

Advisory Opinion #36

Parties: Loafer Rim Properties, LC and City of Salem

Issued: April 8, 2008

TOPIC CATEGORIES:

E: Entitlement to Application Approval (Vesting)

R(ii): Other Topics (Subdivision Plat Approval)

A federal agency likely has a valid claim to a canal and a right of way for access, but the width, extent and restricted uses of such a right-of-way have not been determined. Since this information is unknown, the right-of-way claimed by the agency could be a taking.

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.



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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Loafer Rim Properties, LC
by William Young, Manager

Local Government Entity: Salem City

Applicant for the Land Use Approval: Loafer Rim Properties, LC

Project: Residential Subdivision

Date of this Advisory Opinion: April 8, 2008

Opinion Authored By: Brent N. Bateman, Lead Attorney,
Office of the Property Rights Ombudsman

Issues

Is the property owner entitled to approval of its final subdivision application under UTAH CODE § 10-9a-509, where the Bureau of Reclamation has recorded a notice of interest against the property claiming an interest in a 200 foot wide right-of-way along the Strawberry High Land Canal?

Summary of Advisory Opinion

A right-of-way for the benefit of the United States does exist in the property. However, the width, extent, and the restricted uses of the right-of-way are undefined. The 200 foot right-of-way claimed by the United States Bureau of Reclamation, as shown on the Notice of Right-of-Way, may be excessive and illegal as a taking of property without just compensation. Nevertheless, the City is not the proper party to determine the extent and the validity of the United States' claim of right-of-way. A right-of-way of undetermined and disputed extent, which may conflict with the application for development approval, raises serious and compelling issues that the City is not at liberty to disregard. Therefore, the City could find that a compelling, countervailing public interest exists sufficient to justify denial of the final plat application; at least until the right-of-way issue is first fully resolved in the proper forum.

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 Loafer Rim Properties, LC on December 18, 2007. A letter with the request attached was sent via certified mail, return receipt requested, to Jeffrey Nielsen, Salem City Recorder, at 30 West 100 South, PO Box 901, Salem, Utah 84653. The return receipt was delivered and signed on December 21, 2007, indicating that the City had received it. In addition to the parties, the request was copied to Joe Hunter, Chief of Staff to Congressman Chris Cannon; Lawrence J. Jensen, Regional Solicitor to the U.S. Department of the Interior; David Krueger, U.S. Bureau of Reclamation; and Steve Far, Highline Canal Company. A response was received from S. Junior Baker, Salem City Attorney on January 7, 2008. No responses were received by any other parties.

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 dated December 18, 2007 with the Office of the Property Rights Ombudsman by Loafer Rim Properties, LC, with attachments.
2. Response letter from S. Junior Baker, Salem City Attorney, dated January 4, 2008, with attachments.
3. United States Department of the Interior, Notice of Right-of-Way, Strawberry Valley Project, Dated November 29, 2005, and recorded with the Utah County Recorder as Entry #137261:2005.

Background

Loafer Rim Properties, LC (“Developer”) is the developer of a 58 acre parcel of property in Salem, Utah (the “Property”). Across the northern section of the Property crosses the Strawberry High Line Canal (“Canal”). The Canal appears to have been constructed between 1915 and 1918 under the authority of the United States Bureau of Reclamation (“BoR”). According to the Developer, the Canal bed is approximately twelve (12) feet wide, with an approximately twenty (20) foot wide dirt road running directly north of the Canal. It does not appear that any road or access to the Canal exists on the south edge of the Canal.

Developer asserts that from the 1920's through 1940's, the BoR purchased rights-of-way from various property owners along the length of the Canal. The rights-of-way range in width from approximately 150 to 200 feet along the centerline of the Canal. Nevertheless, Developer claims that on some sections of the Canal, no rights-of-way were obtained. Such is the case for a section of approximately 950 feet of the Canal across the Property. On this section, no records of easements or rights-of-way for the benefit of the United States can be found at the Utah County Recorder's Office. The Developer plans to develop the Property along the south edge of the Canal. Within that 950 foot section, the Development plans show intended improvements within fifteen feet from the Canal's edge.

Developer has received final approval and commenced construction on early phases of the development. As a condition of final approval of phase two, the City of Salem required that the Developer replace the old bridges that traversed the canal at the west and east ends of the development. The Developer applied to the BoR for the right to do so, and in the process the BOR informed the Developer that it claimed ownership of a 200-foot right-of-way along the entire length of the Canal. The Developer asserts that the BoR stated that the right-of-way was granted by the Congressional Canal Statute of 1890, and that the right-of-way restricted building any structure, swimming pool, storage shed, landscaping, berms, trees or fences within the right-of-way.

Developer continued its development activities on the Property. On January 11, 2006, the BoR issued a Cease and Desist Order to Salem City and the Developer, demanding that the Developer cease all development activities adjacent to the Canal. The BoR again claimed that its right of way was based upon an Act of Congress, dated August 30, 1890.¹ The BoR later withdrew the Order, but on November 29, 2005, recorded a Notice of Right-of-Way against the Property for a 200 foot right-of-way along the centerline of the Canal (the "Notice").

Developer would like to obtain final approval and record the plat for Phase 4 of the Development. Phase 4 includes the 950 foot section of the property. The City has indicated to the Developer that, due to the Notice of Right-of-Way recorded November 29, 2005, the final plat of that portion of the Property affected by the Notice cannot be approved. The City indicates its belief that a title dispute exists between the Developer and the BoR over the extent of the right-of-way, that it is not the arbiter to determine the validity or invalidity of the Notice, and that the title dispute must resolved before the City can approve the development.

Analysis

A. The Right-of-Way is A Valid Property Interest, But of Unspecified Extent

According to the Notice of Right-of-Way, the BoR claims ownership of a right-of-way along the length of the Canal, and that right-of-way extends approximately 100 feet from the centerline of

¹ The referenced statute reads as follows: "In all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by authority of the United States." 43 U.S.C. § 945.

the Canal in each direction. The record indicates three possible supporting theories for the right-of-way claim. First, the original patent for the Property, issued by President Benjamin Harrison to David R. Taylor on February 23, 1892, states that “[t]here is reserved from lands hereby granted a right of way thereon for ditches and canals constructed by the authority of the United States.” This language in the Patent does reserve a right-of-way for ditches and canals across the Property. However, the Patent reservation is silent regarding the location, width, extent, and use restrictions of the right-of-way.

The second indication that a right-of-way may exist across the Property is 43 U.S.C. § 945, which was enacted in 1890:

In all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by authority of the United States.

This statute predates the Patent by two years, but is very similar. This statute also reserves to the United States a right-of-way for ditches and canals, but is also silent regarding the width, extent, and use restrictions of the right-of-way. Again, it appears that by operation of this statute, a right-of-way for the Canal exists, but the extent of the right-of-way is undefined.

A third possible support for the existence of the right-of-way is the legal doctrine of easement by prescription. Under Utah law, an easement by prescription arises by operation of law “when the dominant estate owner’s use of a passage across the servient estate has been open, notorious, adverse and continuous for a period of 20 years.” *Jensen v. Brown*, 639 P.2d 150, 152 (Utah 1981). The location, extent and use restrictions of a prescriptive easement are generally established and limited by the use of the easement during the prescriptive period. *Mary Jane Stevens Co. v. First Nat. Bldg. Co.*, 57 P.2d 1099 (Utah 1936). There appears to be no dispute that the Canal has been in its course through the Property for a period exceeding twenty years. Therefore, again, an easement by prescription for the canal could exist. However, the prescriptive easement doctrine again does not clearly define right-of-way with respect to the width, extent, and restricted uses of the right-of-way. It only provides a means to determine the width, extent, and restricted uses: those that historically existed during the prescriptive period. The historical extent of the right-of-way is thus a very fact intensive question. The Developer claims that on the south side of the Canal, very little access to the Canal or maintenance of the Canal has taken place. Assuming that this is true, there may not be a prescriptive easement along the south boundary of the Canal. However, in order to specifically determine the width and extent of the right-of-way, proof must be provided and weighed. The determination of whether the activity along the south side of the canal was sufficient to give rise to an easement, and indeed the existence of the right-of-way itself, is a matter for the Court.

Examination of these possible supports for the BoR’s right-of-way claim indicates that a right-of-way for the benefit of the United States exists along the Canal. However, the width, extent, and

restricted uses of the right-of-way have never been established. The Notice of Right-of-Way executed and recorded with the Utah County Recorder on November 29, 2005, attempting to establish that the right-of-way is approximately 200 feet wide, is therefore without support.² Moreover, it was signed and filed approximately 113 years after the grant of patent (and reservation of right-of-way) that the BoR claims gave rise to the right-of-way.³ The Notice contains no indication of assent of the property owner to its terms. Additionally, the BoR indicates that no development activities are allowable within the 200 foot right-of-way area. Therefore, the filing of the Notice of Right-of-Way, and the claim of an approximately 200 foot wide right-of-way, may be an illegal taking.⁴

B. The City Has No Authority To Determine The Validity Or The Extent Of The Right-Of-Way

The Developer persuasively argues that it is unfair and unnecessary for the BoR to claim a right-of-way of 100 feet on each side of the centerline of the canal. The Developer indicates that 100 feet is well in excess of the reasonable width necessary for maintenance of or access to the Canal. Further, the Developer argues that the historic use of the Canal bank, especially on the south side, does not justify a 200 foot right-of-way. Therefore, Developer argues, the BoR claim of a 200 foot right-of-way is excessive, unnecessary, unjustified, and may be a taking of private property without just compensation, in violation of the Fifth Amendment to the United States Constitution. This Opinion does not, and cannot, determine the width and extent of the right-of-way. The appropriate venue to determine the extent the width of the right-of-way is by a quiet title action in the Courts. Absent a quiet title order, or some clear and express documentation indicating the width and extent of the right-of-way, this Office is obliged to treat the right-of-way as undetermined with regard to width.⁵

Because the City has an obligation to protect all legitimate property rights when considering a land use application, the City must likewise treat the right-of-way as undetermined with regard to width absent some clear indication or court order to the contrary. The City has no authority to quiet title to property in any party. That authority rests solely with the courts. Therefore, despite the possibility that the 200 foot wide claimed right-of-way is excessive or an illegal taking without just compensation, the City is obligated to treat the right-of-way as a legitimate and

² This width and the restricted uses appear to be culled from the general width and restricted uses of the recorded Canal easements on the neighboring properties. However, no legal basis has been found to extend the terms of those easements to the Property.

³ Under UTAH CODE § 57-9-4, a party may record a notice of claim of interest in a parcel of property, but only within forty years of the date when the claim of interest arose.

⁴ This Opinion does not find that the BoR's claim of a 200 foot wide right-of-way is an illegal taking, nor that a legal action against the United States will result in a judgment of a taking. Only that, if the facts as presented by the Developer are true, and unless some basis for claiming a 200 foot right-of-way exists that is not shown, that those actions may be an illegal taking. The BoR has not provided any input or materials that have been considered in preparing this Opinion.

⁵ Utah Code § 13-43-206 limits the subjects upon which an Advisory Opinion can be issued by this Office. Although the question of whether an applicant is entitled to approval of a land use application under Utah Code § 10-9a-509 is an appropriate subject for an Advisory Opinion, quieting title in land is not listed as an appropriate Advisory Opinion subject.

enforceable property interest when making a decision regarding the present application, and must consider the impact that the development may have on that property interest.

C. *The City could find a Compelling, Countervailing Public Interest Sufficient to Justify Denial of the Application*

The Developer has not applied to the City for approval of its final plat application. However, the City has indicated that, considering the unresolved issues regarding the right-of-way, it would not issue final approval. Were an application for final approval before the City, the City would be justified in finding that the right-of-way constitutes a compelling, countervailing public interest sufficient for the City to deny final approval of the subdivision until the extent of the right-of-way is resolved.

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. *See* UTAH CODE § 10-9a-509. This 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 § 10-9a-509(1)(a)(i). 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 do so. Once 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.

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 § 10-9a-509(1)(a)(i). The term "compelling, countervailing public interest" is not defined in the Utah Code, nor has the exception been examined in recent case law. In the land use context, the phrase arose in the *Western Land Equities* case. In *Western Land Equities*, 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.

. . . .

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.

Western Land Equities, 617 P.2d at 395-6. Accordingly, a “compelling, countervailing public interest” inquiry requires a determination that a compelling and serious problem exists that “calls for an immediate amendment to a zoning ordinance.” *Id.*

Salem City could find that a compelling, countervailing public interest exists sufficient to withhold approval of the subdivision until issues related to the right-of-way are resolved. 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, and take action that does not disregard those interests. This avoids conflicts and litigation, and promotes fundamental fairness and protection of property values. (*See* Utah Code § 10-9a-102). The City must protect its interests as well as the interests of property owners and community members. The City may be exposing itself to liability by approving the subdivision where that subdivision may impact a right-of-way owned by the United States Government. Allowing the subdivision to proceed where it may negatively impact the legitimate but undetermined property interest represented by the right-of-way would be irresponsible stewardship of the City’s duty to serve its citizenry. Simply put, all interests—the City’s, the right-of-way owner’s, **and** the developer’s—are better served if the right-of-way issue is resolved in some way, or the subdivision modified to ensure noninterference with the interests of the United States.⁶ Because approval of the development may impact a legitimate right-of-way, and because impacts to that right-of-way may result in serious and compelling negative impacts to the City and the community members, the City could find that a compelling, countervailing public interest exists sufficient to justify denial of the application.

Conclusion

There are simply too many unanswered questions raised by the right-of-way. It is not sufficient to argue, however persuasively, that the right-of-way claim by the BoR is excessive, unnecessary, and possibly illegal. The fact remains that a right-of-way of undetermined size exists, and the City is not the proper party to determine the validity or the extent of the right-of-way. The City has an obligation to protect legitimate property rights, and therefore cannot approve a development that may interfere with legitimate property rights, and subject it and its citizens to significant future problems. For these reasons, the City could find a compelling, countervailing reason to deny the application, at least until concerns about the right-of-way have been resolved.

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

⁶ It is assumed for the purposes of this Opinion that the subdivision application meets all other requirements, and that it would be approved but for the right-of-way issue. Neither party has identified any other obstacle suggesting that the subdivision would not be approved. This Opinion should not be read as implying that the Developer is automatically entitled to approval if the right-of-way issue is resolved. All approvals must be considered and granted by the proper land use authority.

NOTE:

This is an advisory opinion as defined in UTAH CODE § 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:

Jeffrey Nielsen
City Recorder
30West 100 South
Salem, UT 84653

On this _____ Day of April, 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