

Advisory Opinion #28

Parties: North Salt Lake Heights, LLC and North Salt Lake City

Issued: January 23, 2008

TOPIC CATEGORIES:

E: Entitlement to Application Approval (Vesting)
H: Compelling, Countervailing Public Interests
R(vi): Other Topics (Easements)

Approval of an application that would deleteriously impact an easement holder's ability to enjoy the easement would be irresponsible. The City may condition approval on resolution of issues related to the easement, without immediately amending the zoning ordinance. Compelling, countervailing public interests are serious problems that call for immediate amendments to zoning ordinances. Therefore the easement need not be considered a compelling, countervailing public interest since the need at issue can be addressed by existing mechanisms.

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 (REVISED AND RESTATED)

Advisory Opinion Requested by: North Salt Lake Heights, LLC
by Kevin Anderson, Anderson Call,
Counsel for Property Owners

Local Government Entity: North Salt Lake City

Applicant for the Land Use Approval: North Salt Lake Heights, LLC (Logan Cannon,
Registered Agent)

Project: Residential Subdivision

Date of this Advisory Opinion: January 23, 2008

Opinion Authored By: Brent N. Bateman and Elliot R. Lawrence,
Attorneys, Office of the Property Rights
Ombudsman

Issues

Is the property owner entitled to preliminary approval of a subdivision application, when the parcel to be divided is subject to an easement that potentially conflicts with proposed use as residential lots?

Summary of Advisory Opinion

NSL Heights is entitled to preliminary approval of its subdivision application.¹ The subdivision application and approval procedure adopted by the City contemplates a multi-stage application and approval process. NSL Heights's application is presently under consideration for preliminary approval. Although the Easement is a valid and substantial encumbrance on the subdivision property, and the City has legitimate concerns regarding how the Easement will impact the

¹ It is assumed for the purposes of this Opinion that the subdivision application meets all other preliminary application requirements, and that it would receive preliminary approval but for the easement issue. Neither party has identified any other obstacle suggesting that the subdivision would not be preliminarily approved. This Opinion takes no position on the validity of the application.

subdivision and the City, those concerns and interests do not conflict with the City's preliminary approval requirements. The City can conditionally approve the application, and require that issues and concerns related to the Easement be addressed and resolved prior to subdivision of the property and recordation of the plat.

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 North Salt Lake Heights Development, LLC on October 29, 2007. A letter with the request attached was sent via certified mail, return receipt requested, to Mayor Shanna Schaefermeyer, North Salt Lake City, at 20 S. Highway 89, North Salt Lake City, Utah 84054. The return receipt was signed and was received on November 5, 2007, indicating that the City had received it. A response was received from the North Salt Lake City Attorney on November 16, 2007.

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 filed October 29, 2007 with the Office of the Property Rights Ombudsman by North Salt Lake Heights Development, LLC, including exhibits.
2. Response letter from D. Michael Nielsen, North Salt Lake City Attorney, received November 16, 2007.
3. Letter from Kevin E. Anderson, Anderson Call, P.C. dated December 26, 2007 requesting reconsideration of the Advisory Opinion in this matter.
4. Response letter from D. Michael Nielsen, North Salt Lake City Attorney, received January 7, 2008.
5. Response letter from Kevin E. Anderson, Anderson Call, P.C. dated January 10, 2008.
6. Response letter from Kevin R. Watkins, Attorney for Lakeview Rock Products dated January 14, 2008.

Assumed Facts

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

Revisions to Advisory Opinion

This Revised and Restated Advisory Opinion supersedes in its entirety the previously released Advisory Opinion in this matter dated December 14, 2007. The previous Advisory Opinion is withdrawn in its entirety and of no force or effect.

Background

North Salt Lake Heights, LLC (“NSL Heights”) is the owner of a parcel located in North Salt Lake City (the “City”). The parcel is subject to a 50-foot wide road easement which runs along the northern portion of the parcel’s eastern boundary (the “Easement”). NSL Heights has proposed a 19-lot subdivision on the parcel, and submitted with its application material a preliminary plat. This preliminary plat acknowledges this Easement, and includes it in the easternmost parts of lots 7, 8, and 10. The Easement also appears to cross the proposed “Pace Lane,” a public road intended as access to the lots in the subdivision.

The Easement was created by a court order in a quiet title action decided in 1988 titled *Bates v. Clarke*. The court order states as follows:

The aforementioned property is subject to an ingress, egress and right-of-way easement . . . over and across the easternmost 50 feet of the aforescribed property for purposes of a road, curb and gutter, sidewalk and underground utilities.

The purpose of the Easement is presumably to access property to the south of the proposed subdivision. Lakeview Rock Products is shown as the owner of a fifty-foot wide strip that runs along the southern portion of the eastern boundary of the parcel. This strip corresponds to and adjoins the location of the Easement.

There is no recorded or historical use of the Easement as a roadway, no construction of a road, curb and gutter, or sidewalk, and apparently no physical evidence that the Easement has ever been used as access or for underground utilities. The Easement terminates at the northern boundary of the parcel, which adjoins an existing subdivision, identified as “Eaglepointe Estates.” The property immediately east of the Easement is owned by North Salt Lake City, and is accessed by another road. As noted above, the southern terminus of the Easement adjoins a 50-foot strip owned by Lakeview Rock. There has been no evidence presented that the strip has ever been used as access or as a road.

Lakeview Rock Products was not a party to the 1988 quiet title action, but claims to be a successor to one of the parties to that action, and thus claims ownership of the Easement. The City claims that the Easement also provides access for Staker Parson (another private company) and Salt Lake City Corporation. There has been no evidence indicating what access or other interest these last two entities claim, or if they have taken any steps to enforce a right to the Easement.

In August of 2007, NSL Heights applied for preliminary approval of the proposed subdivision. The City's Planning Commission initially considered the application on August 14, but continued the matter until October 9. At that meeting, the matter was continued again, because of the Easement issue. City staff prepared a memorandum evaluating the Easement. The memorandum concluded that the Easement presented significant problems which should be resolved before the subdivision plat could be approved. The memorandum determined that lots 7, 8, and 10 may become noncomplying if a road were built on the Easement, because the roadway would reduce the size of the lots. It also cited potential problems with dedicating a public street subject to the Easement, and the fact that the Easement owners have not signed the plat. On October 23, the Planning Commission recommended that the City Council deny the application. The Commission based its decision on the staff memorandum's recommendations.

Analysis

A. *The Utah Vesting Rule*

In Utah, a land use applicant is entitled to approval of a complete land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect.² This rule, sometimes known as the "early 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 codified at UTAH CODE ANN. § 10-9a-509(1)(a)(i). 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.

Western Land Equities, Inc. v. City of Logan, 617 P.2d 388, 396 (Utah 1980).

This rule dictates how a municipality can control the land use activities within its boundaries. If restrictions or guidelines on development are desired, the municipality must adopt ordinances to

² Utah Code Ann. § 10-9a-509(1)(a)(i). Exceptions to this rule exist. One is relevant to this Advisory Opinion, and will be discussed below.

do so. Once properly enacted, those ordinances must be followed by land use applicants. Yet applicants also have an appropriate expectation that their application will not be denied midway through the process by unstated rules. Development of property is a difficult and costly process, and the rule prevents a community from unfairly denying a compliant land use application after significant funds are spent. “The economic waste that occurs when a project is halted after substantial costs have been incurred in its commencement is of no benefit either to the public or to landowners.” *Id.*

One exception to this rule states that even if an application is complete and complies with all applicable laws and ordinances, a municipality may nevertheless deny it if a “compelling, countervailing public interest would be jeopardized” if the application were approved. *See* UTAH CODE ANN. § 10-9a-509(1)(a)(i). Although this exception is now part of the Utah Code, the term “compelling, countervailing public interest” is not defined in the statute, nor has the exception been examined in recent case law. Accordingly, an examination of the circumstances of each case is necessary to determine whether that high exception has been met.

Although no specific definition of a “compelling, countervailing public interest” has been provided, *Western Land Equities* provides some useful guidance. There the court explained that this exception provides a safe harbor where communities can deny an application when important public interests come to light for the first time that have not been previously included in the community’s ordinances:

A rule which vests a right unconditionally at the time application for a permit is made affords no protection for important public interests that may legitimately require interference with planned private development. If a proposal met zoning requirements at the time of application but seriously threatens public health, safety, or welfare, the interests of the public should not be thwarted.

Western Land Equities, 617 P.2d at 395-6. The Court then provides one way to determine whether a “compelling, countervailing public interest” exists:

A city should not be unduly restricted in effectuating legitimate policy changes when they are grounded in recognized legislative police powers. There may be instances when an application would for the first time draw attention to a serious problem that calls for an immediate amendment to a zoning ordinance, and such an amendment would be entitled to valid retroactive effect.

Id. at 396.

This guidance from *Western Land Equities* indicates that a “compelling, countervailing public interest” would include a “serious problem that calls for an immediate amendment to a zoning ordinance . . . entitled to valid retroactive effect” *Id.* For a problem to require an immediate amendment to the zoning ordinance, that problem would need to be one that is unaddressed in the present zoning ordinances. It follows, therefore, that when the problem is fully remediable

within the current ordinances, immediate amendment of the ordinance is unnecessary. If the problem can be thus resolved, then a “compelling, countervailing public interest” may not exist.

B. The Application Process

Not all land use applications are created equal. Numerous types of land use applications are permitted in the communities within this State, each with differing requirements. Utah’s vesting rule, as found in UTAH CODE ANN. § 10-9a-509(1), by its plain language makes no distinction between the various types of land use applications. Whether the applicant seeks approval of a preliminary plat, final plat, or even a conditional use permit, the same standard applies; if the application is complete and complies with the municipality's land use maps, zoning map, and applicable land use ordinance, the application must be approved unless an exception applies.

North Salt Lake City’s Ordinance calls for an incremental subdivision application and approval process. See NSL Ordinances § 3.2.4. First, a developer applies for Concept Plan Approval. Concept plan approval permits the developer to pursue that concept and apply for Preliminary Design Plan approval. NSL Ordinances § 3.3.3.2. Next, a developer may file application for Preliminary Design Plan approval. The City may approve the preliminary design plan, approve the preliminary design plan with conditions, or reject the preliminary design plan. NSL Ordinances § 3.4.1. Preliminary Design Plan approval permits the developer to resolve any concerns or conditions imposed under that Preliminary Design Plan, and apply for Final Plat approval. NSL Ordinances § 3.5. Final Plat approval authorizes the developer to record the plat. NSL Ordinances § 3.5.5.

Because each application has different procedures and requirements, and approval vests the developer in different rights, the type of application under consideration must be examined. Interests that may be compelling under one application may not be compelling under another. Likewise, an interest that arises at one type of application may require immediate amendment of a zoning ordinance, but may be easily remediable under another application’s process.

C. The Easement

The problem presently under examination is the Easement, and the compelling public interest, private easement rights. The Easement was created by court order in a quiet title action decided in 1988. No express evidence has been produced indicating that the Easement has terminated or abandoned, or is otherwise unenforceable. Accordingly, the Easement is a valid and substantial encumbrance upon the property. Disregarding the Easement would impact the valid property interest of some individual or entity.

Orderly development of the community obligates the City to consider how a proposed development will impact the owners of all interests in the property being developed. As the Utah Supreme Court articulated in *Nyman v. Anchor Dev., L.L.C.*, 2003 UT 27, both the property owner and the Easement owner have important interests that must be respected:

Whenever there is ownership of property subject to an easement there is a dichotomy of interests, both of which must be respected and kept in balance. On the one hand, it is to be realized that the owner of the fee title, because of his general ownership, should have the use and enjoyment of his property to the highest degree possible, not inconsistent with the easement. On the other, the owner of the easement should likewise have the right to use and enjoy his easement to the fullest extent possible not inconsistent with the rights of the fee owner.

Accordingly, as long as the fee owner does not interfere with the full enjoyment of the Easement, the fee owner can use and develop the property as he sees fit. The City may approve a land use application that does not interfere with the full enjoyment of the easement rights. Conversely, approval of a land use application that would deleteriously impact an easement holder's ability to enjoy the Easement to the fullest would be irresponsible stewardship of the City's duty to serve its citizenry. Acting to protect those legitimate property interests helps avoid conflicts and litigation, and promotes fundamental fairness and protection of property values. (*See Utah Code § 10-9a-102*). This responsibility to protect the property rights of easement holders is profound.

The proposed development gives rise to legitimate and potentially compelling impacts to the Easement. These impacts could be particularly acute had this Easement issue arisen for the first time at final plat approval. Granting final approval vests the applicant with the authority to record the plat, sell individual lots, and construct approved structures on the lots. NSL Ordinances § 3.5.5. Road layouts and planned lot improvements may deleteriously impact the Easement and its intended uses.³ Moreover, the situation could arise where, long after lots 7, 8, and 10 are sold to private homeowners, and the owner of the Easement could claim an interest in the lots. This could create a legitimate potential for litigation against both the homeowners and the City. Avoiding future liability and problems for homeowners, as well as for the City, is a compelling interest that could justify the City's decision to deny the recordation of a final plat.⁴

However, the application presently under consideration is for preliminary plat approval. According to North Salt Lake City's Ordinances, preliminary plat approval entitles the applicant to proceed under the preliminary plan, subject to the conditions imposed, to final plat approval.

³ It appears that the easement is non-exclusive. Presuming that is true, the Easement's use as a road for ingress and egress will not conflict with the road as proposed by the developer. The Easement burdens the fee owner of the property with the obligation to permit the Easement owner to use the road, but since the easement is non-exclusive, the fee owner of the property may also permit others to use the road, including the general public. To the extent that the road proposed by the developer intersects with the easement, neither will act to "cut off" the other, and both uses will need to be compatibly designed.

⁴ That is not to say that the existence of the Easement necessarily would give rise to a compelling countervailing public interest at final plat stage – only that the potential is there. Close examination of the specific circumstances would be necessary. The layout and details of a final plat may not deleteriously affect the Easement owner's rights. The Easement could be clearly designated upon the plat, and notice of the easement and the limitations it imposes could be clearly noticed to potential purchasers. Lots may be platted that are clearly designated as improvable only to the extent that the improvements do not interfere with the Easement rights. These and other safeguards could adequately protect the Easement holder's property rights, and could result in a finding that a compelling countervailing public interest does not exist. This Advisory Opinion does not resolve this question.

NSL Ordinances § 3.5. No authority can be found to indicate that approval of a preliminary plat encumbers property or diminishes the validity or enforceability of an easement. Because of this, the potential impacts of approval upon the Easement are significantly lower at the preliminary approval stage.

Most importantly, however, the City has authority according to its ordinances to provide preliminary design plan approval with conditions, and require that such conditions be resolved before final plat approval is given. The City could impose upon the developer various conditions to final approval that resolve potential impacts upon the Easement, and thereby protect the Easement holder's legitimate property rights.⁵ This ability to impose and enforce conditions, and thereby require that applicant ensure that the subdivision will not negatively impact the Easement holder's rights, negates the need at preliminary approval stage to immediately amend the zoning ordinance. The public interest, even though very compelling, can be satisfactorily and legally addressed by existing means. Since no need to immediately amend an ordinance exists at this stage, no compelling, countervailing public interest to deny preliminary approval arises.⁶

This appears to comply with prevailing practices. By all accounts, a significant percentage of vacant property in Utah is encumbered by Easements for the benefit of third parties. Such Easements may arise for any number of purposes, including conveyance of water, underground or overhead utilities, or ingress and egress across property. It does not appear that the existence of such Easements typically result in denial of a preliminary subdivision applications. Rather, it appears to be common that conditions set at preliminary approval include resolution of potential negative impacts upon an Easement.

Conclusion

Considering the Easement itself, and the potential impacts that approval of the present application may have on the Easement, North Salt Lake Heights is entitled to approval of its land

⁵ The City may not impose any conditions upon the development it sees fit, no matter how burdensome. Conditions imposed must comply with applicable law and ordinances, including but not limited to UTAH CODE ANN. § 10-9a-509. The City could impose conditions requiring that final plat comply with state law and local ordinances.

⁶ It should be noted that the guidance provided in *Western Land Equities* indicates that there is a timing component to determining when a compelling, countervailing public interest arises. *Western Land Equities* states that a compelling countervailing public interest arises "when an application would for **the first time** draw attention to a serious problem that calls for an **immediate** amendment to a zoning ordinance." Therefore, a compelling, countervailing public interest arises when the problem arises **for the first time**. This Advisory Opinion finds that if at such time the problem can be satisfactorily dealt with by an existing process, then it is not necessary to immediately amend a zoning ordinance. In the present case, the Easement has been recognized at the preliminary approval stage, and the City has the opportunity to require that the developer address and resolve the impacts on the Easement at this stage. Since the issue can be dealt with now, there would be no need at final plat stage to immediately amend the zoning ordinance. As a result, the City cannot justify denial of the preliminary approval application because they feel that a compelling, countervailing public interest will arise at final approval stage, and therefore preliminary approval would be a waste of time. If, at final application, the Easement is still an issue, that would mean that the developer failed to meet the conditions imposed at preliminary approval stage. Then the final application can be denied for failure to meet the legitimate conditions imposed. A finding of a "compelling, countervailing public interest" would then be unnecessary.

use application. Final approval of the subdivision has the potential to have extensive negative impacts on the property rights of the Easement holders. Because the present application is for preliminary approval, the City has a mechanism for addressing and resolving those impacts before they arise, by means of conditional approval on the preliminary plan. Accordingly, no compelling, countervailing public interests exists sufficient justify denial of the preliminary plan approval 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:

Mayor Shanna Schaefermeyer
North Salt Lake City
20 S. Highway 89
North Salt Lake, UT 84054

On this _____ Day of January, 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