Advisory Opinion #97

Parties: Christine Brown and Weber County
Issued: March 14, 2011

TOPIC CATEGORIES

Nonconforming Uses and Noncomplying Structures
Appealing Land Use Decisions

The time to appeal a land use decision begins to run from when a person has notice of the decision. If a person receives erroneous information that affects a decision to appeal, the time should run from when the person has correct information. A local government is not obligated to resolve disputes concerning private rights-of-way.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Christine Brown
Local Government Entity:	Weber County
Type of Property:	Residential Lot
Date of this Advisory Opinion:	March 14, 2011
Opinion Authored By:	Brent N. Bateman, Lead Attorney, OPRO Elliot R. Lawrence, Attorney, OPRO

Issues

When may an affected property owner appeal a building permit approval?

Summary of Advisory Opinion

The time to file an appeal of a local land use decision begins to run from the time an affected property owner receives actual or constructive notice of the decision. This is not necessarily the same date as the decision itself. An affected property owner receives constructive notice that a building permit has been issued when construction activity begins. The time for appeal begins to run from that date. Ms. Brown filed her appeal more than 15 days after receiving constructive notice that the building permit had been issued. Accordingly, her appeal appears to be untimely.

However, Ms. Brown alleges that she received erroneous information from the County that no building permit had been issued. If this allegation can be proven, and it can be proven that the erroneous information prevented a fair and reasonable opportunity to timely appeal the land use decision, then equity and fairness requires that the time for an appeal not run until the correct information is obtained. These allegations have not been proven for purposes of this Advisory Opinion. However, if proven, the appeal deadline would be delayed and not begin until Ms. Brown had a reasonable opportunity to obtain the correct information. Under these circumstances, Ms. Brown's appeal would be timely.

Nevertheless, Ms. Brown's appeal of the County's building permit would not resolve issues regarding the alleged right-of-way, its scope, use, or location, nor is it likely to prevent the neighboring landowner from using the right-of-way. The permitted uses and scope of a right-of-way are found in the terms of the instrument that grants the right-of-way. It is not within the

purview of local government to alter those terms, nor resolve ambiguities in a right-of-way instrument. Disputes involving the placement, scope, and use of an easement or right-of-way should be resolved between the owners of the benefited and burdened parcels, not by local governments. Accordingly, Ms. Brown's primary cause of action is against the property owner, not the County.

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. 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 Christine Brown on November 8, 2010. A copy of that request was sent via certified mail to Alan D. McEwan, County Clerk/Auditor for Weber County. The County received the request on November 10, 2010. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on November 22, 2010. Ms. Brown submitted a reply, which was dated November 27, 2010. The County responded in a letter dated December 6, 2010. Ms. Brown submitted a response dated December 10, 2010. She also submitted additional materials on December 14, 2010.

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, including attachments, filed November 8, 2010 with the Office of the Property Rights Ombudsman by Christine Brown.
2. Response from Weber County submitted by Christopher Allred, County Attorney, received on November 22, 2010.
3. Reply from Ms. Brown, dated November 27, 2010.
4. Reply from Weber County, dated December 6, 2010.
5. Reply from Ms. Brown, dated December 10, 2010.
6. Additional materials submitted by Ms. Brown on December 14, 2010.

Background

Christine Brown owns a 5 acre parcel of land in Weber County. Her parcel is identified as Lot 7 of a subdivision plat that was approved by the County in 1974. She owns a home on her Lot, and also a well which provides water for the property. Her Lot adjoins Lot 8, which also consists of five acres. For some time, Lot 8 was not developed.

When the subdivision was approved and platted in 1974, a 15-foot-wide right-of-way for Lot 8 was created across Ms. Brown's lot (the "Right-of-Way"). The subdivision plat only states the existence of a "15 foot R.O.W. for Lot 8" and does not give any further information regarding the purpose or use of the Right-of-Way. The location of the Right-of-Way seems to be along an irrigation canal. A note on the plat explains that an 80-foot right of way was reserved for irrigation canals, with 10 feet on either side of "all existing irrigation ditches."[1] An arrow points from that R.O.W. label to an irrigation canal to the north of Ms. Brown's property line.[2] However, another plat indicates that the Right-of-Way runs along the northern boundary of Ms. Brown's property.[3] According to Ms. Brown, the 15 foot Right-of-Way, regardless of its location, was never used for vehicular traffic.

In March of 2010, the new owners of Lot 8 obtained a building permit to construct a home. Lot 8 has access and frontage along 1400 North, a public road which borders Lot 8 on the south. Nevertheless, when the owners of Lot 8 obtained their building permit, they desired to use the Right-of-Way across Lot 7 as a driveway from a cul-de-sac which forms the northwestern boundary of Ms. Brown's lot. The driveway would continue across Ms. Brown's property, and onto Lot 8. The County approved the building permit in March of 2010. The permit states that "[a]ccess for this lot 8 is through a ROW on lot 7". There was no requirement that neighboring property owners be notified of the building permit, so Ms. Brown and her neighbors were not aware of the pending development on Lot 8.

Sometime in August of 2010, construction activity on Ms. Brown's lot began. Ms. Brown was concerned about the activity, and requested information from the County. According to Ms. Brown, the County first told her that no permit was necessary for the driveway. Further discussions ensued, and on or about September 13, the County informed her that a permit had in fact been issued. The County provided her with a copy of the building permit on September 24, 2010. On September 27, Ms. Brown submitted a written objection to the Weber County Planning Department. In that document, Ms. Brown explains why she feels that permission to construct the Right-of-Way was given in error. She specifically requested an appeal of any approvals granted.

Ms. Brown's objections were based on the 1974-era subdivision ordinances. The County's ordinances in effect when the subdivision was approved required that a "Lot Right-of-Way" be at least 16 feet wide. Ms. Brown argued that the 15-foot Right-of-Way identified in the plat could not be a valid right-of-way for access. Furthermore, the ordinance provided that a right-of-way could be approved, but only for lots without access from a public street. Since Lot 8 adjoined a public street, a right-of-way was not necessary, and therefore could not be approved.

In addition, Ms. Brown argued that it was not clear what purpose the Right-of-Way served, where it was located, or even if it still existed. She pointed out that plats of the subdivision recorded after

[1] The area is agricultural in nature, and in 1974 was served by several irrigation ditches.
[2] In 1974, that canal was an open ditch running through the area. It has since been piped and now runs underground.
[3] It is not clear which plat is correct. The two plats submitted for this Opinion were not dated. Ms. Brown believes the right-of-way ran either to or along the canal, and was used primarily for irrigation access. The head gates which diverted water from the canal were located in the approximate location for the right-of-way.

1974 do not show the Right-of-Way, although it reappeared later. She also notes statements from neighboring farmers that the access was for irrigation, not vehicular access from a road.

In response, the County acknowledged that its 1974 ordinances required rights-of-way to be 16 feet wide, but it states that the County Commission had the authority to waive or modify requirements if necessary due to unusual topographical features or other exceptional conditions. The County did not provide any statutes from 1974 showing that the County Commission actually possessed such authority. The County reasons that the County Commission could have found that exceptional conditions existed that justified approving a narrower right-of-way. However, the County did not provide any evidence that such findings were made, or why the Right-of-Way was narrowed by only one foot. The County also notes that a lot may have access from both a street and a right-of-way, so it would not be impossible for Lot 8 to have both accesses. Again, the County has not submitted any documentation showing that the findings necessary to approve access via a right-of-way were ever made.

Ms. Brown also claims that the owners of Lot 8 have moved the Right-of-Way several feet to the south, further encroaching upon her property, and potentially damaging her well.[4] She also points out that the present location of the driveway interferes with an irrigation canal belonging to a mutual water company.[5] The County has not expressed any response to these allegations.

After more back and forth with the County about which ordinances applied and which didn't, Ms. Brown completed a formal request for an appeal, based on the County's interpretation and application of its ordinances. In response, the County informed her that the time to appeal the land use permit had long expired, since the permit was issued in March. On December 9, 2010, the Weber County Board of Adjustment rejected her appeal, on the basis that she had not filed a timely application for an appeal. As far as is known, Ms. Brown has not taken any action against the owner of Lot 8 to quiet title in the Right-of-Way, or to determine the extent or location of the Right-of-Way.

Analysis

I. The Time for Appeal Began When Ms. Brown Received Constructive Notice of the Building Permit.

Like all affected property owners, Ms. Brown is entitled to a fair and reasonable opportunity to challenge a land use decision. In Utah, the decision by a local government to issue a building permit, like any administrative land use decision, may be appealed by anyone adversely affected by the decision. However, such appeal must be brought within the time period provided in the local ordinance:

> The applicant, a board or officer of the county, or any person adversely affected by the land use authority's decision administering or interpreting a land use ordinance may, within the time period provided by ordinance, appeal that decision to the

[4] Ms. Brown states that her well stopped after construction on the driveway began. It is not known if the stoppage was due to the construction.

[5] A representative of the water company confirmed the interference, and also objected to the driveway.

> appeal authority by alleging that there is error in any order, requirement, decision, or determination made by the land use authority in the administration or interpretation of the land use ordinance.

UTAH CODE ANN. § 17-27a-703(1).[6] According to the County, appeals of a building permit must be filed within 15 days of a final decision. The County made its final decision to issue the building permit in March, 2010. Ms. Brown did not appeal until, at the earliest, September 27, 2010.[7]

The time to file an appeal begins to run when a party receives notice that a permit exits. In *Fox v. Park City*, 2008 UT 85, 200 P.3d 182, the Utah Supreme Court determined that such a rule is necessary to preserve a party's right to appeal. In that case, Park City had issued a building permit for a new home. There was no public hearing or other public notice of that action. Sometime during construction, the owners of a neighboring property discovered that the new home would violate the city's height restrictions. Those neighbors filed an appeal with the city's planning commission, well after the date of the permit. The planning commission dismissed the appeal, stating that any appeals had to be filed within 10 days after the permit had issued.

On appeal, the Utah Supreme Court noted that the statutory right to appeal is conferred upon all adversely affected property owners. *Id.* 2008 UT 85, ¶22. The Court in *Fox* recognized that if an adversely affected person does not have any reason to know that there has been a decision administering a land use ordinance, then the right to appeal would be meaningless. *Id.* 2008 UT 85, ¶23. The Court therefore held that the time limitation for filing an appeal does not begin to run until the affected property owner receives actual or constructive notice that a decision has been made. *Id.* 2008 UT 85,¶ 25. In other words, the time limitation begins when the person knows or has reason to know that a permit has been issued.

The court then discussed when a party receives constructive notice (has reason to know) that a permit has been issued. The court ruled that a party receives such notice when construction activities are visible on the property: "Generally, if a party does not receive actual notice of the issuance of a building permit, the party receives constructive notice that a building permit has issued when construction begins." *Id*. 2008 UT 85, ¶27. Further, the court went on to explain that once a party has constructive notice that building permit has been issued, that party has a responsibility to investigate: "the rule places on the neighboring landowners the responsibility of reviewing the available information to determine if they want to appeal the permit's issuance." *Id*. 2008 UT 85, ¶34. The court held that once a party receives notice that a building permit has been issued, the party also becomes chargeable of the information contained in that permit: "Accordingly, if the facts that form the basis for the party's appeal can be ascertained by a review of the permit application, the party is charged with knowledge of those facts once he or she has actual or constructive notice of the permit's issuance." *Id*. 2008 UT 85, ¶28. Thus, under *Fox*, a party receives notice that a building permit has been issued once visible construction begins. That

[6] *See also* UTAH CODE ANN. § 17-27a-704 (Appeals must be filed within a "reasonable time," which cannot be less than 10 days).

[7] This Advisory Opinion does not decide or opine on whether the objection filed by on September 27, 2010 amounts to an appeal under the statute or local ordinance, or whether her later, formal appeal was a proper appeal. For discussion purposes, it will be assumed without deciding that the September 27, 2010 objection constitutes an appeal.

party is then chargeable with knowledge of the information that can be found in the permit, whether or not that person actually reviews the permit.

According to Ms. Brown, Right-of-Way construction activities on her property began sometime in August, 2010. Therefore, under *Fox*, Ms. Brown received constructive notice that a building permit had been issued in August. It was her responsibility to investigate the issuance of the building permit, and she had 15 days to determine whether to appeal. If Ms. Brown received constructive notice on August 31, 2010, then she would have had, at the latest, until September 15, 2010 to file her appeal. However, but the first date that she can be said to have brought an appeal is September 27, 2010. Accordingly, Ms. Brown's appeal appears to be untimely.

However, Ms. Brown alleges that she went to the County soon after construction began to inquire about the matter, and was told by the County that no building permit was necessary to construct a road on her property.[8] She further alleges that she was told that a permit did exist on or about September 13, and was provided with a copy of the permit on September 24.

Notwithstanding the rule discussed above, the *Fox* decision leaves the door open to situations where circumstances allow for judicial review even if the normal time for an appeal has run:

> We note that the rule we adopt is a general rule and that there may be exceptional circumstances that may allow an affected party to bring an appeal even after the appeal period has run. Such circumstances may include fraud on the part of the permit applicant or bribery of municipal officials to secure the building permit. These types of actions so severely undermine the permit process that the appeal period would not begin until the affected parties have notice of them.

Id. 2008 UT 85, ¶29. Accordingly, if an affected party does make an effort to investigate the issuance of the building permit as required by *Fox*, but receives misleading or mistaken information that would prevent that party from receiving actual or constructive knowledge of the permit, that party does not have the knowledge necessary to properly form the basis of an appeal. Thus, in order to put meaning and equity to a property owner's statutory right to appeal, such erroneous information, if proven to prevent a party from a reasonable opportunity to appeal, must permit appeal after the appeal period has run, as contemplated in *Fox*.

Such an exemption is consistent with the reasoning in *Fox*, which places great importance on a party's statutory right to appeal. That right cannot be fully exercised if a party receives inaccurate information from the entity charged with providing it.[9] It should also be noted that this exemption is narrow: It would not apply to a party who receives *actual* notice of a building permit, and it would only apply if the misleading information negatively impacted whether a party could form

[8] It is noted that this factual allegation has been made without documentary or other evidentiary support apart from Ms. Brown's statement. The Office of the Property Rights Ombudsman makes no judgment or assumption about the factual truth of this allegation, the circumstances surrounding this event, or the impact or result of this event.

[9] Another important consideration is preventing local governments from benefiting from their own mistakes, and removing incentives to mislead property owners.

the basis of an appeal.[10] If, after a consideration of all the facts, it is determined that a party has not received a fair and reasonable opportunity to challenge an action due to inaccurate information from a local government, the party should be afforded the opportunity to pursue an appeal.

Accordingly, if Ms. Brown can prove that she received information from the County that no permit had been issued, and that this information prevented her from filing a timely appeal, she should be allowed to appeal the building permit decision after the deadline. Her appeal on September 27, 2010 would therefore be timely. However, this Advisory Opinion lacks information necessary to so hold.

The time to appeal a land use decision is always very short. Courts are generally draconian in upholding those deadlines in order to promote the "expeditious and orderly development of a community." *See Gillmor v. Summit County*, 2010 UT 69, ¶ 34. However, expediency and order must yield in order to preserve a party's statutory right of appeal. *Id.*[11] Ms. Brown received constructive notice that a building permit was issued when construction began on the Right-of-Way sometime in August, 2010. Her latest date for a timely appeal was September 15, 2010. However, she alleges that when she sought information from the County, she was told there was no permit. If proven, and if it is shown that this information prevented her from filing a timely appeal, then Ms. Brown's statutory right to appeal should not be compromised by misleading information from the County.[12] Under such circumstances, Ms. Brown should be able to continue her appeal. If she cannot establish this, she is not entitled to an exemption from the *Fox* rule.

II. An Affected Party Has Other Options to Resolve Claims Related to a Land Use Decision Without Filing an Appeal.

An affected party may file a complaint against a local government, to seek relief from claims arising from a land use decision, even if an appeal based on § 801 is not available. The Utah Supreme Court explained that property owners who disagree with a land use decision actually have two options for relief. "They can either file a petition for review pursuant to [§ 801 of LUDMA], or they may file a complaint against the land use authority, which may include a variety of claims, including constitutional claims." *Petersen v. Riverton City*, 2010 UT 58, ¶ 20.[13] In other words, if Ms. Brown has a cause of action against the County beyond the appeal of the building permit, she has another avenue for relief, and is not necessarily restricted to the appeal process in § 801 only. A "general" type of complaint (*i.e.*, not an appeal pursuant to § 801) would not need to be filed in the shortened time frame as an appeal.[14]

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[10] For example, if a party receives correct information about a permit, but the date of the application was inaccurate, or the applicant's name was misspelled, the time for appeal would begin to run from the date of constructive or actual notice, because the erroneous information has no bearing on an appeal.

[11] "[W]e do not think the Legislature intended to provide for 'expeditious and orderly development of a community' at the expense of a fair and reasonable opportunity to challenge an allegedly invalid [land use decision]." *Gillmor*, 2010 UT 69, ¶34.

[12] There is no reason to believe that the mistake was purposeful, or that the County intended to mislead Ms. Brown. However, the exemption should apply, even if the mistake was inadvertent.

[13] "LUDMA" refers to the Land Use Development and Management Acts, found at §§ 10-9a-101–803 (municipalities) and §§ 17-27a-101–803 (counties).

[14] A complaint would need to be filed before being barred by a statute of limitations.

III. Even if Ms. Brown's Appeal Had Been Timely, Her Cause of Action Is Primarily Against the Neighboring Property Owner, Not the County.

Notwithstanding the above, even if Ms. Brown could bring an appeal of the County's decision, and even if that appeal were successful, Ms. Brown is unlikely to achieve the result she seeks. The County granted a building permit to the owner of Lot 8. That building permit included the statement "[a]ccess for this lot 8 is through a ROW on lot 7." Ms. Brown's appeal challenges the decision to grant the building permit. A successful appeal would, at best, result in rescinding the building permit, or at least striking the language from the permit allowing the ROW for access. It would not, however, have any effect on the existence of the Right-of-Way, nor would it clarify the ownership or extent or location of the Right-of-Way, nor would it prevent the owner of Lot 8 from using the Right-of-Way.

Ms. Brown has raised several issues regarding the Right-of-Way, including issues regarding whether it even exists or has been abandoned, whether it was properly created, whether it has been moved or is in its original location, and whether it is available for vehicular travel as a thoroughfare or was just used to access irrigation facilities.[15] These issues are crucial to a determination of whether the owner of Lot 8 can use the Right-of-Way to access that lot. However, if the Right-of-Way does exist, the owner of that Right-of-Way has the right to use it to the extent permitted by the Right-of-Way. The County must acknowledge that person's right. Issues and disputes concerning the extent of the Right-of-Way are between the owner of the benefited parcel and the owner of the burdened parcel. The County has no authority to resolve these issues. The County's authority does not extend to deciding disputes between two private citizens, or forcing a citizen to accept an uncompensated easement or property burden.[16]

The authority to resolve disputes between citizens rests solely with the courts. If Ms. Brown desires to resolve these unclear issues regarding this Right-of-Way, or to prevent her neighbor's use of the Right-of-Way, she must bring a court action, perhaps for Quiet Title, against the owner of Lot 8. Otherwise, she must negotiate with the owner of Lot 8 to find a mutually acceptable solution.

Accordingly, while a successful appeal may result in withdrawal of the City's grant of access to Lot 8 across Lot 7, it would not extinguish the Right-of-Way. The appeal would affect only the building permit of the home on Lot 8. Indeed, the owner of Lot 8 could continue to use the Right-of-Way without the County's permission, based upon their claim that the Right-of-Way on the plat allows such use. If Ms. Brown wants to prevent that use or resolve issues related to the Right-of-Way, her cause of action is against the property owner, not the County.

Conclusion

[15] This Advisory Opinion expresses no opinion whatsoever concerning the existence, nature, uses, location, or extent of the Right-of-Way.

[16] If the intended use of the right-of-way was for a limited purpose, the County does not have the authority to expand that right, or alter the placement of the easement, at the expense of Ms. Brown's property interests, unless it exercises eminent domain authority and provides compensation. *See e.g., Evans v. Utah County*, 2004 UT App 256, ¶ 12, 97 P.3d 697, 701 ("A right of way founded on a deed or grant is limited to the uses and extent fixed by the instrument.")

Ms. Brown received constructive notice that a building permit had been issued when construction began. According to *Fox* and the County ordinances, she then had 15 days from that notice to submit an appeal of the decision to grant the building permit. She did not appeal within that time. However, if she can show that the County provided her with misleading information, and that because of that error, she was unable to form the basis for an appeal, the time to file an appeal should not begin to run until she obtained the correct information. A party's right to a fair and reasonable opportunity to challenge a land use decision should not be compromised by misleading information. However, even if she cannot pursue this appeal of the building permit, there are other avenues for her to present her claims.

Nevertheless, an appeal of the building permit could only have resulted in the withdrawal of the permit or a revision of permit's terms. It would not resolve the outstanding issues related to the Right-of-Way. It would not have terminated the Right-of-Way, determined its placement or scope, and it would not have interfered with the use of the Right-of-Way. Such matters must be resolved in court between the interested private property owners.

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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.