Advisory Opinion #137

Parties: Ryan Bybee (Cadence Homes and American Fork City

Issued: January 31, 2014

TOPIC CATEGORIES:
N: Review of Warranty Work for Completion
Other Topics (vii): Development Bonds

Local governments may require completion and warranty bonds, to ensure that public infrastructure is properly constructed. Local agencies should adopt design and construction standards to govern construction and warranty work, but the standards must be in place before a development application is submitted. New standards may not be imposed on existing applications, or development permits which have already been issued.

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

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI
Executive Director

BRENT N. BATEMAN
Lead Attorney, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested by:	Ryan Bybee
Local Government Entity:	American Fork City
Applicant for the Land Use Approval:	Cadence Homes
Type of Property:	Residential
Date of this Advisory Opinion:	January 31, 2014
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

May a local government enact construction and repair standards applicable to existing subdivision applications?

Summary of Advisory Opinion

Local governments may require construction assurance, to ensure that required public improvements are completed, and improvement warranties, to guarantee the quality of public improvements. Local governments may impose standards governing construction and warranty work, as long as the standards were in place when the development application was submitted. New standards may not be imposed on existing applications or on approved development permits.

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 UTAH CODE § 13-43-205. An advisory 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.

A Request for an Advisory Opinion was received from Ryan Bybee, owner of Cadence Homes, on November 21, 2013. A copy of that request was sent via certified mail to Pamela Hunsaker, American Fork City Treasurer, at 51 East Main Street, American Fork, Utah. According to the return receipt, the City received the Request on November 25, 2013.

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, with attachments, submitted by Ryan Bybee, owner of Cadence Homes, received by the Office of the Property Rights Ombudsman on November 21, 2013.
2. Response submitted on behalf of American Fork City, by Kasey L. Wright, attorney for the City, received on January 2, 2014.
3. Reply submitted by Mr. Bybee, received on January 9, 2014.
4. Ordinance 2013-08-27, received from American Fork City, January 13, 2014.

Background

Ryan Bybee owns Cadence Homes, which developed a residential subdivision in American Fork. The City requires developers to post an improvement warranty bond, entitled a "durability retainer" as a one-year guarantee of "the durability of constructed improvements . . .." AMERICAN FORK CITY CODE, § 17.9.402. If the improvements are unsatisfactory, the City may require the developer to make repairs; if the developer does not make the repairs, the City may use the retainer for the repairs. After one year, the retainer is released. Cadence posted a bond worth approximately $168,000 as a durability retainer for its subdivision.

In the summer of 2013, Cadence was nearing the end of the one-year warranty period on its subdivision. The City inspected the public improvements, and identified settling around four storm drains located in public streets. Cadence agreed to repair the settling, which would require removing the asphalt around the drains, adding fill material, and replacing the pavement. Cadence states that in the past, the City had accepted a "T-patch" in similar situations.[1] However, in 2013, the City required that Cadence mill down and repave all of the streets in the subdivision, not just the areas immediately around the storm drains.[2]

[1] A "T-patch" is a method of replacing asphalt in an existing street. The old asphalt is removed in the area that needs to be repaired, extending a short distance from the repair area, which allows some undisturbed base or fill as a ledge around the repair work (the arms of the "T"). After the base is repaired and levelled, new asphalt would be laid over the entire area, including the ledge.

[2] Cadence does not object to repairing the settled areas near the drains using T-patches.

After Cadence objected to repaving or resealing the entire subdivision, the City enacted Ordinance 2013-08-27, which adopted a new section of the City Code, "Pavement Preservation."[3] The Ordinance was adopted on August 27, 2013, after Cadence's one-year warranty period had expired. The new language governs excavations in the City's streets, setting out specific guidelines for replacement of pavement when necessary due to repairs or construction. The 2013 Ordinance requires that one year after being installed, the asphalt in a patch area is to be milled down and replaced. Along with that milling, all cracks or joints in the entire block on either side of the patch area are to be sealed, with a bituminous seal coated over the entire length of the block. *Id*., § 12.08.040(E)(1).

The new language also requires crack sealing and a new seal coat on all new subdivision streets. This work is to be completed near the end of the durability retainer period, and must be completed before the retainer will be released. *Id.*, §12.08.040(J).[4] Prior to the adoption of this language, the City had no ordinance or written policy expressing standards on pavement repair or release of warranty bonds. According to Cadence, however, the City had accepted "simple" T-patches for several years.[5]

Cadence maintains that the City's new Ordinance should only apply to projects commenced after August of 2013, and not to projects which had already been approved. In particular, Cadence notes that its subdivision project was constructed and the warranty period completed when the new ordinance was adopted. Cadence agrees that the City could adopt new standards for pavement repairs and warranty releases, but argues that the new standards should not have been applied to existing projects.

The City argues that no ordinance or written policy on pavement repairs was in place until August of 2013, and Cadence cannot rely on past practices. The City acknowledges that T-patches have been accepted in the past, but it states that the practice was not universal, nor was it approved as an official policy. The City argues that it may require any reasonable standards that in its discretion is necessary to ensure that its roads are safe and durable. Since there was no ordinance or policy, no developer could have gained a vested right in any past practices.

Analysis

I. Local Governments May Require Completion Assurance and Warranty Bonds to Guarantee Construction of Public Improvements.

A local government may require completion assurance as a means of guaranteeing that public improvements will be built.[6] Local governments may also require that developers warrant work

[3] The new section is numbered 12.08.040.
[4] Cracks larger than 3/8'' must be replaced rather than sealed. AMERICAN FORK CITY CODE, § 12.08.040(J)(2)(a).
[5] The City's new ordinance does not reject T-patches, but adds the additional requirements of replacing the asphalt in a patch after one year, and resealing entire blocks of streets. It appears that Cadence's objections stem from these additional requirements.
[6] UTAH CODE ANN. § 10-9a-103(18): "'Improvement completion assurance'" means a surety bond, letter of credit, cash, or other security required by a municipality to guaranty the proper completion of landscaping or infrastructure that the land use authority has required . . .." *See also id.*, § 17-27a-103(21) (applicable to counties).

on public improvements for one year after completion.[7] Requiring a developer to post a bond for the estimated cost of the improvements, and to also maintain funds for a warranty period are reasonable means to accomplish the legitimate government interest of ensuring that public improvements are properly designed and constructed. The Utah Code authorizes completion and warranty bonds:

> (2) (a) A land use authority shall require an applicant to complete a required landscaping or infrastructure improvement prior to any plat recordation or development activity.
>
> (b) Subsection (2)(a) does not apply if:
>
> (i) upon the applicant's request, the land use authority has authorized the applicant to post an improvement completion assurance in a manner that is consistent with local ordinance; and
>
> (ii) the land use authority has established a system for the partial release of the improvement completion assurance as portions of required improvements are completed and accepted.
>
> (3) At any time up to the land use authority's acceptance of a landscaping or infrastructure improvement, and for the duration of each improvement warranty period, the land use authority may require the developer to:
>
> (a) execute an improvement warranty for the improvement warranty period; and
>
> (b) post a cash deposit, surety bond, letter of credit, or other similar security, as required by the municipality, in the amount of up to 10% of the lesser of the:
>
> (i) engineer's original estimated cost of completion; or
>
> (ii) applicant's reasonable proven cost of completion.

UTAH CODE ANN. § 10-9a-604.5(2)-(3).[8]

Local governments must adopt written standards which guide design and construction of public improvements, and the same standards should apply to any work required during a warranty period. "With reasonable diligence, each land use authority shall determine whether the installation of required subdivision improvements or the performance of warranty work meets . . . adopted standards." UTAH CODE ANN. § 10-9a-509.5(3)(a).[9] Thus, local governments may adopt reasonable standards governing construction of required public improvements and standards governing repairs to those improvements during a warranty period.

---

[7] *Id.*, §§ 10-9a-103(19) & (20); 17-27a-103(22) & (23) (Definitions of "Improvement Warranty" and "Improvement Warranty Period," which may not exceed one year).

[8] *See also* UTAH CODE ANN. § 17-27a-604.5 (applicable to counties).

[9] *See id.*, § 17-27a-509.5(3)(a); *see also id.*, § 10-9a-103(19) (Improvement warranty means that required work "complies with . . . written standards for design, materials, and workmanship . . ..")

Cadence Homes does not dispute that the City may require warranty bonds to guarantee work performed on public improvements. Their question centers on whether the City may adopt new standards for warranty work after approving a development application.

II. Requirements Imposed on a Subdivision or Land Use Permit Must be Expressed in Writing at the Time the Application is Submitted or Approved.

Because the additional requirements for pavement repair and replacement were imposed after Cadence applied for and received approval for its subdivision, the City cannot require them on work done for that subdivision. The Utah Code restricts the conditions or requirements that may be imposed on developers:

> (h) A municipality may not impose on an applicant who has submitted a complete application for preliminary subdivision approval a requirement that is not expressed in:
> (i) this chapter [*i.e.*, Chapter 10-9a];
> (ii) a municipal ordinance; or
> (iii) a *municipal specification for public improvements* applicable to a subdivision or development that is in effect on the date that the applicant submits an application.

UTAH CODE ANN. § 10-9a-509(h) (emphasis added).[10] In essence, this language prohibits changing construction and warranty standards after an application is submitted or approved.[11] A local government may adopt new requirements and standards, but they may only be imposed on development applications received after the new standards were adopted.

Since Cadence's application had been submitted and approved before 2013, the City may not impose the new requirements adopted in Ordinance 2013-08-27. The new standards for pavement repair and replacement may only be required from development applications received after the effective date of that Ordinance. Cadence is still required to repair the roadways, as part of the improvement warranty, by following whatever repair standards the City had in place when the subdivision application was submitted.

Likewise, in the absence of a written standard, the City may not impose any standard it creates or deems necessary. As stated above, the City may not impose a requirement that is not expressed in the Utah Code, a municipal ordinance, or an applicable municipal specification for public improvements. UTAH CODE ANN. § 10-9a-509(h). Accordingly, the City does not have discretion to apply unexpressed standards or requirements.

[10] *See also id.*, § 17-27a-508 (applicable to counties).
[11] Subsection (h) prohibits changes from being imposed after an application for a subdivision is received. The next subsection of that statute, subsection (i), prohibits new requirements from being imposed on existing land use permits or final subdivision plats, reinforcing the conclusion that a local government may not apply new standards to existing development applications or permits.

Conclusion

Local governments may require that developers provide completion assurance, to ensure that public improvements are constructed, and warranty bonds, to ensure that public improvements satisfy standards for design, materials, and workmanship. These assurances and bonds may be required as a condition of development approval, if they are established as requirements when a development application is submitted.

In like manner, a local government may adopt reasonable standards governing construction of public improvements, and subsequent repairs under improvement warranties. In order to be valid, however, these standards must be in writing, and must have been adopted before a development application is submitted. New standards may not be imposed upon existing development applications or on approved development permits.

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

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. 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.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code 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:

Richard M. Colborn
City Recorder/Risk Manager
City of American Fork
51 East Main Street
American Fork, Utah 84003

On this _____ Day of January, 2014, 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