Advisory Opinion 256

Parties: Spencer Packer / Centerville City

Issued: May 11, 2022

TOPIC CATEGORIES:

Compliance With Land Use Ordinances

Subdivision Plat Approval

The City appropriately approved a subdivision that was opposed by an adjoining landowner who claimed that certain easement interests he held in the subdivision property would be adversely affected by the proposed subdivision development. The City's authority is not to settle quiet title disputes, but to ensure its land use ordinances have been followed. The City's ordinances required depiction of all easements—both those recorded and merely claimed. These ordinances were satisfied where the City required the plat be noted to depict the disputed nature of the adjoining landowner's claimed easements. Whether the eventual use of the subdivided property will give rise to some private cause of action by the adjoining landowner for interfering with an easement is a question answerable by the court.

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ADVISORY OPINION

Advisory Opinion Requested By:	Spencer Packer
Local Government Entity:	Centerville City
Applicant for Land Use Approval:	Symphony Homes
Type of Property:	Residential
Date of this Advisory Opinion:	May 11, 2022
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUE

Did the City appropriately approve a subdivision where a neighboring landowner raised a disputed easement claim that may be affected by the anticipated development?

SUMMARY OF ADVISORY OPINION

A land use authority is not in a position to adjudicate quiet title disputes, which is the realm of the court, and must generally approve land use applications that are compliant with applicable land use regulations. The City's ordinances required preliminary plats to depict existing easements, which includes both those recorded as well as those claimed by use. Similarly, final plats are to adhere to the same standards as preliminary plats, and require existing easements to be clearly labeled and identified.

In response to a proposed subdivision, a neighboring landowner raised a claim for two easements that would be impacted by the anticipated development. The City approved the subdivision and the lots as proposed, but imposed conditions that the plat depict the claimed easements as "disputed easement areas," together with plat notes describing the disputed nature of the easements. Because the City's ordinances merely required the depiction of claimed easements, but did not affirmatively prohibit approval of the subdivision, the City's decision approving the subdivision on these conditions was proper, and appropriately refrained from opining on a private property dispute.

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 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 Spencer Packer on July 28, 2021. A copy of the request was sent via certified mail to Janet Denison, City Recorder for the City of Centerville, 250 North Main Street, Centerville UT 84014, on August 6, 2021.

EVIDENCE

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

1. Request for Advisory Opinion submitted by Spencer Packer on July 28, 2021.
2. Letter from Robert C. Keller, Attorney for the City of Centerville, on August 30, 2021.
3. Letter from Kevin E. Anderson and Melvin E. Smith, Attorneys for Symphony Homes, on August 31, 2021.
4. Letter from Spencer Packer on October 24, 2021.
5. Email from Spencer Packer on November 2, 2021.
6. Email from Spencer Packer on January 28, 2022.
7. Email from Lisa Romney, Centerville City Attorney, on March 29, 2022.

BACKGROUND

Symphony Homes submitted a land use application to Centerville City proposing the "Summerhill Lane" subdivision, a development proposing several residential lots on an approximately 17.24-acre parcel. Mr. Packer owns an adjoining narrow strip of land used for agricultural purposes, which is landlocked[1] by the subdivision property.

Mr. Packer alleges that two separate easements cross over the subdivision parcel that provide access to his property. First, an alleged perpetual 2 rod (33' wide) fenced and partially paved right-of-way, traditionally knowns as "Drake Lane," which both parties acknowledge to be historically

[1] Use of the term "landlocked" is not a conclusion as to whether or not the property has some form of legal right for access, rather, it is merely "an expression applied to a piece of land belonging to one person and surrounded by land belonging to other persons, so that it cannot be approached except over their land. Access to such land will normally be via an easement from surrounding landowner." BLACK'S LAW DICTIONARY, 878 (6th ed.).

recorded by deed when the property was sold in 1908. However, both parties likewise acknowledge that the easement was not reflected in either the deed from Mr. Packer's predecessor conveying the property to him, nor in the deed conveying the Summerhill Lane property to Symphony Homes. The parties draw differing legal conclusions from these two sets of facts: Symphony Homes claiming that, while an easement is acknowledged to have existed at one time, it no longer does; while Mr. Packer claims that the easement continues and has not been legally extinguished. As it relates to the Summerhill lane development, the Drake Lane easement would encumber the rear yard of some 14 proposed lots (lots 120-134) that back up to the Packer property.

Secondly, Mr. Packer also claims to have a prescriptive easement to a second right-of-way running north-south that, in relation to the proposed street layout for the Summerhill Lane development, connects one of the planned interior streets to the Packer property, and which would effectively prohibit any development on one particular lot- (lot 120). While Mr. Packer claims that use of this right-of-way has been open, notorious, and constant for more than twenty years, the owner and developer dispute the claim for prescriptive rights, alleging that recent use for this right-of-way had been permissive.

As initially submitted, the proposed preliminary plat submitted by Symphony Homes did not account for either easement claimed by the Packers. On review for preliminary plat approval, the information included in the staff report and considered by the Planning Commission included a letter from Mr. Packer's attorney asserting the claim for an easement (Drake Lane) in the subject property and urging action to table, deny, or otherwise condition approval to account for the alleged easement interest. The letter references the title report performed for Symphony Homes, also included in the staff report, which notes the Drake Lane easement in the listed exceptions, as well as a copy of a Notice of Claim of Interest, recently recorded on the subject property March 30, 2021, asserting the Packers' interest in the subject property for the Drake Lane easement.

At the April 28, 2021 Planning Commission meeting, the claimed Drake Lane easement was discussed at some length, with members of the commission debating to what extent it should be considered, or whether any consideration of the easement was involving the City in a private land dispute. After discussion, the preliminary plat was approved with listed conditions, which included that the final plat "comply with CZC 15.03.030(l)" (which requires inclusion on the preliminary plat of all "existing or recorded" easements)[2] and that the Plat Note shall show the book and page number and a notice of claim."

Mr. Packer initially appealed the preliminary plat approval, arguing that compliance with CZC 15.03.030(l) was required for preliminary plat approval, and that the City erred in approving the preliminary plat on condition that the Final Plat thereafter comply. The appeal argued that not only did 15.03.030(l) require inclusion of the Drake Lane easement, but also a separate prescriptive easement from the north end of the 400 West stub to the Packer property that was not an "easement of record," but nevertheless one "claimed by usage." Mr. Packer later withdrew the appeal following an agreement that the developer would submit a revised plat that would depict both the Drake Lane easement as well as the additional prescriptive easement claimed by the Packers. The

[2] CZC § 15.03.030(l) reads as follows: "The preliminary plat shall . . . include the following[:] (l) The location, principal dimension, and names of all existing or recorded streets, alleys, and easements, both within the proposed subdivision and within 100 feet of the boundary thereof, showing whether recorded or claimed by usage."

City acknowledged receipt and approval of the amended plat, which had added depictions of "Disputed Easement Area[s]" 1 and 2 on the plat, as well as the addition of "Note 4" which provided a lengthy comment on the disputed easement areas by identifying the Packers' two easement claims, adding that the claims are "hotly disputed by the property owner and developer," and expressly reserving all "rights, claims, defenses and arguments by the property owner and developer."

While Mr. Packer withdrew his appeal of the preliminary plat approval, he continued to object to the City's ability to approve the subdivision as contradictory to his claimed easements. The Summerhill Lane application came back before the planning commission on October 27, 2021 for recommendation for final plat approval. Mr. Packer's easements claims were again discussed, including the newly asserted prescriptive easement not addressed at the preliminary plat stage. The planning commission again wrestled with what to do about the easement claims. The position of planning staff, as stated by the City's legal counsel, was that Mr. Packer's prescriptive easement claim was not perfected,[3] and not shown on the Title report, and therefore was not required by city ordinances to be shown on the final plat. The planning commission nevertheless recommended approval of the final plat as proposed (depicting both disputed easement areas) on certain conditions, one of them being to specify, in the plat notes, the lots affected by the recorded Notice of Claim of Interest (which pertains only to the Drake Lane easement).

After a public hearing with significant discussion on the easement issues, the City Council initially tabled the matter of final plat approval for a later date. Then, on December 7, 2021, the City Council ultimately approved the final plat of the Summerhill Lane development on the following conditions related to the easement issue:

1. The Developer shall depict on the Final Subdivision Plat the easement area along the northern boundary of the subdivision potentially affecting Lots 120-134 and as previously shown on the Preliminary Subdivision Plat and labeled as "Disputed Easement Area 1" and the disputed easement over and across Lot 120 as shown on the Preliminary Plat and labeled as "Disputed Easement Area 2."
2. The Developer shall designate such easement areas with the following description: "Disputed Easement Area 1" and "Disputed Easement Area 2," as previously described on the Preliminary Subdivision Plat, along with the notation "See, Note 2 regarding Notice of Claim of Interest."
3. Revise Note 2 to read: "A Notice of Claim of Interest was Recorded in the Davis County Recorder's Office on March 30, 2021, as Entry 3365360, Book 7727, Pages 2144-2190, potentially affecting Lots 120-134 as more particularly designated on this plat as the Disputed Easement Areas."

Under "Reasons for Action," the City Council set out various findings as support of the conditioned approval, including that "The City Council finds there is substantial evidence in the record to support designating the disputed easement areas on the final plat as set forth in the above conditions as 'existing or proposed easements' in accordance with CMC 15.04.030(m)."

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[3] To "perfect" an easement is to say that the easement has "perfect title"; that is, it is "good and valid beyond all reasonable doubt" and "requires no further act from the legal authority to constitute an absolute title to the land taking effect at once." BLACK'S LAW DICTIONARY 1486 (6th ed.).

Mr. Packer would like an opinion from the Ombudsman as to whether the City has complied with all City codes and ordinances in approving the Summerhill Lane subdivision with plat notes reflecting that the easements are disputed.

ANALYSIS

The jurisdiction of the Office of the Property Rights Ombudsman, in this type of case, is limited to determining compliance with Utah's Land Use Development and Management Act (LUDMA),[4] which is the enabling act that allows all municipalities to regulate the use of property through their own legislatively enacted land use ordinances. 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.[5]

This dispute, in a nutshell, is that the Packers claim certain easement rights in the Symphony Homes property (disputed by Symphony Homes), and argue that if the Summerhill Lane subdivision is developed as proposed, this would result in injury to the Packers. This easement question between the Packers and Symphony Homes may ultimately be resolved by the courts, as the sole authority to quiet title in real property. The question for us, however, is to what extent the City plays a role in that dispute as the land use authority responsible for granting approval to Symphony Homes to subdivide the property, and whether the City has acted appropriately and complied with its ordinances.

I. LUDMA requirements

The land use authority substantively reviews a complete application and takes final action to approve or deny the application according to its legislated standards.[6] An applicant is typically entitled 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. A municipality may not impose on an applicant who has submitted a complete application a requirement that is not expressed in either LUDMA or a municipal ordinance.[7] A compliant application is entitled to approval unless "the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application."[8] The City made

[4] *See* UTAH CODE ANN. § 13-43-205 (also, compliance with Utah's Impact Fee Act, which is not applicable here).
[5] UTAH CODE ANN. § 10-9a-509(2).
[6] UTAH CODE ANN. § 10-9a-509.5(2)(a).
[7] UTAH CODE ANN. § 10-9a-509(1)(a)(ii), (f).
[8] UTAH CODE ANN. § 10-9a-509(1)(a)(ii)(A). 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. Therefore, in certain cases, it could be appropriate for a municipality to deny an otherwise compliant land use application if it reasonably presents constitutional taking issues. According to Mr. Packer, he claims he would be injured by the City's approval of the Summerhill Lane subdivision as amounting to a taking of his property interests. While not elaborated any further, we make the assumption that this claim is based on the fact that the subdivided lots anticipate future structures within the easement areas that would materially interfere with his claimed rights-of-way. While it is certainly true that Utah recognizes certain takings claims "[w]here governmental action, not amounting to a physical taking, effectively deprives a property owner of reasonable access to property," *Three D Corp. v. Salt Lake City*, 752 P.2d 1321, 1325 (Utah Ct. App. 1988), we express doubts that such a taking is implicated by a subdivision approval, namely because the subdivision approval merely creates subdivided lots, whereas the deprivation that Mr.

no such finding, in this case. The City reviewed he application and found it complied with applicable ordinances, and granted approval accordingly. Therefore, we must review the City's enacted land use regulations to determine whether the City's decision has adhered to all mandatory provisions.

I. City ordinances

In preparing a preliminary plat for a proposed subdivision, City ordinances require the applicant to include certain required information, which includes: "[t]he location, principal dimension, and names of all ***existing or recorded*** streets, alleys, ***and easements***, both within the proposed subdivision and within 100 feet of the boundary thereof, showing whether ***recorded or claimed by usage***."[9] Additionally, the applicant is required to provide certain documents, which include "[a] copy of a preliminary title report evidencing satisfactory proof of ownership, ***other land owners of interest***, including lienholders, legal description of all property within the subdivision, and ***easements of record*** encumbering any property within the subdivision."[10]

The City's final plat standards employ somewhat different language, requiring that "[a]ll ***existing and proposed*** easements shall be clearly labeled and identified."[11] There seems to be a sentiment within the City that there is a substantive difference between what is required for preliminary plat and final plat in regards to depicting easements, namely, that while the preliminary plat might require even mere *claims* for easements, only "existing" easements need be reflected in the final plat, which is taken to mean only those easements that have been perfected.

However, this idea is not supported by the City's ordinances, which provide that "[t]he final plat and construction plans submitted shall conform in all respects to those regulations and requirements specified during the preliminary plat procedure."[12] According to the plain language of the preliminary plat standards, even those easements that are "claimed by usage" are still considered to be "existing," even if not "recorded."

The position of planning staff, as stated by the City's legal counsel during approval proceedings, was that neither of Mr. Packer's easement claims were perfected, and were not required to be shown on the final plat. Nevertheless, the City Council did, ultimately, require the disputed easements to be depicted, but allowed plat notation to reflect that the existence of the depicted easement was in dispute. This effectively created a "notice" to future lot owners within the subdivision as to the existence of a disputed easement claim by the Packers.

The Packers, however, believe that the City's ordinances required it to do more, and that adding a disputed notation simply clouds title and exacerbates the problem, rather than solving it. The Packers claim that this does not protect the Packers or affected future lot owners, and that the more

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Packer appears to anticipate would likely come later, if ever, with the construction of a residential home on the lot following the approval of an application for a building permit. Even then, the issue may nonetheless be more correctly characterized as one of whether a servient estate holder has unreasonably interfered with the interests of a dominant estate holder, instead of as a constitutional takings question.

[9] CENTERVILLE ZONING CODE ("CZC") 15.03.030(l) (emphasis added).

[10] CZC 15.03.030(y)(3) (emphasis added).

[11] CZC 15.04.030(m) (emphasis added).

[12] CZC 15.04.010.

appropriate action for the City to have taken was denial of the application until the easement dispute was resolved.

The position of both the Packers and City staff would have the City making a conclusion as to the legitimacy of the Packer's claimed easement, which places the City in the impermissible position of adjudicating private rights. The courts are the sole authority to quiet title in real property, where the involved parties are unable to reach a negotiated resolution.

While Utah law has not directly commented on a municipality's obligation to consider private property disputes raised in response to a land use proposal, 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).

The City's ordinances require depicting easements on the plat, both those that are recorded, as well as those that are "claimed by usage." In response to Symphony Home's land use application, Mr. Packer presented the City with arguments and evidence alleging that such easements existed. However, some City officials incorrectly took it upon themselves to evaluate the credibility of these claims, whether the Packer's historically recorded easements should continue to be considered "recorded" today, or whether Packer's claimed prescriptive easement was "perfected." Because the City has no authority to quiet title, the City is not in a position to determine whether claims for easements are perfected. Therefore, the only acceptable meaning of the plain language of the City's ordinances is that a subdivision applicant must depict all claimed easements raised in response to the application. That is exactly what the applicant ultimately did, and what the City required. The final plat appropriately depicts both of the Packer's claimed easements, both the historically recorded "Drake lane," as well as the claimed prescriptive easement.

As for the substantive effect of claimed easements, other than being required to be "clearly labeled and identified" on the final plat, nothing in the City's ordinances directs the land use authority to take any particular action on a proposed subdivision if a claimed easement purports to be inconsistent with the lots or uses proposed. Therefore, because the final plat complies with City ordinances, including depicting the disputed easements, the City is required to approve it unless it formally finds that a "compelling, countervailing public interest would be jeopardized by approving the application."[13] The City has no authority to evaluate the validity of Packer's easement claims. Only the courts can quiet title. In light of this, requiring that the easements be noted on the plat as disputed only further ensures that the easements are "clearly labeled and identified" according to the City's requirements by accurately reflecting the status of the easements as claimed, and is consistent with the City Council's authority, as the land use authority, to impose conditions consistent with the zoning ordinances, while at the same time abstaining from purporting to resolve any title disputes. Local ordinances do not require that the easement dispute be resolved prior to subdivision approval.

[13] *See supra,* note 8.

Conclusion

The disputed easement claims between the developer and neighboring landowner may only be adjudicated by the courts, who have sole authority to quiet title in real estate. As for the City's involvement as a land use authority, the City appropriately approved the subdivision application where it imposed conditions that allowed for the claimed easements to be depicted on the plat map as required by local ordinances. Beyond this, local ordinances did not require that the easement dispute be resolved prior to subdivision approval.

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.