

Advisory Opinion #8

Parties: Kim C. Datwyler, Neighborhood Nonprofit Housing Corporation
and Smithfield City

Issued: September 7, 2006

TOPIC CATEGORIES:

- D: Exactions on Development
- E: Entitlement to Application Approval (Vesting)
- H: Compelling, Countervailing Public Interests

Dedication of property for a park must satisfy “rough proportionality” analysis. Since the application appeared to satisfy the City’s ordinances, requiring additional access to the City’s road system would need to be justified by showing that the extra access was necessary as a compelling, countervailing interest.

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: Kim C. Datwyler
Neighborhood Nonprofit Housing
Corporation

Local Government Entity: Smithfield City

Applicant for the Land Use Approval: Neighborhood Nonprofit Housing
Corporation and Compass Point Homes,
Inc.

Project: Park Place Subdivision
A 90 lot subdivision in the R-1 zone at
approx. 600 West 100 North

Date of this Advisory Opinion: September 7, 2006

Issue: In reviewing the application for approval for the Park Place Subdivision, did the Smithfield Planning Commission impose illegal conditions or exactions?

Review:

The request for an advisory opinion in this matter was received by the Office of the Property Rights Ombudsman on Wednesday, July 31, 2006. A letter with the request attached was sent by certified mail, return receipt requested, to Smithfield City on July 31, 2006. The letter was addressed to James Gass, City Manager, 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.

During the preparation of this opinion, I discussed the matter with Kim Datwyler, representative of the applicant. I also met with Jim Gass, Smithfield City Manager at the City offices in Smithfield on August 24, 2006 and made a follow-up phone call

to Charlene Izatt, the Deputy City Recorder, about the applicable ordinances related to open space and access issues.

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

1. Proposed subdivision plat for Park Place Subdivision.
2. Schematic drawing of proposed access road superimposed on an aerial photograph of some lands adjoining the proposed subdivision.
3. Minutes of the Smithfield Planning Commission meeting held June 21, 2006.
4. Title 16 (Subdivision Regulations) and Title 17 (Zoning Regulations) of the Smithfield City Ordinances as found online at www.smithfieldcity.org.

Assumed facts:

1. The individual who requested this advisory opinion represents an applicant for approval of the Park Place Subdivision within the city limits of Smithfield City.
2. Under the Smithfield City Ordinances, the applicant for a major subdivision approval must receive preliminary plat approval from the planning commission prior to preparing a final plat. (Smithfield Ordinances at 16.09.040)
3. After approval of the preliminary plat, the applicant is to prepare a final plat for review by the Planning Commission, which will make a recommendation to the Smithfield City Council which must approve the final plat prior to its being recorded and the subdivision approval process being completed. (SO 16.12.070)
4. At a meeting held on June 21, 2006, the Smithfield Planning Commission acted to approve the preliminary plat for the Park Place Subdivision, subject to three conditions.
5. The first condition imposed was that the "plat be amended to show pedestrian access to 300 North east to Saddleback Road."
6. The second condition imposed was "continue to encourage development of a park within the development so that it can be more easily maintained by the City."
7. The third condition imposed was "reasonable efforts be made to connect 200 North headed east to 400 West so the Development can be connected to the City grid at both it's south and east ends."

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 Park Place Subdivision, the Planning Commission is deemed to have concluded that the proposed plat conforms to the requirements of the applicable land use ordinances. The Smithfield Ordinances provide at Section 16.09.040 that the Planning Commission shall review any proposed major subdivision preliminary plats and visit the subdivision site. "Following the review, the planning commission shall determine compliance with the standards and criteria set forth in this title and all other ordinances of Smithfield City, including, but not limited to, the land use ordinance, general plan and master street plan."

The motion to approve the plat at the meeting held June 21, 2006 represents the Planning Commission's conclusion that the proposed subdivision conformed to the applicable ordinances, with the conditions imposed. I will therefore assume that the Planning Commission's approval of the preliminary plat has resolved any issues not logically connected to the conditions imposed.

Condition One: Pedestrian Access

The Smithfield Ordinances provide:

Dedicated walkways through the block may be required where access is necessary to a point designated by the planning commission. Such walkways

shall be a minimum of five feet (5') in width, but may be required to be wider where determined necessary by the planning commission.

SO 16.16.010(D). This would seem to allow reasonable requirements for pedestrian corridors, although there are no findings in the record that would provide the substantial evidence to sustain this requirement.

When a land use decision is made as an exercise of administrative or quasi-judicial powers, however, we have held that such decisions are not arbitrary and capricious if they are supported by "substantial evidence." *Xanthos v. Bd. of Adjustment of Salt Lake City*, 685 P.2d 1032, 1034-35 (Utah 1984) (reviewing board of adjustment decision as an administrative act and employing substantial evidence standard).

Bradley v. Payson City Corp., 2003 UT 16. See also U.C.A. 10-9a-801(3)(a). Since this is a preliminary approval, the applicant may request that evidence be provided to justify this requirement in the final plat, or comply with this condition if it does not object to providing the pathway. My impression is that the applicants do not object to the pedestrian access. This is the only mandatory condition imposed in the plat approval.

Condition Two: Park Requirements

This condition is not clear to me in that it seems only to "encourage development of a park within the development" rather than to require the dedication of a park to the City. On the other hand, it also indicates that the justification for this requirement is "so it can be more easily maintained by the City." The City would be unlikely to maintain a private park, I will assume, so I am not sure whether the expectation is that the final plat will include a public park within the subdivision or a private one.

In any event, the condition is worded tentatively, and it could be assumed that the Planning Commission was not sure that it could require a park as a condition of development. Perhaps the goal was to only encourage a park, and in that event I hope my comments below are not taken to be an overreaction to this condition.

I find no provision in the subdivision ordinance nor the zoning ordinance that allows or directs the City to require that subdivisions include land for parks, either privately or publicly owned. As discussed above, if a land use application conforms to the applicable ordinances it must be approved. There is no ability by the City to impose park dedication requirements or even a requirement that a private park be

provided in a development if the ordinance does not authorize such a requirement. Open space standards are common in many local ordinances, but I did not find any in the Smithfield ordinances in my review that would relate to traditional subdivision as opposed to planned unit developments.

If this condition anticipates the dedication of a park to public ownership rather than just a private open space, then it is doubly problematic. The dedication of private land to public use is an area of significant scrutiny by the courts. Often it is required that the applicant for some development approval must deed land for a park, road, open space, trail, or other public purpose as a condition of development. Sometimes this dedication can take the form of a surface or underground easement or the duty to allow the public to enter upon lands formerly considered to be private with restricted access.

Real estate dedications can be 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 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 the City had a provision in its ordinances requiring all development to provide park space or pay an impact fee for parks, it would likely be legal if that provision was based on proportionality and impact.

If a land use approval does require a dedication without that proof of uniformity and proportionality, the land demanded must be compensated for. An example of an appropriate approach to such an issue is found in the Smithfield ordinances. Under the terms of SO 16.12.070(B) related to accessways along canals, rivers, and streams, it is noted that pathways along waterways can be required as a condition of final plat approval, but the City will pay fair market value for the right of way thus acquired.

As I stated above, it is likely that this review of the law does not provide any information to the City officials than they already knew, and the condition was worded tentatively to encourage the development of a park where those involved in reviewing the subdivision as proposed knew they could not mandate open space in this particular development.

Condition Three: Road Access

In this condition, the Planning Commission imposes a requirement that the applicant make reasonable efforts to acquire land beyond the subdivision boundaries to connect the development through an adjoining block to another City street.

There is no evidence in the record of this matter that the subdivision plat as proposed does not provide the access required by the City ordinances and the relevant provisions of the fire code or other applicable rules and regulations.

A review of the City ordinances does not yield any specific enabling language allowing the Planning Commission to require alternative or more preferable access when the applicant's proposed access complies with the applicable ordinances. Indeed, the state statute cited above prohibits the denial of an application that conforms with local codes.

There is no substantial evidence in the record to demonstrate any failing of the access to the subdivision as originally proposed to meet the ordinances or to provide any threat to health or safety. No compelling, countervailing public interest has been noted that would justify imposing a requirement outside of the provisions of the ordinances.

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, just as would the requirement to dedicate a park as discussed above.

Local governments can only operate within the boundaries of existing ordinances and state statute, and cannot impose requirements based on the preferences of decision makers where no discretion is provided for in the applicable ordinances. Although the condition as stated by the Planning Commission for Park Place is only that the developer make reasonable efforts to acquire the desired access, even that condition is illegal because the requirement for an alternate access is not authorized by the ordinances. There is no evidence in the record that the City has done the analysis to show that the imposition of this burden is both appropriate and proportionate as required by the state law cited above. The applicant does not need to comply with this condition.

As with the condition related to a park, the Planning Commission worded this requirement in a tentative manner, imposing on the applicant a duty to make "reasonable efforts" to extend 200 North to the East. This is most easily explained by assuming that the Commissioners knew that they could not impose this condition as an absolute mandate, which is a conclusion that I agree with.

Conclusion:

The condition to require a pedestrian access may or may not be legally imposed on final plat approval, depending on whether or not there is substantial evidence in the record to support this condition. If the applicant wishes to provide it, the issue is moot.

A condition to require the development of a park would be illegal since there is no requirement in the ordinance for the provision of parks or open spaces in subdivisions. The subdivision cannot be denied if the applicant refuses to provide the park. If the anticipated result of the park condition is that the applicant might be required to deed a park to the City, this condition would also be illegal under state statute and requires compensation under both the state and federal Constitutions. This is so because the condition is not supported by an analysis in the record of the burdens created by the development, how the proposed park addresses those burdens, and whether the scale of the park requirement is proportionate to the burdens created by the development.

The condition to require the applicant to expend "reasonable efforts" to create an alternative access to the subdivision is illegal in that the local ordinances do not

allow for the imposition of alternative access requirements when the access as proposed by the applicant complies with the ordinances. A requirement to acquire and dedicate land to the City is also illegal absent the required analysis described in the preceding paragraph for the exaction of land dedications in the development process. The subdivision could not be denied if the sole reason for denial is that the applicant refuses to attempt to connect 200 North Street to 400 West Street as a condition of development.

By its preliminary approval, the Planning Commission has found that the application as submitted complies with the applicable ordinances. The conditions imposed, particularly conditions two and three, would be illegal. The Planning Commission should review the final plat for the project without regard to conditions two or three, and without regard to condition one unless the applicant waives any objection to that condition or unless the City provides substantial evidence in the record to support that requirement.

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:

James Gass, City Manager
Smithfield City
69 North Main Street
Smithfield, UT 84335

On this Seventh day of September, 2006, 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.

Craig M. Call, Office of the Property Rights Ombudsman