

# Advisory Opinion #56

Parties: Kevin Dudley (Parley Dudley) and City of Salem

Issued: November 18, 2008

## TOPIC CATEGORIES:

E: Entitlement to Application Approval (Vesting)

R(vi): Other Topics (Easements)

An easement must either be in writing or evidenced by actual use. Without sufficient proof of an easement, it cannot be said that the Property Owner has access to a public road. Without access, the lot would not be eligible for a building permit.

## 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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# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

### ADVISORY OPINION

Advisory Opinion Requested by: Kevin Dudley  
On behalf of his father Parley Dudley

Local Government Entity: Salem City

Applicant for the Land Use Approval: Parley Dudley

Project: Building Lot

Date of this Advisory Opinion: November 18, 2008

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

### Issues

Is the Applicant's lot eligible to receive a building permit, and thereby a higher appraised fair market value?

### Summary of Advisory Opinion

It is not clear whether the property has a legal right of access to the system of public streets. Although legal access may exist, either by reservation when the parcel was created or by other means, nothing has been provided to establish access with legal certainty. The City cannot assume that that access to the property exists and grant a building permit on that basis. An uncertain and unestablished right of access raises serious and compelling issues that the City is not at liberty to disregard. Until the property owner can establish that a legal and permanent right of access exists, the property is ineligible to receive a building permit.

### 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 Kevin Dudley on September 17, 2008. 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, Salem, Utah 84653. The return receipt was signed on September 22, 2008, indicating that the City had received it. A response was received from S. Junior Baker, Salem City Attorney on October 14, 2008. A letter dated October 21, 2008 was sent to Kevin Dudley, inviting Mr. Dudley to respond to Mr. Baker's submission. Mr. Dudley submitted no response.

## **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 September 17, 2008 by Kevin Dudley, with attachments.
2. Response letter from S. Junior Baker, Salem City Attorney, dated October 21, 2008, with attachments.
3. Review by the Office of the Property Rights Ombudsman of the records for the Property and neighboring properties available on the website for the Utah County Recorder.

## **Background**

Parley Dudley is the record owner of a parcel of property located near Salem Lake Drive in Salem, Utah (the "Property"). According to Kevin Dudley, son to Parley Dudley, this parcel of property was created in 1960 as a result of a divorce decree by subdivision from another parcel. It appears that Parley Dudley obtained title to the property on December 12, 1994 by a Deed of Distribution, Entry #93732, Book 3585, Page 751, Utah County Recorder ("Deed of Distribution"). This Deed of Distribution describes the Property as follows:

Commencing 198.66 feet South of the Northeast corner of Lot 3, Block 7, Plat "A", Salem City Survey of Building Lots, Utah County; thence South 198.66 feet or 3.01 chains; thence North 88 degrees West 2.15 chains; thence North 3 degrees East 198.66 feet or 3.01 chains; thence East 2.15 chains more or less to the beginning. Together with a right of way over the east 12 feet of the property awarded to the plaintiff for ingress and egress and vehicular travel. As set forth in the Decree of Divorce dated September 1, 1961, Civil No. 23,810.

According to Mr. Dudley, in 2006 the City of Salem inquired about the purchase of the property. Mr. Dudley was unable to come to an agreement with the City regarding the purchase price. Mr. Dudley indicates that the City obtained an appraisal of the property. That appraisal indicated that the lot was not eligible for a building permit under the Salem City Ordinances, and the appraiser therefore valued the property at a low value. It also appears that Mr. Dudley obtained an appraisal which gave the same conclusion. The Property does not abut any public road or right-of-way. Mr. Dudley would like right to build upon the property, presumably so that the property would be valued as a buildable lot rather than as a non-buildable lot. Neither party indicates whether negotiations for the property are ongoing, nor whether the City intends to acquire the property through eminent domain.

## **Analysis**

### *A. The Owner Has Not Established A Permanent Legal Right to Access the Property*

The property owner indicates that the Property was subdivided as the result of a divorce, and that a 12 foot easement was given to allow access to the Property. Longstanding Utah law instructs that an easement by reservation, as in interest in real property, must be in writing in order to be enforceable. UTAH CODE ANN. § 25-5-1. The writing in question must be certain and definite in describing the easement conveyed. *Warburton v. Virginia Beach Fed. Sav. & Loan Ass'n*, 899 P.2d 779, 781 (Utah Ct. App. 1995).

Although it may be true that access was reserved for the Property at the time of subdivision, no written evidence of such a right has been provided. Neither the materials provided with the request for Advisory Opinion, nor an informal search by this Office of the documents available at the Utah County Recorder's website of the Property or of neighboring properties provide evidence that an easement or any other legal right of access exists for this parcel.

The Deed of Distribution provided by the City<sup>1</sup> does contain reference to a right-of-way: "Together with a right of way over the east 12 feet of the property awarded to the plaintiff for ingress and egress and vehicular travel." This language, however, does not establish a legal right to access the system of public streets. It describes an easement 12 feet in width for ingress and egress and vehicular travel. However, the easement by its own terms crosses "the property" and is for the benefit of "the plaintiff." The term, "the property" does not describe any neighboring parcel of property that would give access to the public streets. It is therefore insufficient to establish a legal right-of-way across any other parcel owned by any other party. In fact, a reasonable interpretation of the plain language of the term "the property" would refer to Mr. Dudley's parcel itself, since it is the only property described in the Deed of Distribution.<sup>2</sup>

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<sup>1</sup> The Deed of Distribution was found recorded against the property at the Utah County Recorder's website.

<sup>2</sup> The identity of "the Plaintiff" is likewise unknown. It could be assumed that "the Plaintiff" refers to the plaintiff in the identified legal action "As set forth in the Decree of Divorce dated September 1, 1961, Civil No. 23,810." However, that decree has not been provided, and remains insufficient to establish an easement across any other parcel of property.

Therefore, the Deed of Distribution does not establish a legal and permanent right to cross another parcel of property to access the system of public streets.

A right to access to the public streets may have also been established at the time of subdivision by an easement by necessity. An easement by necessity may arise where property is severed from a previous unity of title, but one of the severed parcels does not abut a public road. *See Chournos v. Alkema*, 27 Utah 2d 244, 247, 494 P.2d 950 (1972). However, the City of Salem has neither the responsibility, nor the authority, to decree that an easement by necessity exists for the benefit of the Property over a neighboring parcel of land. Some legal evidence of the *actual* establishment of the easement must be provided. It is likely that the only method available to establishing such an easement will be through a quiet title action in the District Court. The Court has the sole authority to establish ownership and easement interests in real property. Absent a decree from a court establishing the easement, or some other documentation unequivocally establishing the existence of a permanent easement to cross neighboring property to access the public street, the property cannot be deemed to have access to the system of public streets.

*B. The City Cannot Approve a Building Permit Without A Permanent Legal Right of Access*

No evidence of the existence of a right-of-way across any neighboring parcel is apparent from an informal search of those parcels on the Utah County Recorder's website.<sup>3</sup> Without evidence of a permanent, legal, and reliable right of access to the system of public streets, the City cannot approve a building permit on the property.

Neighboring property owners may not be aware that their properties are burdened by a right-of-way. Recording of easements imparts notice. UTAH CODE ANN. § 57-3-102. An innocent purchaser for value without notice of an unrecorded previous conveyance, who first records his conveyance, takes preference over a prior unrecorded conveyance. *McGarry v. Thompson*, 114 Utah 442, 201 P.2d 288 (1948). If the neighbors are unaware of an easement across their parcels, it is very likely that any attempt to use the easement will be met with strenuous resistance. This is true even assuming that the decree of divorce can be located, and that divorce decree establishes a right-of-way across an adjoining property. The neighbors are likely to claim that the easement is invalid or abandoned.

The City has the obligation to protect the health, safety, and welfare of its citizens. In light of this fact, the City is justified in requiring that the property owner produce either a definite writing or agreement establishing the easement, or a quiet title judgment establishing a permanent right-of-way across neighboring property before issuing a building permit. Thereby the City can ensure

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<sup>3</sup> The informal search performed by this Office is not a professional title search and should not be relied upon. This search consisted of locating the abstracts for the adjacent parcels, and reviewing whether any documents available contained a record of a right-of-way benefiting the Property. Documents not available upon the Utah County Recorder's website were not reviewed. Documents reserving such a right-of-way may exist, but were not located during this informal search. It is up to the property owner to locate them and supply them to the City. Until the property owner does so, the City is entitled to assume that such documents do not exist.

that future residents of the Property can maintain a permanent right of access, that neighboring owners' property rights are not violated, and that peace is maintained in the City. The City must protect its interests as well as the interests of all property owners and community members. The City could expose itself to liability by approving a building permit upon property where the right of access is questionable and indefinite.<sup>4</sup> Accordingly, without evidence of a legal, permanent, and definite right of access, the City cannot approve a building permit at the property.

## **Conclusion**

Legal access to the Property may exist, either by reservation when the parcel was created or by other means. However, the property owner has provided nothing to the City to establish definite, permanent, and legal access to the Property. The City cannot assume that that access to the property exists and grant a building permit on that basis. An uncertain and unestablished right of access raises serious and compelling issues that the City is not at liberty to disregard. Until the property owner can establish that a legal and permanent right of access exists, the property is ineligible to receive a building permit.

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

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<sup>4</sup> If the property owner were to provide evidence of a definite, permanent, legal right of access, other issues regarding buildability would arise, such as the question of a non-conforming flag lot. This Office is willing to review any such documents, consider those issues, and reconsider issuing an amended Advisory Opinion addressing those topics.

**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

UTAH CODE ANN. §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 UTAH CODE ANN. § 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 Nielson  
City Recorder  
30 West 100 South  
Salem, UT 84653

On this \_\_\_\_\_ Day of November, 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.

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Office of the Property Rights Ombudsman