

# Advisory Opinion #23

Parties: Christopher Ames & Ames Group, LLC and City of West Jordan

Issued: October 23, 2007

## TOPIC CATEGORIES:

- E: Entitlement to Application Approval (Vesting)
- K: Compliance with Mandatory Land Use Ordinances
- R(ii): Other Topics (Subdivision Plat Approval)
- R(iii): Other Topics (Waiver of Conditions)

Applicant did not obtain approval from the culinary water authority as required for the preliminary approval of a subdivision. Failure to obtain such approval renders the final plat incomplete, and recording is invalid.

## 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: Christopher Ames and Ames Group, LLC  
by J. Thomas Bowen, Attorney at Law

Local Government Entity: West Jordan City

Applicant for the Land Use Approval: Ames Group, LLC

Project: Subdivision at 6790 South 1300 West

Date of this Advisory Opinion: October 23, 2007

Opinion Prepared by: Brent N. Bateman

### Issue

Is the City of West Jordan obligated to accept and approve the Applicant's subdivision located at 6790 South 1300 West, West Jordan, Utah where the subdivision application was filed and prosecuted while the subdivision property was within the boundaries of Taylorsville City, but final signatures and recordation of the plat occurred while the property was within the boundaries of West Jordan City?

### Summary of Advisory Opinion

The Applicant has not completed entitlement of the subdivision because the Applicant has failed to satisfy the express requirement that the City of West Jordan approve the subdivision before recording. Therefore, the City of West Jordan is not obligated to accept and honor the recorded subdivision plat. It is not necessary to determine whether the signatures of the Taylorsville Mayor and Attorney were ministerial acts or were invalid and ineffective due to lack of jurisdiction.

### 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 ANN. § 13-43-205. 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 an advisory opinion in this matter was received from J. Thomas Bowen, Attorney for the Applicant, on August 31, 2007. A letter with the request attached was sent by certified mail, return receipt requested, to Melanie Briggs, West Jordan City Recorder, at 8000 South Redwood Road, West Jordan, UT 84088. Ms. Briggs is the individual whose name is listed as the designated agent on the records of the Division of for the receipt of notice under the Utah Governmental Immunity Act. A return receipt was received indicating that Ms. Briggs' office received the request. Darien Alcorn, Deputy West Jordan City Attorney, responded to the request.

The parties did not appoint a neutral to write the opinion, so this office has prepared it. On several occasions prior to the preparation of this opinion, Brent N. Bateman of this office conversed and/or traded emails with J. Thomas Bowen, Attorney for the Applicant and Darien Alcorn, Deputy West Jordan City Attorney.

### **Evidence**

The following documents with relevance to the issue involved in this advisory opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion filed August 31, 2007 with the Office of the Property Rights Ombudsman by J. Thomas Bowen, Attorney at Law for the Ames Group, LLC.
2. Letter dated August 31, 2007 to Brent N. Bateman of the Office of the Property Rights Ombudsman from J. Thomas Bowen.
3. Letter dated September 27, 2007 to Brent Bateman of the Office of the Property Rights Ombudsman from Darien Alcorn.
4. Minutes of the February 1, 2007 meeting of the Taylorsville City Council.
5. Minutes of the December 12, 2006 meeting of the Taylorsville Planning Commission.
6. Various Taylorsville City Ordinances, including but not limited to Ordinance No. 12.08.010, located at <http://www.sterlingcodifiers.com/UT/Taylorsville/index.htm>.
7. Letter dated January 11, 2007 to Chris Ames of the Ames Group from Michael D Malloy, Taylorsville City Community Development Director.
8. Email letter dated April 19, 2007 to Craig@pgay-architects.com from Paul Coates, West Jordan City Office of Development Assistance Manager.
9. Email letter dated June 29, 2007 to Mark McGrath from Chris J. Gilbert, West Jordan City Associate Planner.
10. Letter dated April 30, 2007 to Salt Lake Valley Health Department from Nathan Nelson, West Jordan City Engineer.
11. Letter dated July 19, 2007 to Mark McGrath from Tom Burdett, West Jordan City Director of Community Development.

Other documents were submitted by the parties but were not deemed relevant to this opinion and therefore not reviewed in connection with its preparation.

### **Assumed Facts**

1. The boundary adjustment between Taylorsville City and West Jordan City dated May 23, 2007 is validly enacted and took effect July 1, 2007.
2. The property included in the subdivision application is entirely within the boundary adjustment area.
3. Agents of the Ames Group, LLC submitted a valid subdivision application to Taylorsville City in 2006, at which time the property seeking to be subdivided was within the municipal boundaries of Taylorsville City.
4. On December 12, 2006, Taylorsville City planning commission granted preliminary approval of the subdivision subject to twelve conditions.
5. On February 21, 2007, the Taylorsville City Council approved and granted an exception to the Roadway Development Standards in the Taylorsville City Code to the Subdivision.
6. On June 20, 2007, the Applicant signed the Final Plat with appropriate acknowledgements and authority and submitted the final plat to the City for signatures.
7. On June 21, 2007, the Taylorsville City Engineer signed the Final Plat with appropriate acknowledgements and authority.
8. On June 25, 2007, the Taylorsville Planning Commission Chair signed the Final Plat with appropriate acknowledgements and authority.
9. On June 25, 2007, the Taylorsville Planning Commission Chair signed the Final Plat with appropriate acknowledgements and authority.
10. On June 28, 2007, the Taylorsville City Attorney reviewed the Final Plat and declined to sign.
11. On June 29, 2007, the appropriate utility companies signed the Final Plat with appropriate acknowledgements and authority.
12. On July 3, 2007, the Taylorsville Mayor, Attorney, and City Clerk all signed the Final Plat with appropriate acknowledgements.

13. On July 10, 2007, the Applicant recorded the plat with the Salt Lake County Recorder.

### **Background**

Sometime in 2006, the Ames Group, LLC (“Applicant”) applied to create a small subdivision within the boundaries of Taylorsville City. While the subdivision application was pending, Taylorsville City and West Jordan City entered into a boundary adjustment in accordance with UTAH CODE ANN. § 10-2-419. This boundary adjustment had the effect of disconnecting the subdivision property, along with other properties, from Taylorsville City and annexing them into West Jordan City. Despite the fact that the subdivision property was soon to come under West Jordan City jurisdiction, the Applicant and Taylorsville City proceeded with the subdivision application. This and other circumstances present a very unique situation; some of the required signatures were placed on the plat prior to the effective date of the boundary adjustment, but some necessary signatures by Taylorsville City officials were not obtained until after the property was officially part of the City of West Jordan. The question presented by the parties, therefore, is whether the applicant obtained full and irrevocable entitlement to the subdivision from Taylorsville City.

The Applicant contends that the subdivision application process was complete, and full and final approval received, from Taylorsville City prior to the boundary adjustment. Applicant further argues that the signatures on the plat of the Mayor, City Attorney, and City Clerk of Taylorsville, obtained after the boundary adjustment effective date, were merely ministerial acts and do not invalidate the approval received prior to the boundary adjustment. Applicant therefore contends that West Jordan must honor the approval and allow development of the subdivision. The City of West Jordan contends that the Taylorsville City officials who signed the plat after the boundary adjustment did not have jurisdiction over the property, and therefore did not have authority to sign or approve the plat. Accordingly, West Jordan contends that the subdivision plat is not validly approved or executed. The primary question presented for this Advisory Opinion concerns whether the signatures of the Taylorsville City officials were ministerial acts or whether they were required approvals given without proper authority. It is unnecessary to decide this question because this Opinion concludes that the Applicant has not fulfilled the requirements for full entitlement.

### **Analysis**

The Applicant received preliminary approval of the subdivision from the Taylorsville Planning Commission on December 12, 2006. According to the official minutes of that Planning Commission meeting, and according to the letter dated January 11, 2007 to the Applicant from Michael D Malloy, Taylorsville City Community Development Director, preliminary approval was granted subject to twelve conditions:

- 1) Under the authority of the Planning Commission, staff shall administrate final review of the subdivision plat. For clarification, that final approval only has to come back to the Commission if

problems relative to the subdivision cannot be resolved between staff and the developer – particularly the engineering and drainage issues along the south property line as raised by the adjacent property owners.

- 2) Applicant shall pay all required fees prior to final approval of the subdivision plat including impact fees and recordation fee.
- 3) Application must receive approval from all applicable agencies (i.e., City Engineer, Unified Fire Authority, West Jordan City, etc.) prior to recordation.
- 4) Applicant shall provide for technical review civil engineering plans with adjacent property lines and setback measurements from property lines to existing structures on adjoining properties.
- 5) Applicant shall design and submit an engineered storm drainage master plan that is acceptable to the City Engineer.
- 6) Developer shall be responsible for the installation of all public improvements including the planting of 2 inch caliper (minimum) park strip trees. Park strip tree species shall be approved by staff. Trees shall be planted on 25 foot centers. Spacing may be adjusted due to species selection or conflicts with public improvements such as meters, hydrants, street lights, or drive approaches but may not be reduced in number.
- 7) Applicant shall provide property addresses for each parcel within the plat.
- 8) Applicant shall contact Salt Lake County Recorder's Office and Assessor's Office and to verify record-ability of the subdivision plat (including proposed subdivision name and addressing) prior to final subdivision plat to be recorded.
- 9) Preliminary subdivision approval is contingent upon City Council approval of an exception to the City's Highway Ordinance to allow development of a 25-foot wide private road without park strip and sidewalk.
- 10) That the length of the driveway be moved to the south to accommodate an appropriate radius at the intersection at 1300 West to provide for street improvements.
- 11) That at least a 5' wide sidewalk be installed along that driveway from the western end all the way to 1300 West for pedestrian access.
- 12) That perimeter vinyl fencing be installed at a minimum height of 6' as indicated by the developer.

Notable is condition #3:

- 3) Application must receive approval from all applicable agencies (i.e., City Engineer, Unified Fire Authority, West Jordan City, etc.) prior to recordation.

According to Condition #3, the Applicant must obtain the approval of West Jordan City prior to recordation. The requirement does not state why West Jordan must approve the Application, or what type of review West Jordan is to provide.<sup>1</sup> But the obligation to obtain the approval of West Jordan is unequivocal.

West Jordan City indicates that it did not provide its approval of the application. The materials provided to this Office by West Jordan City indicate that the Applicant first requested West Jordan's approval approximately one week before the boundary adjustment became effective. In an email letter to Mark McGrath from Chris J. Gilbert, West Jordan City Associate Planner dated

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<sup>1</sup> The fact that West Jordan is listed in this condition as an *applicable agency*, along with the City Engineer and the Unified Fire Authority, indicates that Taylorsville contemplated that West Jordan would provide services to the subdivision. Other statements by the parties and documents provided to this Office indicate that the parties consider West Jordan to be the culinary water authority for the property.

June 29, 2007, two days prior to the effective date of the boundary adjustment, West Jordan City states that it has not had the opportunity to review the final plans and plat, and that it had not seen the final plat until it “was brought in last week by the developer to request a will-serve letter.” West Jordan specifically denies approving the plat. This office has not received any evidence to indicate that West Jordan approved the plat. If Applicant did not obtain the approval of West Jordan, then the Applicant did not fulfill this express condition imposed by the Taylorsville Planning Commission.

The signatures on the plat of the Taylorsville Mayor, City Attorney, City Clerk, or Planning Commission Chair, given despite the Applicant’s failure to obtain the approval of West Jordan, do not compel a contrary conclusion. There is no indication that the City of Taylorsville expressly waived the Planning Commission’s condition. The signatures on the plat also do not amount to an implied waiver. Condition #3 states that West Jordan’s approval must be received prior to *recording* of the plat. The condition does not make West Jordan’s approval necessary prior to *signing* the final plat. Whether this was intentional or unintentional,<sup>2</sup> it leaves the window open for Taylorsville Officials to sign the plat prior to receiving the approval of West Jordan, with knowledge that the applicant had yet to fulfill condition #3. These signatures therefore cannot be considered a waiver of the condition.

Additionally, even if Taylorsville had waived condition #3, the subdivision application has not met the requirements for full entitlement. The Applicant has also failed to complete the requirements imposed by Utah law and the Taylorsville City Ordinances. Taylorsville City Ordinances give a general overview of that City’s subdivision approval process:

12.08.010: PROCEDURE GENERALLY:

Before subdividing any tract or lot or parcel of land into two (2) or more lots, a subdivider shall:

- A. Prior to or coincident with the submission of the preliminary plat, file with the planning commission a completed subdivision information form or forms to be furnished by the planning commission;
- B. File with the planning commission for examination and subsequent action prints of the preliminary plat prepared in conformance with the provisions of this title. . . . ;
- C. Within one year after receiving approval of the preliminary plat by the planning commission, submit the original and one copy of the final plat to the planning commission for final approval or disapproval, as the case may be. . . . ;
- D. Present, after receiving final approval by the planning commission, the original of the final plat to the community development director for survey and engineering review by the engineering contractor;
- E. Ensure the water supply and sewage disposal shall have been approved by the health department, culinary water authority and sanitary sewer authority;
- F. Ensure a current commitment for title insurance from an acceptable title company and bond or other acceptable security shall be submitted to the city attorney for approval;
- G. Ensure the community development department will submit the final plat to the mayor for action after approval from the city attorney; and

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<sup>2</sup> “When examining the plain language [of an ordinance], we must assume that each term included in the ordinance was used advisedly.” *Carrier v. Salt Lake County*, 2004 UT 98, ¶30.

H. Ensure after obtaining final approval from the mayor the final plat bearing all official approvals as required in this title must be recorded with the county recorder at the expense of the subdivider.  
... (Ord. 06-01, 2-15-2006)

Requirement E mandates that subdivision applicants “Ensure the water supply and sewage disposal shall have been approved by the health department, *culinary water authority* and sanitary sewer authority.”

In addition, Utah statutory law sets forth when an applicant is entitled to approval of a subdivision application:

“Subject to Subsections (3), (4), and (5), if the plat conforms to the municipality's ordinances and this part and has been *approved by the culinary water authority* and the sanitary sewer authority, the municipality shall approve the plat.” UTAH CODE ANN. § 10-9a-603 (2)(a) (emphasis added).

This ordinance and statute both impose a prerequisite to subdivision approval that the culinary water authority approve the subdivision. The documents submitted by the parties indicate that all parties — the Applicant, Taylorsville City, and West Jordan City — considered West Jordan City to be the culinary water authority for the project. As stated above, West Jordan did not approve the project. In the Letter dated April 30, 2007 to Salt Lake Valley Health Department from Nathan Nelson, West Jordan City Engineer, West Jordan states that water is available to the subdivision, but service to the subdivision is “subject to” the subdivision becoming part of West Jordan and the “utility systems being constructed in accordance with City standards and *approved plans*” (emphasis added). This indicates that West Jordan will only serve the project if West Jordan has approved the plans for the project. This letter is, at best, an indication of water availability and the conditions under which West Jordan will serve the subdivision. This letter cannot be considered a will-serve letter or an express approval of the subdivision.<sup>3</sup> In addition, according to the June 29, 2007 email letter discussed above, as late as one week prior to the effective date of the boundary adjustment, it appears that the Applicant believed that a will-serve commitment had not been received, because he approached West Jordan City seeking one. Therefore, the subdivision does not have a valid will-serve commitment, and lacks the approval of the culinary water authority, in violation of Taylorsville City Ordinances and Utah law.

Taylorsville cannot expressly or impliedly waive these conditions by signing the plat in the absence of these approvals. Where Utah statute imposes a condition upon development approval, the City cannot release the Applicant from the statutory requirement by imposing a less restrictive condition. UTAH CODE ANN. § 10-9a-104. Taylorsville also cannot waive the mandatory conditions in its own ordinances. UTAH CODE ANN. § 10-9a-509(2). The Applicant is only entitled to approval of a subdivision if the applicant receives express approval from the culinary water authority.

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<sup>3</sup> The Taylorsville City Ordinance requires that approval by the culinary water authority be express, rather than implied or conditional, by stating that the Applicant must “*ensure*” that the culinary water authority approve the plans.

Applicant's failure to obtain such approval means that the applicant is not entitled to subdivision approval. UTAH CODE ANN. § 10-9a-603 (2)(a). According to Utah statute, the failure to obtain these approvals before recording renders the plat void:

A person may not submit a subdivision plat to the county recorder's office for recording unless . . . the plat has been approved by: . . .(ii) other officers that the municipality designates in its ordinance; and (iii) all approvals are entered in writing on the plat by the designated officers. . . . (2) A subdivision plat recorded without the signatures required under this section is void.”

UTAH CODE ANN. § 10-9a-604. Taylorsville City Ordinances, along with Utah State law and the conditions imposed for approval by the Taylorsville Planning Commission, require that the Applicant obtain the approval of West Jordan City. The Applicant did not do so before recording the plat. Therefore, the plat is void. West Jordan is not obligated to accept and honor the subdivision plat.

### **Conclusion**

Utah law and Taylorsville Ordinance require that an applicant for subdivision approval receive the approval of the culinary water authority. In addition, an express condition to the development imposed by the Taylorsville Planning Commission is that the application be approved by West Jordan City prior to recording. Nothing received by this office indicates that West Jordan City provided either express or implied approval of the subdivision. Instead, West Jordan City expressly states that it has not approved the plat. Likewise, nothing received by this office indicates that any culinary water authority has approved the subdivision. The signatures of the Taylorsville City officials on the plat cannot be considered a waiver of that condition. Moreover, Taylorsville City Officials cannot waive or bypass a prerequisite imposed by Utah statute. Because the Applicant failed to meet those conditions and requirements, the subdivision approval is not final. The Applicant is not fully entitled to develop the subdivision, and West Jordan is not obligated to accept the subdivision plat.

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

### **NOTE:**

**This is an advisory opinion as defined in UTAH CODE ANN., § 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

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:

Melanie Briggs  
West Jordan City Recorder  
8000 S. Redwood Road  
West Jordan, UT 84088

On this 24 Day of October, 2007, 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