Advisory Opinion 239

Parties: Harbut & Sawyer / Big Water Town

Issued: May 5, 2021

TOPIC CATEGORIES:

Compelling, Countervailing Interests

Compliance With Land Use Ordinances

Interpretation of Ordinances

The meaning of "subdivision" under Utah Code and local ordinance does not refer to any land division, but to the recorded division of land approved pursuant to a regulatory scheme. Big Water Town's ordinances prohibit consolidating subdivided lots. Small tracts of once-public land that were initially platted and divided by the US government to convey to private ownership under a federal homesteading act are not considered to be subdivided lots for purposes of parcel joinder.

Municipalities must comply with the mandatory provisions of its land use ordinances. A dispute over private easement rights does not generally speak to an application's compliance with applicable land use regulations, and the municipality should approve a compliant application if not contrary to law, while leaving disputes over private rights to the courts to resolve. However, a deprivation of private property rights resulting from a land use approval may, in certain cases, be properly considered a compelling, countervailing public interest that could justify denial of a compliant application until a court or the involved parties resolve any inherent takings concerns. While third parties asserted an easement interest in the subject property and alleged taking concerns with a planned unit development, the site plan did not propose any infringement on the purported easement, and the Town's approval without regard to the easement claim was proper.

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ADVISORY OPINION

Advisory Opinion Requested By:	Ronald E. Harbut and Tom Sawyer
Local Government Entity:	Big Water Town
Applicant for Land Use Approval:	Michael and Robin Crowther
Type of Property:	Residential
Date of this Advisory Opinion:	May 5, 2021
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUE

1. Did the Town's approval of a joinder of land tracts originally issued together as US land patents violate the Town's ordinances that prohibit consolidating subdivided lots?
2. May the Town approve a development proposal where a third party has asserted that the approval would interfere with a private easement interest in the subject property?

SUMMARY OF ADVISORY OPINION

Tracts of land are not considered to be a subdivision under state law or local ordinance simply by virtue of having originated as issued land patents of once-public lands. Therefore, a provision of the Town's ordinances prohibiting the consolidation of subdivided lots in an existing subdivision did not prohibit approval of the application for joinder of tracts deriving from BLM land patents.

Regarding the proposed development, municipalities are bound by, and must comply with, the mandatory provisions of its land use ordinances. A dispute over private easement rights does not generally speak to an application's compliance with applicable land use regulations. A municipality's land use authority should approve compliant applications if there is sufficient information to find that the municipality's approval is not contrary to law, while leaving disputes over private rights to the courts to resolve.

However, even a complete application that complies with applicable standards is not entitled to approval if the land use authority formally finds that a compelling, countervailing public interest would be jeopardized by approving the application. The potential deprivation of an individual's fundamental property rights as a result of a land use approval may, in certain cases, be properly considered a compelling, countervailing public interest that could justify denial of a development application until a court or the involved parties resolve any takings concerns inherent in approval.

Here, third parties assert private easement rights over the subject property and raised takings concerns in opposition to the Town's approval of a residential subdivision. However, the subdivision plans actually approved by the Town do not appear to alter or restrict those purported rights in any way. The Town concluded that the proposed development presented no takings issues, and moved forward with approval of the application. The Town's action to approve without regard to the asserted private claims was not improper.

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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 this 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 Ronald E. Harbut on November 16, 2020, and later joined by Tom Sawyer on November 25, 2020. A copy of the request was sent via certified mail to Jennifer Johnson, Municipal Clerk for Big Water Town, 60 North Aaron Burr, Big Water, Utah 84741, on December 1, 2020.

EVIDENCE

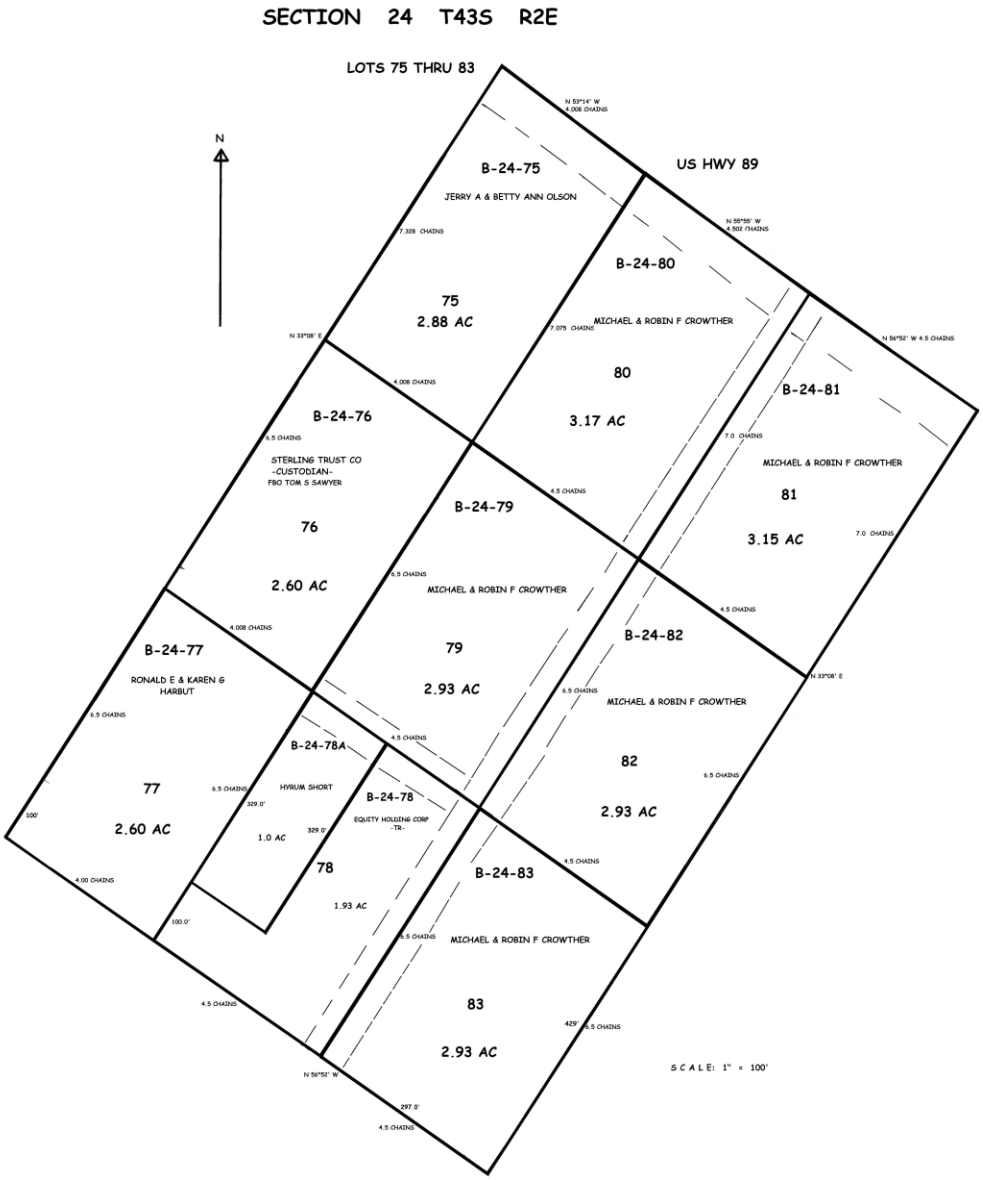
The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Supplemental Arguments and Documents submitted by Ronald E. Harbut, received January 15 and January 19, 2021.
2. Letter from attorney Joseph M. Chambers re: Opinion Regarding Advisory Opinion Request, submitted by Ronald E. Harbut, dated February 19, 2021.
3. Letter re: Lone Rock Views at Lake Powell Subdivision, submitted by David W. Hunter, attorney for Michael & Robin Crowther, dated March 16, 2021.
4. Letter from Joseph M. Chambers in response to March 16, 2021 David Hunter letter, dated March 22, 2021.
5. Letter from attorney Scott F. Garrett on behalf of concerned citizens of Big Water to Mayor David Schmuker dated January 22, 2021.

6. Memorandum re: Big Water Town's Legal Position, submitted by Justin Wayment, counsel for Big Water, dated April 21, 2021.

BACKGROUND

In the Town of Big Water, just off of state highway 89, sits a group of nine adjacent tracts of vacant land of similar size (roughly 3 acres each), labeled as parcels B-24-75 through B-24-83,[1] illustrated as follows:



[1] As depicted in the following illustration, there are actually 10 parcels, as lot B-24-78 appears to have subdivided off a one-acre portion now labeled B-24-78A.

Once public land, the area comprising the above-illustrated properties was internally surveyed and platted for the defined tracts by the Bureau of Land Management ("BLM") in 1958 and transferred from the Federal Government to private ownership through land patents issued in 1959 pursuant to the Small Tract Act of 1938. Each land patent is described as "subject to a right-of-way not exceeding 33 feet in width, for roadway and public utility purposes" along specified boundaries of each tract that, when read together, depict a 66-foot right-of-way originating off highway 89 and running through the nine tracts along certain of their respective shared boundaries, as shown in the above illustration above by dotted lines.

Michael & Robin Crowther ("the Crowthers") own five of the nine tracts, Lots 79 through 83, and approached the Town with plans to develop a residential subdivision called "Lone Rock Views at Lake Powell". Tom Sawyer and Ronald Harbut ("the Neighbors") own Lots 76 and 77, respectively, in the southwest end of the grid. These tracts are both otherwise landlocked but for the right-of-way described in the land patents across the Crowther-owned tracts. The Neighbors argue that the rights-of-way referenced in the US land patents constitute a dedication of a public right-of-way, as well as a reservation of private easement rights for the surrounding lot owners.

The Crowthers applied to the Town for a lot consolidation/parcel joinder to combine the five tracts they own in anticipation of further subdividing the resulting consolidated property into several townhomes. The Town approved the lot consolidation/parcel joinder on April 5, 2021. As for the Lone Rock Views subdivision, the initial site plan submitted depicted three rows of townhomes, with the middle row sitting on top of the right-of-way described in the land patents, and proposed relocating that portion of right-of-way to the western boundaries of lots 79 and 80 to service the other tracts, and adding some private roads. This application was subsequently withdrawn, and a new design was submitted, and subsequently approved on April 5, 2021, which acknowledges the land patents' described rights-of-way in their entirety, and instead depicts two rows of townhomes on either side of the patent right-of-way running NE/SW, while half the width of the 66' NW/SE patent right-of-way on the Crowther side will be improved along the shared boundaries of lots 78 and 79, connecting with new 33' private roads.

The Neighbors oppose the lot consolidation and proposed subdivision and road plan, alleging that the land patents constitute a subdivision which cannot be further subdivided under the Town's ordinances. Further, citing the Crowthers' initial site plan, the Neighbors express concern with the approved plan to only improve half the width of certain portions of the patent rights-of-way, fearing that the Town may simply vacate the remaining unimproved portions of the rights-of-way in the future, which would then pave the way for the Crowthers to resurrect the original site plan. The Neighbors argue that any action by the Town accepting a plat that does not respect all of the current patented rights-of-way constitutes a taking of their property interests in a private easement.

ANALYSIS

I. History of Private Land Ownership in Utah and the Town of Big Water

In way of a brief history, the United States government acquired territory including what now constitutes the State of Utah from Mexico with the signing of the Treaty of Guadalupe Hidalgo in February 1848. As a result, this land came into possession of the Federal Government with a clear

and undisputed title.[2] Under the Homestead Act of 1862 and other land-grant acts, the United States conveyed title in public lands to individuals across the country, including Utah, well into the twentieth century. Therefore, every original land title in Utah can be traced to a patent or other document transferring that land from the Federal Government.

In this case, the subject tracts of land were all issued as land patents by the BLM under the Small Tract Act of 1938[3] between August and September of 1959. The community later officially incorporated as the Town of Big Water on July 1, 1984.

Essentially, it appears that all privately owned property within the limits of the Town of Big Water derives title from these land patents as platted by the BLM under the Small Tract Act.[4]

II. Parcel Joinder and Subdivisions

The Town has approved a consolidation of the Crowther-owned tracts into a single parcel in anticipation of the proposed Lone Rock Views subdivision, which will further subdivide the consolidated parcel into townhomes. The Town's subdivision ordinance provides for parcel joinder, also called "lot consolidation".

The Town's ordinance defines "parcel joinder (lot consolidation)" to mean "revising the legal description of more than one contiguous *unsubdivided* parcel of property into one legal description encompassing all such parcels of property," or, "joining a *subdivided* parcel of property to another parcel of property that *has not been subdivided.*"[5]

The Neighbors argue that this language does not authorize the joinder of *two subdivided* parcels, and allege that the properties in question constitute a legal subdivision. The Neighbors turn to Utah Code, as it existed at the time of the Request for Advisory Opinion,[6] for the definition of "Subdivided land" as meaning "the land, tract, or lot described in a recorded subdivision plat."[7] Because Lots 75-83 were issued as land patents pursuant to the BLM's 1958 survey and plat, the

[2] Utah entered the Union as a state in 1895 pursuant to an 1894 Enabling Act. The Enabling Act proposed to admit Utah as a state on an "equal footing with the original states." As with all other states entering the Union, the transition of the Utah territory to statehood had no effect on private land titles conferred prior to statehood. However, the Enabling Act required the people of Utah to "forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof," and to agree that those lands "shall be and remain subject to the disposition of the United States." Utah Enabling Act, ch. 138, 28 Stat. 107 (1894).

[3] 52 Stat. 609 (June 1, 1938). The Small Tract Act of 1938 was a law passed by Congress making it possible for any citizen to obtain certain lands from the Federal Government for residence, recreation, or business purposes.

[4] According to the Big Water General Plan dated January 16, 1996 over 80% of the land base within the corporate limits was in public ownership and approximately 10% had been platted under provisions of the Small Tract Act. Big Water further developed its land base by acquiring additional property from the BLM through the Recreation and Public Purposes Act. The State of Utah owns several tracts of land within and around the town proper as State Institutional Trust Lands-(SITLA) that have been turned into subdivisions. Kane County Resource Management Plan, 137-138 (July 2017).

[5] 14.20.020 (emphasis added).

[6] Provisions of the Utah Code relevant to this issue have been affected by H.B. 409, which was enacted by the 2021 General Legislative Session and will take effect on May 5, 2021. See discussion, *infra*.

[7] UTAH CODE ANN. § 10-9a-103(64) (2020), affected by H.B. 409, 2021 Utah General Legislative Session (signed by Governor on March 22, 2021).

Neighbors argue, they constitute a legal subdivision.[8] The Town argues that the BLM "lots" do not constitute a subdivision, and that the Town has historically treated similarly situated lots as undivided parcels that could be further subdivided under Town ordinances.[9]

Whether interpreting a local ordinance or state statute, the standard rules of statutory construction apply.[10] The primary goal in interpreting statutes is "to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve."[11] That necessarily includes that courts "construe statutes in a manner that renders all parts thereof relevant and meaningful."[12]

Here, the Neighbors' interpretation is impermissible. Both state law and the Town's subdivision ordinances make a clear distinction between property that has been subdivided, and property that has not. However, considering the history of private property deriving title from public land-grants, as discussed, the Neighbors' interpretation would mean that all privately owned property within the State of Utah generally, and in particular the Town of Big Water specifically, would be considered subdivided land insofar as some map or plat depicting the tracts divided off from larger public lands was recorded. As applied, such an interpretation renders the Town's distinction of subdivided and unsubdivided parcels in its subdivision ordinance meaningless.

This is not the meaning of "subdivision" or "subdivided lands" under Utah Code, and, in turn, the Town's subdivision ordinance. In looking to the definition of "subdivided land" that references a "recorded subdivision plat,"[13] the Neighbors overlook that "Plat" is defined as a professionally prepared map or other geographical representation of land "mad[e] and prepare[d] *in accordance with* Section 10-9a-603"[14]—which details plat requirements for land use approval of a subdivision under local subdivision ordinances.

A subdivision therefore does not refer to any division of land; rather, it relates to the recorded division of land as approved by a land use authority pursuant to a regulatory scheme. This is made

[8] The Neighbors, or Mr. Harbut particularly, also feel that this is validated by County records. Mr. Harbut points to Kane County's online summary of the recorded warranty deed under which he acquired the property, which begins a description of conveyance as "SUBD: BIG WATER S 24 T 43S R 2E" followed by the legal description found in the actual deed instrument (a copy of Mr. Harbut's actual warranty deed was included in the party submissions. *See* Submission 3, Exhibit H). Mr. Harbut believes this is proof of an existing subdivision, but fails to understand that the County's online summary is informational only. The County Recorder's role is simply to be a custodian of documents; its actions do not ratify the legality of the recorded instruments nor does the acceptance and recording of an instrument serve to arbitrate competing legal claims of the parties involved—only a court may do that. *See, e.g., Grand Cty. v. Rogers*, 2002 UT 25, ¶ 25 (the mere act of accepting and recording conveyance instruments did not reasonably justify a belief by a developer that the county intended to forego enforcing its land use code).

[9] Case in point being "Lot 78" of the properties in question, which appears to have been subdivided in some point in the past to create a 1-acre "Lot 78A". *See* illustration in Background, *supra*.

[10] *See* Brendle v. City of Draper, 937 P.2d 1044, 1047 (Utah Ct. App. 1997).

[11] *Foutz v. South Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171.

[12] Id. (cleaned up).

[13] UTAH CODE ANN. § 10-9a-103(64) (2020), affected by H.B. 409, 2021 Utah General Legislative Session (signed by Governor on March 22, 2021).

[14] UTAH CODE ANN. § 10-9a-103(49) (2020), affected by H.B. 409, 2021 Utah General Legislative Session (signed by Governor on March 22, 2021).

even more apparent by the recent legislative changes to statutory language that clarifies some terms relevant to subdivisions.[15]

Here, because the BLM's internal survey and division of land tracts for conveyance to private ownership—done years prior to the Town's incorporation—was not made pursuant to any regulatory scheme of a local land use authority, such divisions are not considered a subdivision under Utah law. As such, approving the Crowther parcel joinder/lot consolidation did not violate the provision in Town ordinances prohibiting joinder or consolidation of subdivided lots.[16]

III. Right-of-Way Dispute

A point of dispute on the proposed subdivision development is the accounting for existing public streets and other rights-of-way in the approval process.

Here, the Neighbors argue that Big Water's acceptance of a subdivision plat that vacates or accepts dedication of roads and easements that interferes with the patented rights-of-way to extinguish their rights would amount to a taking. This may have arguably been a concern with the initial, withdrawn application that proposed relocating the patent rights-of-way, but the revised preliminary plat that was actually approved by the Town appears to make this point moot. While the plans only propose to improve a half-width of certain portions of the patent rights-of-way, the plat nevertheless clearly depicts and accounts for the full width of the entire portion of the rights-of-way as described in the land patents. The Neighbors' concern with the Town's approval as it relates to the rights-of-way is wholly limited to speculation as to some future action the Town may take in derogation of their purported easement rights—which is not ripe for consideration.

Despite this, the parties have each carefully articulated their respective positions on whether the land patent rights-of-way constitute a dedication of a public right-of-way, a reservation of a private easement, neither, or both—and appear interested in having the Ombudsman's Office weigh in.

Our jurisdiction is limited to answering questions of compliance with Utah's Land Use Development and Management Act (LUDMA) in adhering to applicable land use ordinances in approving land use proposals.[17] To that end, a municipality is bound by the terms and standards of applicable land use regulations and shall comply with mandatory provisions of those regulations.[18] The land use authority substantively reviews a complete application and takes final action to approve or deny the application according to those standards.[19] An applicant is typically entitled

[15] H.B. 409 Municipal and County Land Use and Development Amendments, enacted in the 2021 General Legislative Session, completely removes the definition of "subdivided land" and makes several other changes to terms relevant to subdivisions. First, a clarification that a "parcel" is simply real property that is "not a lot", whereas a "lot" specifically means—regardless of label—a tract of land "created by and shown on a subdivision plat that has been recorded" with the county recorder. "Plat", in turn, was clarified as "mean[ing] *an instrument* subdividing property into lots *as depicted on a map* or other graphical representation." (emphasis added). In other words, a map that depicts a partition of property is not itself a subdivision; rather, a plat is the legal instrument used to subdivide according to a map or other representation.

[16] This question, specifically, is what was raised in the Request for Advisory Opinion and is the extent to which we opine on whether the lot consolidation application was properly approved.

[17] *See* UTAH CODE ANN. § 13-43-205 (also, compliance with Utah's Impact Fee Act, which is not applicable here).

[18] UTAH CODE ANN. § 10-9a-509(2).

[19] UTAH CODE ANN. § 10-9a-509.5(2)(a).

to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards; however, even a compliant application may not be entitled to approval if "the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application."[20]

We believe that a "compelling, countervailing public interest" is akin to the "compelling state interest" so often discussed by the courts as pertaining to fundamental rights, including private property rights.[21] Therefore, in certain cases, it may be appropriate for a municipality to deny a complete land use application if it reasonably presents constitutional taking issues.[22]

However, where the existence of certain private rights are raised in opposition to proposed development, turning to the land use authority to resolve disputed property interests places the municipality in the impermissible position of adjudicating private rights; this is a role fulfilled only by the court as the sole authority to quiet title in real property.[23] Therefore, where there is a legitimate factual dispute as to a land use applicant's right to what is proposed, or whether the proposal will materially affect the private property interests of another person, a municipality may choose to deny the application until a court or the involved parties resolve any takings concerns inherent in approval of the development.

Here, because it appears that the Crowthers' proposed development does not involve any alteration to the rights-of-way, regardless of whether they are determined to be public or private, there is nothing for us to opine on as the proposal does not implicate any applicable land use ordinances regarding the roads. The Town also appears to have concluded that it had the information necessary to determine that approval of the proposed development would not create a taking, provided it assures and affords legal and adequate access to the rear tracts. Because the plans, as presented to the Town for approval, would not affect the purported easement interests of the Neighbors, it was

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[20] UTAH CODE ANN. § 10-9a-509(1)(a)(ii)(A).

[21] For example: *Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998) (holding that free speech is only to be burdened if a compelling state interest is found and the law is the least restrictive means of accomplishing that interest, and the state has a compelling interest in ensuring that all parties are able to resolve legal disputes before a neutral tribunal); *Kearns-Tribune Corp. v. Lewis,* 685 P.2d 515 (Utah 1984) (holding that the public's right of access to a criminal trial subject only to "narrowly tailored exceptions tied to a compelling state interest"); *In re P,* 648 P.2d 1364 (Utah 1982) (holding that the cutting of family ties is a step of the utmost gravity which should be done only for the most compelling reasons *); Gallivan v. Walker*, 2002 UT 89 (holding that "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively"); and *State v. Debooy*, 2000 UT 32 (holding that the State has a clear and compelling interest in promoting highway safety and keeping drunk drivers off the road) (emphasis added).

[22] Pursuant to the Constitutional Takings Issues Act, UTAH CODE ANN § 63L-4-101 et seq., each political subdivision must consider certain guidelines when taking any action other than a formal exercise of eminent domain that might otherwise result in the physical taking or exaction of private real property.

[23] Utah law has not directly addressed a municipality's obligation as to consideration of private property disputes raised in response to a land use proposal. However, this concept that land use approval is not the appropriate venue for quiet title claims has been well articulated in some other states. *See, e.g., Borough of Braddock v. Allegheny County Planning Department*, 687 A.2d 407 (Pa. Cmwlth. 1996) (a zoning board is an inappropriate vehicle to deal with complex issues of title, which the opposing parties should resolve by a quiet title action); *see also*, *Cybulski v. Planning & Zoning Comm'n*, 43 Conn. App. 105, 110, 682 A.2d 1073, 1076 (1996) (planning commission does not have the authority to determine whether a claimed right-of-way is a public highway, since that conclusion can be made only by a judicial authority in a quiet title action).

not improper for the Town to move forward with approval despite the Neighbors' opposition over private easement concerns.[24]

Any remaining dispute as to whether the Neighbors have a private easement interest in the Crowther property should be left to the courts to resolve. As to speculative future action by the developer, should a separate development plan arise in the future that proposes a vacation or alteration of the rights-of-way, the issue should be addressed at that time by the Town according to the legal framework that we have identified.[25] Otherwise, outside of a land use approval under these standards, the law provides other avenues for aggrieved third parties to pursue relief to prevent an otherwise valid land use if it would violate private property rights.[26]

CONCLUSION

The tracts of land included in the Town's parcel joinder approval did not constitute an existing subdivision under the Town's ordinances. Because the proposed development acknowledges the entirety of the rights-of-way depicted in the land patents, the Town properly concluded that no present controversy needed resolution prior to the Town's review and approval. Quiet title disputes as to public or private rights-of-way cannot be resolved by the Town's land use authority. Should unresolved issues arise in a future request, the Town may deny approval if it makes a finding of a compelling, countervailing public interest until such potential constitutional takings issues are resolved. Otherwise, complete land use applications that do not implicate takings issues should be reviewed for approval under applicable land use ordinances.

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[24] We again note that the Town's consideration of the land patent rights-of-way is the extent to which we have analyzed whether the development proposal was entitled to approval, as framed in the Request for Advisory Opinion. The Town's approval was decided after receipt of the Request for an Advisory Opinion, and we are aware that a citizens group has challenged the Town's approval on appeal for several alleged deficiencies under the Town's ordinances. Because those alleged deficiencies were not briefed in the parties' submittals, we do not dedicate any portion of our analysis to these other points of ordinance compliance. We note for reference, however, that in reviewing a challenge to a municipality's land use decision for noncompliance with its ordinances, the applicable standard employed by the courts is one of prejudice resulting from the noncompliance, in that there must be "a reasonable likelihood that the legal defect in the city's process changed the outcome of the proceeding." *Potter v. S. Salt Lake City*, 2018 UT 21, ¶ 24 (holding that no prejudice was established by a petition to vacate a public street that failed to list the name and address of adjacent property owners as required, where conceded that it would not have affected the city council's decision).

[25] Except that in instance of a petition to vacate a public road, rather than constituting an administrative review under existing ordinances by a land use authority, the vacation must be approved by the legislative body upon finding good cause for the vacation and that "neither the public interest nor any person will be materially injured by the vacation." UTAH CODE ANN. § 10-9a-609.5(4). Vacation of a public street, however, does not impair any private right-of-way or easement of a property owner. UTAH CODE ANN. § 10-9a-609.5(6)(b)(i); *see also Tuttle v. Sowadzki*, 41 Utah 501, 508, 126 P. 959, 962 (Sup.Ct. 1912) (in addition to a public easement, property owners that abut on a street also acquire a private easement, which "can only be taken from them or obstructed by making proper compensation therefor.") Indeed, governmental action that effectively deprives a property owner of reasonable access to property constitutes a compensable taking. *Three D Corp. v. Salt Lake City*, 752 P.2d 1321, 1325 (Utah Ct. App. 1988).

[26] UTAH CODE ANN. § 10-9a-802(1); *see generally, Benjamin v. Lietz*, 116 Utah 476, 211 P.2d 449 (Sup.Ct. 1949) (holding that a business, though lawful under zoning, may be operated so as to constitute a nuisance).

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Section 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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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 and civil penalty provisions, found in Section 13-43-206 of the Utah Code, 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 § 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:

Amber Banfill, Municipal Clerk
Big Water Town
60 North Aaron Burr
Big Water, Utah 84741-2127

On this 12th Day of May, 2021, 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