for residential streets.

When the City's minimum requirements have thus been set, however, the requirement of more land and more street improvements must be supported by an individualized analysis of rough proportionality as required by statute and case law. The last paragraph in the City's PWS at Section 1.06 states that roadways up to 66 feet can be exacted without compensation, including the dedication of land. In light of the BAM case and U.S. Supreme Court precedents, these general requirements are unconstitutional unless supported, in each situation, with substantial evidence on the record justifying the dedication requirements.

No such analysis was completed in this matter. Since the proposed subdivision is for residential uses, the residential standard of 50 feet would apply unless it is shown that the Olsson Subdivision creates the need for a 66 foot street. Since the City has agreed to allow a half street improvement in this case, the applicant can be

required to provide 25 feet of pavement from the center line of 600 West. No additional street pavement can be required unless it is shown by substantial evidence on the record that the proposed subdivision is creating the need for a 33 foot half width.

Conclusion

The applicant has no duty to provide land to extend 2100 North Street through its subdivision to 600 North Street. It may negotiate with the City to trade land for that purpose if the pending quiet title action concludes that the City has an interest in the disputed "gap" property and the City wishes to participate in a trade. The City could condition approval of the subdivision on the applicant demonstrating that it has good and marketable title to the "gap" before selling lots.

The City's requirement of a 33 foot half width pavement of 600 West has not been adequately supported by substantial evidence in the record that supports the conclusion that the proposed Olsson Subdivision creates the need for a 33 foot wide half street instead of a 25 foot wide half street, which would seem to meet the road requirements for normal residential uses.

Craig M. Call, Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, 13-42-205. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are 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

Utah Code Annotated Section 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. Section 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:

Amanda R. Fraughton
City Recorder
City of Pleasant Grove
70 South 100 East
Pleasant Grove, UT 84062

On this _____ day of March, 2007, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

Shantel Marcy, Office of the Property Rights Ombudsman