Advisory Opinion 262

Parties: Land Development Solutions, LLC / Apple Valley

Issued: October 5, 2022

TOPIC CATEGORIES:

Compliance With Land Use Regulations

Proceeding with Reasonable Diligence

Requirements Imposed On Development

Subdivision Plat Approval

A previous landowner's subdivision approval made years prior that was left abandoned before completion and recording was no longer valid for purposes of Developer's current attempt to complete the project. The continuing validity of a land use approval is conditioned upon the applicant proceeding after approval to implement the approval with reasonable diligence. The Town's ordinances at the time provided clear standards on the continued validity of both preliminary and final plat approvals. When Developer approached the Town in 2021 about finishing the project, the former mayor erroneously concluded that Developer had a standing entitlement to subdivision approval and could have a new final plat signed despite the clear guidance in Town ordinance and state law. The Town's current officials are right to decline signing a newly revised final plat that has not yet been through the correct plat approval process.

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ADVISORY OPINION

Advisory Opinion Requested By:	Pat & Kathy Melfi
Local Government Entity:	Apple Valley Town
Applicant for Land Use Approval:	Land Development Solutions, LLC.
Type of Property:	Residential
Date of this Advisory Opinion:	October 5, 2022
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUES

1. May the Town require the Developer to go through the subdivision approval process again for a subdivision that was previously approved and nearly fully improved but left incomplete?
2. Did the actions of the Town's previous mayor amount to an approval of the subdivision?

SUMMARY OF ADVISORY OPINION

Utah law provides that the continuing validity of a land use approval is conditioned upon the applicant proceeding after approval to implement the approval with reasonable diligence. The previous owner of Developer's property obtained a subdivision approval in 2007, and later a one-year extension in 2008. However, apparently due to the economic recession, the project was abandoned though nearly fully improved, just short of finished roads. The property remained that way until Developer bought it in 2021.

The Town's ordinances at the time provided clear standards on the continued validity of both preliminary and final plat approvals. Final plats were required to be submitted within one year of preliminary plat approval, and approved final plats are void if not recorded within one year after receiving approval.

When Developer approached the Town in 2021 about finishing the project, the former mayor erroneously concluded that Developer had a standing entitlement to subdivision approval and could have a new final plat signed despite the clear guidance in Town ordinance and state law. The Town's current officials are right to decline signing a newly revised final plat that has not yet been through the correct plat approval process.

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 Pat & Kathy Melfi, on behalf of Land Development Solutions, LLC., received on June 23, 2022.
2. Letter from Mayor Frank Lindhardt, on behalf of Town of Apple Valley, on July 10, 2022.
3. Document: *Plan Approval Summary for Land Development Solutions*, from Pat and Kathy Melfi, prepared by Northern Engineering on their behalf, on July 19, 2022.
4. Letter from Mayor Frank G. Lindhardt, dated August 5, 2022.
5. Email from Pat Melfi on August 9, 2022.

BACKGROUND

Land Development Solutions ("Developer") owns 217 acres of land in the Apple Valley area, which includes approximately 60 acres within the Town of Apple Valley that was previously proposed for a residential subdivision by the land's prior owner.

The project began as "Canaan Mountain Estates" in 2005 when the property was rezoned residential and received concept approval from the Town Council. In 2007, the Town Council approved a preliminary plat for 36 lots as Canaan Mountain Estates Phase 2,[1] which was granted a one-year extension by the Town Council on August 7, 2008.

This point is where the project is last discussed in available Town minutes or records. However, in support of its Request for an Advisory Opinion, Developer has submitted two letters to provide additional factual background, one letter from the Developer's engineer, Northern Engineering, as well as an email from former mayor Dale Beddo, who acted as mayor of the Town of Apple Valley from April 2021 to January 2022.

Northern Engineering letter

Northern Engineering alleges that during Developer's due diligence period to acquire the property (some point in 2021), it inspected the property and noticed roads were rough graded for the 36 lots, and that water, power, and telephone facilities were also found on the lots. It was assumed that all that was left for the project was road base and asphalt for the roads.

[1] According to the information provided, it would appear that "Phase 1"—consisting of 14 lots—may have already been previously constructed and final plat recorded on December 4, 1995.

Northern Engineering discussed the site improvements with the prior owner, who is purported to have confirmed that the lots were fully improved short of road base and asphalt, but alleges that the project was ultimately left incomplete following to the 2008 housing market collapse. The prior owner is purported to have also alleged that a final plat was never recorded because it intended to first complete required infrastructure without the need to bond for improvements.

Northern Engineering alleges that Developer approached the Town to inquire about finalizing the project, and that the Town's mayor at that time, Dale Beddo, indicated that he and Town staff searched Town records but could not find any final plat or approved construction drawings for Phase 2. However, due to the work on the ground, and some documentation from UDOT regarding access requirements for the 36 lots, Mr. Beddo is purported to have determined there was enough evidence of a previous approval that Developer would not need to obtain any additional approvals from the Planning Commission or Town Council, but would nevertheless need approval from the Joint Utility Committee ("JUC," charged with approving construction drawings pursuant to Town ordinances).

Northern Engineering alleges that Mr. Beddo requested that Developer submit a preliminary plat for review at the Town JUC meeting. The JUC meeting was held on September 15, 2021 with Mr. Beddo and "another gentleman from the Town."[2] Northern Engineering alleges that the preliminary plat submitted at the September 15th meeting was the same preliminary plat that had previously been approved by the Town. Developer was purportedly informed of a number of issues with the preliminary plat that did not comply with the Town's existing land use ordinances and development standards, and was told to make discussed changes and submit final construction drawings and a final plat reflecting those changes.

Dale Beddo email

Mr. Beddo claims that he reviewed the project site and the available documentation from previous Town meetings and concluded that Developer's project had received "it's full entitlements as well as final plat approvals." Though concluding the project had been built out, Mr. Beddo was concerned that there was little documentation, believing the majority of the plan approvals had been lost over the past decade. Mr. Beddo alleges that "The town therefore took the position of requiring a new set of construction drawings and plats be submitted not for approval but to update our records." Mr. Beddo also claims that an update was requested from UDOT confirming that a change lane approval had been awarded to this property beyond what had been already constructed, as the Town had discovered from the UDOT letter that this portion of the property was prohibited from moving forward until such time as Developer constructed at their expense change lanes on Highway 59 to support this project. Mr. Beddo states that the Town concluded that the project was ready for permits upon the submittal and approval of those construction drawings to "bring our documents up to date and to ensure that [the project was] in

[2] In its submissions, the Town alleges this person to be Dale Harris, the water district superintendent.

compliance." Mr. Beddo alleges that the Town issued Developer a Notice to Proceed letter, not for construction, but instead "to clean up [the] development and bring it into full operation prior to issuance of any vertical permits being released from the town."

The "Notice to Proceed" document referenced above by Mr. Beddo was signed and dated by Mr. Beddo October 19, 2021, stating that the Town authorized the commencement of work on Canaan Mountain Estates Phase 2 upon signed and approved construction drawings by the town engineer. The Developer also received a "will serve" letter for the Canaan Mountain Estates Phase 2 from the Big Plains Water and Sewer Special Service District, signed by Mr. Beddo and dated October 19, 2021.

In preparing the new final plat, Developer changed the project name from Canaan Mountain Valley Estates, Phase Two to Mountain Valley Estates, Phase 2. The revised final plat was submitted on November 17, 2021. Sunrise Engineering, acting as the Town engineer, sent a letter to Mr. Beddo on November 29, 2021 with several comments for the submitted final plat. After Developer made revisions according to those comments, Sunrise Engineering sent a second letter to Mr. Beddo on December 13, 2021 saying final plat was compliant.

Following the engineer's approval, the final plat lacked the health department's approval, which was understood to take some time. Mr. Beddo is purported to have alleged that the plat could nevertheless be signed and recorded with a bond posted for improvements, or else the plat could be signed but not recorded until improvements were constructed and accepted by the Town. A final plat was signed by Mr. Beddo, both as Town mayor as well as representing the Big Plains Water and Sewer Special Service District, and attested to by the Town recorder.

The Town thereafter underwent some changes in administration, and Developer alleges that the only remaining signature required on the plat was that of the Town attorney, who refused to sign until the plat could be reviewed by the new administration.

The Town's new administration has communicated to Developer the Town's current position that the initial approvals received by the previous owner had long expired, [3] and in the case of the more recent actions by former mayor Beddo, were not done pursuant to the Town's ordinances and were therefore void. The Town has informed Developer that it must start over by getting a new preliminary plat, new construction plans, and new final plat approved.

Developer submitted a Request for an Advisory Opinion to determine whether the Town has complied with the mandatory provisions of applicable land use regulations in requiring

[3] While a letter dated April 30th letter from Mayor Lindhardt initially determined that Developer's preliminary plat had not expired, finding that applicable Town ordinances at the time of the initial approval did not have a sunset provision, the Town has since made a correction to conclude to the contrary that applicable Town ordinances did, in fact, have a sunset provision, and that Developer's preliminary plat approval, and all subsequent entitlements that came with it, have long expired.

Developer to start the approval process over, or whether Developer has or is otherwise entitled to have a final plat signed that may then be recorded.

ANALYSIS

I. The Prior Owner's Subdivision Approvals are Void for Lack of Implementation

Utah's Land Use Development and Management Act ("LUDMA") provides that the continuing validity of a land use approval is conditioned upon the applicant proceeding after approval to implement the approval with reasonable diligence. UTAH CODE § 10-9a-509(1)(e). In other words, until fully carried out to completion, an issued land use approval can expire.

It is undisputed, according to available Apple Valley Town ("Town") records, that the prior owner of Developer's property received preliminary plat approval for the Canaan Mountain Estates subdivision Phase 2 in 2007, as well as a one-year extension granted by the Town Council on August 7, 2008. What is unclear, however, is whether a final plat was ever formally approved. Even assuming that a final plat had been approved,[4] as will be explained below, the outcome here is the same, in that any previous subdivision approval obtained by the prior owner before Developer's acquisition of the property has long since expired.

The Town's subdivision ordinance effective at the time of Phase 2's preliminary plat approval in 2007 provided clear standards on the continued validity of both preliminary and final plat approvals. Final plats were required to be submitted within one year of preliminary plat approval, which could be extended only once by the land use authority for an additional year. APPLE VALLEY SUBDIVISION ORDINANCE, 2-1.F (2005). The effect of failing to obtain a plat extension is that the plat is void. *Id*. Likewise, once a final plat is approved by the land use authority, it must be submitted to the town board within one year of approval, or else the plat becomes void and must be resubmitted as a preliminary plat to the land use authority. *Id.*, at 2-1.H. Finally, following final approval by the town board any final plat not recorded with the County within one year shall become void and must be resubmitted for preliminary plat approval. *Id.*, at 2-1.I. This last requirement is again repeated a second time in the Town's subdivision ordinance, though an additional reference is made to the ability of the town board to grant extensions "for cause, and upon recommendation of the land use authority." *Id.*, at 4-1.C.

According to the information provided by the Developer, the prior owner alleged that a final plat had not been recorded specifically because the prior owner intended to complete all required improvements without the need to provide a bond—or improvement

[4] Town ordinances at the time prohibited the installation or construction of improvements until after final plat approval by the land use authority and construction drawing approval by the engineer. APPLE VALLEY SUBDIVISION ORDINANCE, 2-5 (2005). It could be inferred, then, that final approval had, in fact, been given, as Town Council meeting minutes reflect that "Construction has progressed" at the time a one-year extension was granted in 2008, *see, Minutes of the regular meeting of the Town Council and Planning Commission of the Town of Apple Valley*, August 7, 2008, and the apparent evidence on the ground suggests that nearly all the improvements had been installed.

completion assurance.[5] However, by the prior owner's own admission there was no development activity after 2008 due to the economic recession, nor is there any evidence of any subsequent Town proceedings regarding the property. The consequence of this, according to the Town's ordinances, is that even assuming a final plat had been approved, the failure to record a final plat after either completing or bonding for required improvements since 2008 means that any approved plat is now void, and must be resubmitted for preliminary plat approval.

Even if we were to assume that the approved 2008 plat extension, was, in fact, a *final* plat extension by the town board, which does not explicitly state an expiration in the provision itself, *see id.*, at 4-1.C., failing to take any development activity for period of 10+ years until Developer bought the property in 2021 does not amount to "proceeding after approval to implement the approval with reasonable diligence" under any objective standard, *see* UTAH CODE § 10-9a-509(1)(e), especially where informed by repeated instances of a one-year deadline found throughout the Town's subdivision ordinance.

II. The Former Mayor's Unauthorized Acts Did Not Bestow Subdivision Approval

Following Developer's acquisition of the property in 2021, it approached the Town about finishing the project. Mr. Beddo, the Town's former mayor, concluded that despite the lack of documented final approval, because the site appeared to have been nearly fully improved, the subdivision must have received final plat approval, and the Developer needed only to submit new copies of plats and construction plans to replace lost records, but that it otherwise remained entitled to develop.

The problem with this is two-fold. Fist, as discussed, it would not have mattered if a final plat approval had in fact been granted, as it would now be expired for never having been recorded. Second, Mr. Beddo's assumption that Developer continued to have a valid final plat is inconsistent with his own subsequent actions where he instructed Developer to make several revisions to submitted plat in order to come into compliance with the Town's development standards.

At Mr. Beddo's direction, Developer subsequently made the suggested changes to the project and submitted all new preliminary plats and construction drawings that differed materially from the preliminary approval obtained in 2005. Stated plainly, even if Developer had somehow continued to have a valid approved subdivision plat since 2008, Developer's submission of a materially revised subdivision proposal would necessitate a new land use approval by the land use authority.

In that regard, the review and acceptance of this new plat by Mr. Beddo and another town official, even acting as the JUC, does not amount to a subdivision approval. A land use authority is "a person, board, commission, agency, or body, including the local legislative

[5] *See* Utah Code § 10-9a-103(23) ("Improvement completion assurance" means a surety bond, letter of credit, financial institution bond, cash, assignment of rights, lien, or other equivalent security required by a municipality to guaranty the proper completion of landscaping or an infrastructure improvement required as a condition precedent to[] recording a subdivision plat; or [] development of a commercial, industrial, mixed use, or multifamily project).

body, designated by the local legislative body to act upon a land use application," or, if the local legislative body has made no such designation, the local legislative body itself. UTAH CODE § 10-9a-103(30).

According to the Town's Subdivision Code, the Joint Utilities Committee is authorized to "review and sign construction drawings," APPLE VALLEY SUBDIVISIONS CODE ("AVS") § 11.02.030 (2019), which itself is a requirement needed for final subdivision approval, *See id.* § 11.02.080; however, it is the Town Council, after receiving a recommendation from the planning commission, who acts as the *land use authority* to approve preliminary and final plats. *Id.* § 11.02.060.J. The role of the mayor in the subdivision approval process is limited to signing the final plat for recording after approval to certify that the conditions of the code have been met and that bonds as required have been posted with the town. *Id.* § 11.08.010.

Utah law provides that a person may not record a subdivision plat unless the plat has been approved by the land use authority of the municipality, as well as "other officers that the municipality designates in its ordinance." UTAH CODE § 10-9a-604(1)(b). Following final approval by the Town Council, the "Town attorney shall be the last signer of the mylar just prior to recordation." AVS § 11.02.100.B(8).

Here, the Developer did not obtain either preliminary or final plat approval for the revised Mountain Valley Estates Phase 2 subdivision by the Town Council. As such, it was entirely appropriate that the Town's attorney, who is an "officer[] that the municipality designate[s] in its ordinance" to approve a final plat, *See* UTAH CODE § 10-9a-604(1)(b), declined to sign. Developer may still hereafter receive subdivision approval for Mountain Valley Estates Phase 2 so long as it goes through the Town's subdivision approval process and complies with the Town's subdivision standards.

CONCLUSION

The prior owner of Developer's property sought approval of a subdivision, but never finished infrastructure improvements to the point where a final plat was ever recorded. Developer's acquisition of the property more than a decade later did not include any valid subdivision approval due to the previous owner's failure to implement prior approvals with reasonable diligence. Developer must apply anew for subdivision approval consistent with the Town's current development standards.

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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.

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