

Advisory Opinion #35

Parties: City of Holladay and the Greek Orthodox Church of Greater Salt Lake

Issued: March 31, 2008

TOPIC CATEGORIES:

D: Exactions on Development

The statute of limitations prohibits government entities from asserting title or other right to real property after seven years. However, adverse possession may be an appropriate way for the public to enforce a claim of title. Finally, the property has been used as part of the road for much longer than ten years and the owner never tried to prevent this use; thus, there is no question that the property is now a public right-of-way.

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: City of Holladay

Local Government Entity: City of Holladay

Applicant for the Land Use Approval: The Greek Orthodox Church of Greater Salt Lake

Project: Enforcement of Conditions Placed on Original Conditional Use Permit.

Date of this Advisory Opinion: March 31, 2008

Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

May the City enforce a property-dedication requirement that was imposed when a conditional use permit was first issued in 1968, and reimposed in 1998, but never formally enforced?

Summary of Advisory Opinion

The Utah Code imposes a seven-year statute of limitation on actions by government entities based on title to real property. The seven-year statute of limitation expired long ago. Therefore, it is far too late for the City or Salt Lake County to file a suit seeking dedication of the property. However, the City or County may claim ownership of the property through adverse possession.

The property in question has been used continuously as part of a public roadway for the statutorily required period. Therefore, the property is subject to a public right-of-way. The Church cannot make any use of or alteration to the property that would interfere with the public's use as a roadway.

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 the City of Holladay on February 4, 2008. A letter with the request attached was sent via certified mail, return receipt requested, to Nick Varanakis, Greek Orthodox Church of Greater Salt Lake, at 5335 Highland Drive, Holladay, Utah 84117. The return receipt was signed and was received on February 5, 2008, indicating that the Church had received it. Representatives from the Church and the City met with the Office of the Property Rights Ombudsman on January 29, 2008, where this Request and the underlying issue were discussed. A response from attorney Kevin Anderson, of Anderson Call, on behalf of the Church was received on March 10, 2008.

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 received February 4, 2008 by the Office of the Property Rights Ombudsman, prepared by H. Craig Hall, attorney for the City of Holladay.
2. Response received March 10, 2008 from Kevin Anderson, Attorney for the Greek Orthodox Church of Greater Salt Lake.

Background

The Greek Orthodox Church owns property located at 5335 S. Highland Drive in Holladay, Utah. Construction of the church building was approved in 1968, by Salt Lake County.¹ When the Church first sought approval for construction in 1968, the County required dedication of a seven-foot strip of the Church's property along Highland Drive as a condition of approval for the building. For unknown reasons, no formal dedication nor other title transfer of the property occurred. Nevertheless the curb was set back seven feet, and the roadway was eventually widened in accordance with the dedication requirement.

¹ At that time, Holladay was an unincorporated area City and the property was under the governing authority of Salt Lake County.

In 1998, the Church sought approval from the County to expand its parking lot. The Salt Lake County Planning Commission granted approval for the expansion, provided the Church dedicate to the County property located “40 feet from the centerline of Highland Drive.” This dedication would have included the seven feet requested in 1968. Although that dedication condition was also not enforced, the parking lot was expanded.² The seven-foot strip was unaffected by the parking lot expansion, and remained part of the roadway.

The City of Holladay incorporated in 1999, and thereafter the Church property formally came under the City’s jurisdiction. In 2006, the Church applied to the City for a conditional use permit to construct a pavilion within the park area on its property. The City of Holladay granted approval, with ten conditions. One of those conditions was again “dedication of 40 feet from the center line of Highland Drive.”³ This represented the dedication requirement from the original 1968 conditional use permit. In a separate Advisory Opinion issued on February 13, 2008, the Office of the Property Rights Ombudsman determined that the City could not require dedication of the seven-foot strip as a condition for approval of the pavilion. The Ombudsman Office concluded that the City had not shown how dedication of the roadway was roughly proportional to the impact of the pavilion, and so the condition was not a proper exaction. As that opinion was being prepared, the City requested this Opinion, which focuses on whether the original permit condition may still be enforced. According to information received, the City has since dropped the road dedication requirement as a condition of approval of the pavilion.

Analysis

A. A Direct Enforcement Action is Barred by the Statute of Limitations.

The City is prevented from enforcing the property dedication condition directly, because an action to force the Church to fulfill the condition is barred by the statute of limitations. UTAH CODE ANN. § 78-12-2 states:

The state will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the state to the same, unless:

- (1) such right or title shall have accrued within seven years before any action or other proceeding for the same shall be commenced; or
- (2) the state or those from whom it claims shall have received the rents and profits of such real property, or some part thereof, within seven years.

This section of the Utah Code prevents a government entity from suing another party over title or other right to real property unless such suit is brought within seven years of the time when the

² No evidence has been provided that would tend to show why these dedication requirements were not enforced or why the property was not dedicated to the City.

³ In its Request, the Church did not object to the other conditions.

State's claim of title arose.⁴ Although actions by government entities to enforce conditions on land use approvals are not specifically identified in a statute of limitations, this limitation is controlling in this case.

Statutes of limitation advance an important public policy: preventing litigation on stale claims. *See, e.g., Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶22 (“Statutes of limitations are intended to prevent unfair dilatory litigation against a defendant and to require that claims be litigated while proper investigation and preservation of evidence can occur.”); *Horton v. Goldminer's Daughter*, 785 P.2d 1087, 1091 (Utah 1989) (“In general, statutes of limitation are intended to compel the exercise of a right of action within a reasonable time and to suppress stale and fraudulent claims so that claims are advanced while evidence to rebut them is still fresh.”). No statute of limitation or other law indicating when conditions imposed upon development approval generally expire has been found. Nevertheless, interpreting this lack of a specific expiration date as an indication that conditions imposed upon development approval never expire directly violates this public policy. In order to prevent the exact situation that is presented here,⁵ some limitation must be applied.

Any number of differing conditions and types of conditions can be placed upon development approval. In the absence of a limitation on enforcement of development approvals in general, the only remaining course is to identify the nature of the development condition, and apply the appropriate existing limitation period thereto. For example, should a condition of development approval be in the nature of an agreement to provide some service to the community, then the limitation to enforce a contract could apply. In the present case, the issue is the dedication of real property, and therefore the limitations for the state to enforce a claim for title for real property should apply. Since the requirement was imposed in 1968, then an action on title to that property should have been initiated sometime before 1975, which is seven years after the Salt Lake County's right to the strip of property first accrued. Although a new cause of action may have accrued in 1998, when the dedication requirement was reimposed as a condition of approval for expansion of the parking lot (*See State v. Huntington-Cleveland Irrigation Co.*, 2002 UT 75 (holding that a cause of action accrues anew each time a legal injury is suffered)), more than seven years have passed since that time as well. Therefore, the City can no longer file a direct legal action to enforce the conditions imposed.

B. The City May Claim Title via Adverse Possession.

Nevertheless, despite its inability to directly enforce the dedication requirement, the City is not without recourse. Although the seven-foot roadway strip was never formally deeded, the City

⁴ The Statute of Limitations is applicable to both the State of Utah and its political subdivisions. *See* UTAH CODE ANN. § 78-12-33; *see also Parker v. Weber County Irrigation Dist.*, 68 Utah 472, 483-84, 251 P. 11, 15-16 (1926); *Trail Mountain Coal Co. v. Utah Division of State Lands and Forestry*, 884 P.2d 1265, 1271 (Utah Ct. App. 1994).

⁵ The parties have acknowledged that there is little hope at this point, forty years after the original condition of dedication approval was imposed, to gather evidence that would be necessary to litigate on the matter. Documentary evidence is now sparse, witnesses would be difficult to find, and memories unreliable after so long. The crucial questions of why the condition was imposed but not enforced would be virtually impossible to answer.

may be able to claim ownership of that portion of the roadway under an adverse possession theory.

Any party, including a public entity, may claim ownership of land which has been possessed and used contrary to the rights of the actual owner. *State ex rel. Road Comm'n v. Cox Corp.*, 29 Utah 2d 127, 130, 506 P.2d 54, 56 (1973). The *Cox Corporation* decision concerned facts somewhat similar to the situation faced by the City and the Church, and is instructive to help resolve this dispute. That case arose as part of an action to condemn a parcel for a road project. The property owner, Cox Corporation, disputed a claim that Salt Lake City owned about one-half of the parcel in question. In approximately 1880, the City had constructed a 30-mile long canal, which crossed the parcel. At the time of construction, Salt Lake City obtained a 66-foot right-of-way along the entire length of the canal. However, due to some error or oversight, the portion of the right-of-way on the parcel was not deeded to Salt Lake. Nevertheless, the canal was maintained and used continuously up until the condemnation action was filed.

Cox Corporation claimed clear title under the Marketable Record Title Act⁶, because it could show an unbroken and unclouded chain of title for over forty years. The Utah Supreme Court noted that the act provided that a party may establish adverse possession of property notwithstanding an unbroken chain of title. The Court held that Salt Lake City had maintained and used the right-of-way on the Cox parcel for well over forty years, and had thus established a claim to a portion of what would have been the right-of-way:

Whenever the possession is of such character that ownership may be inferred therefrom, then the possession ordinarily may be presumed to be hostile to the rights of the true owner; that is, if a party places permanent structures upon the land belonging to another, and uses the land and structures the same as an owner ordinarily uses his land, then, in the absence of something showing a contrary intention, a claim of ownership may be inferred in favor of the party in possession
.....

Cox Corp., 29 Utah 2d at 130, 506 P.2d at 56 (quoting *Pioneer Investment & Trust Co. v. Bd. of Education*, 35 Utah 1, 8, 99 P. 150, 151 (1909)).

In the dispute between Holladay and the Church, the land in question has been possessed and used by the City (and Salt Lake County) for nearly forty years. The land in question has been paved and used as a roadway, in the same manner as other roadways owned and maintained by Holladay and Salt Lake County. The Church has not shown any contrary intention, in fact, it acquiesced in the dedication by installing its curb and fence inward, and by allowing the roadway to be used as a public thoroughfare for nearly forty years.⁷

⁶ The Marketable Record Title Act is found at § 57-9-1 of the Utah Code.

⁷ Another aspect of the *Cox Corporation* decision should also be noted here. The adverse possession statute, § 78-12-12, requires that a claimant under adverse possession must also pay taxes. In *Cox*, Salt Lake City did not pay taxes since it was a government entity. The court explained that the canal in question had been constructed prior to the statute requiring payment of taxes, and so Salt Lake was excused. That same exemption would not necessarily apply to the dispute at issue here, between Holladay/Salt Lake County and the Church, because the statute was in

C. *The Strip has been Dedicated to Use as a Public Thoroughfare.*

Nevertheless, without regard to whether the City may successfully mount a claim for title to the property, the public's right to full use of the property is without question. The seven-foot strip has been dedicated to public use as a thoroughfare, even though title to the property never officially changed hands. Land which has been used continuously as a public thoroughfare for a period of at least ten years is dedicated to public use as a right-of-way. *See* UTAH CODE ANN. § 72-5-104. The seven feet of land in front of the Church's property is, for all intents and purposes, part of Highland Drive. It has been continuously used by the public as a public thoroughfare for more than ten years. There is no evidence that the Church has ever attempted to prevent usage of that strip.⁸ The property has become subject to a right of way.

Even though the Church may own fee title to the property, the Church may not interfere with travel on the roadway. *Carrier v. Lindquist*, 2001 UT 105 (“It is a long-held tenet of property law that a servient estate cannot unreasonably restrict or interfere with the proper use of an easement.”). Although the Church would be entitled to use the property in a manner that would not conflict with the easement, it is unclear what use the Church could possibly hope to put the property to that would not conflict or interfere with the operation of Highland Drive. As a practical matter, the Church could not hope to sell the property for any more than a negligible sum, because the presence of the public easement would severely limit the value of the land in question.

Conclusion

It is far too late for the City or County to initiate an action enforcing the terms of the original conditional use permit. A government entity has seven years to file a suit based on title to real property. However, it must be understood that the seven-foot strip is now subject to a public easement, because it has been used by the public as a roadway for over ten years. The Church cannot now interfere with that easement. It is also possible that the City or County may claim ownership of the strip through adverse possession, because it has been used and maintained by those entities for nearly forty years.

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

effect in 1968, when the adverse period began to run. However, the statute only requires payment of taxes “levied and assessed upon [the] land according to law.” UTAH CODE ANN. § 78-12-12. Since ecclesiastical property is not subject to taxation, no taxes were levied and assessed on any of the Church property, including the strip that would have been dedicated. Since no taxes were levied, none were due, and the City may still maintain its claim under adverse possession.

⁸ *See Wasatch County v. Okleberry*, 2008 UT 10, ¶ 15 (public use may be “interrupted” by overt act of property owner showing intent to block or prevent access).

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, § 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:

Nick Varanakis
Greek Orthodox Church of Greater Salt Lake
5335 Highland Dr
Holladay, Utah 84117

On this _____ Day of March, 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