Advisory Opinion 273

Parties: Bill Salter / Granite School District

Issued: July 18, 2023

TOPIC CATEGORIES:

Occupation or Use of Property

The Ombudsman's Office may provide an advisory opinion on the subject of inverse condemnation of private property by a government's physical occupation. The first required element of any takings claim is the possession of a "protectible interest" in property.

Where conflicting legal descriptions of high school property and adjoining residential property resulted in an apparent seven-foot overlap in respective deeds, the School District provided the most persuasive evidence of its title to the disputed property, by demonstrating that calls to natural monuments in the senior, controlling deed coincide with an existing fence line that divides the properties and has objectively been accepted as the common boundary by the parties' actions for at least 20 years. The District's disturbance and occupation of this disputed area within the fence line is consistent with its title and is therefore done under colorable authority. Therefore, the District's continued occupation up to the fence does not constitute a taking of private property.

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ADVISORY OPINION

Advisory Opinion Requested By:	Bill Salter
Local Government Entity:	Granite School District
Type of Property:	School/Residential
Date of this Advisory Opinion:	July 18, 2023
Opinion Authored By:	Richard B. Plehn, Attorney Office of the Property Rights Ombudsman

ISSUES

During an expansion of school facilities, did Granite School District unlawfully occupy private property amounting to a taking of private property for a public use without just compensation?

SUMMARY OF ADVISORY OPINION

The Ombudsman's Office may provide an advisory opinion on the subject of inverse condemnation of private property by a government's physical occupation. The first required element of any takings claim is the possession of a "protectible interest" in property. In this case, the facts surrounding ownership of the property in question are disputed. Our advisory opinions rely on an informal process of party-volunteered facts. An opinion of this nature, operating as a dispute resolution tool, attempts to resolve the dispute by relying on a statement of facts supported by the most persuasive evidence, as we see it.

Where conflicting legal descriptions of high school property and adjoining residential property resulted in an apparent seven-foot overlap in respective deeds, the School District provided the most persuasive evidence of its title to the disputed property, by demonstrating that calls to natural monuments in the senior, controlling deed coincide with an existing fence line that divides the properties and has objectively been accepted as the common boundary by the parties' actions for at least 20 years. The District's disturbance and occupation of this disputed area within the fence line is consistent with its title and is therefore done under colorable authority. Therefore, the District's continued occupation up to the fence does not constitute a taking of private property.

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 Bill Salter, received on July 8, 2022.
2. Letter from Matthew L. Anderson, on behalf of Granite School District, on July 22, 2022.
3. Email from Bill Salter, on August 4, 2022.
4. Letter from Matthew L. Anderson, on September 7, 2022.
5. Letter from Matthew D. Moscon, attorney for homeowners including Mr. Salter, on November 15, 2022.
6. Letter from Matthew L. Anderson, on January 24, 2023.
7. Letter from Matthew D. Moscon, on February 17, 2023.
8. Letter from Matthew L. Anderson, on April 17, 2022.

BACKGROUND

Skyline High School is part of the Granite School District ("District"), and Bill Salter is one of five property owners directly abutting north of the high school property. The parties in this case appear to agree, generally, that there have historically been two physical features found between the school facilities and Mr. Salter's home and other improvements: (1) a large area of trees and brush that has existed for many decades; and (2) within that area of growth, a chain-link fence that has been reflected in property records starting in 1989.

At the heart of this dispute is a seven-foot-wide strip of land immediately south of the fence line, but within the area of trees and growth. The parties agree that as part of a recent expansion of Skyline High School facilities, the District removed all trees and brush south of the fence in anticipation of a pedestrian thoroughfare along the fence intended to be utilized as part of school facilities. That, unfortunately, is nearly all the parties appear to agree on.

The District has owned its property since 1961, and alleges that this boundary fence was installed by the District sometime thereafter—no later than 1989—to enclose its own property including along the parties' common boundary according to property records (as the District understands them). The District adds that over the years the District has maintained its side of the fence, and on numerous occasions has paid for or repaired or replaced the fence.

Mr. Salter moved into his home in 2005, and alleges, on the other hand, that property records (as he understands them) establish the parties' common boundary instead to be found seven feet south of the fence, alleging that the fence actually belongs to the homeowners (inclusive of neighboring properties to the east and west of him, respectively) for their own use. Mr. Salter adds that whereas the seven-foot strip of land south of the fence was still within the natural privacy of the then-existing trees and brush, for the 17 years in which he has owned the property, Mr. Salter has frequently used this seven-foot area beyond the fence (accessed through a gate) to walk his dogs.

Stated simply, the District believes that the existing fence demarcates the common boundary of the two properties, and that the District's recent construction activity has occurred wholly on its side of this purported property boundary line. Mr. Salter, in contrast, believes that the property line is instead found approximately seven feet south of the fence, demarcated by a "natural" barrier of trees and brush that had existed for decades, and that the District's disturbance of land beyond this natural tree barrier up to the fence amounts to an uncompensated taking of private property.

Mr. Salter has requested an advisory opinion to determine whether the District has occupied his private property for a public use and whether such continued occupation would amount to a taking of private property requiring just compensation.

STATEMENT OF FACTS

The available property records, as provided by the parties, are summarized as follows, with this Office noting where the parties expressly agree to the facts, or where alleged facts have otherwise not been rebutted:

1. Both parties acknowledge that the original deed that created the common boundary between the properties is dated April 13, 1876 ("1876 deed"), recorded with the Salt Lake County Recorder in Book 4A, page 588.
2. The District proffers, through the opinion of a licensed surveyor, that the 1876 deed recites a point of beginning in both course and distance, measured in chains, as well as calls to natural monuments, namely "to the top of the south bluff of Mill Creek." Mr. Salter has not rebutted this proffered description of the deed's point of bearing call to the top of the bluff.
3. Both parties acknowledge that the next deed describing the common property boundary is a deed recorded in 1894 in Book 4-R at Pages 424-425 ("1894 deed"), which describes the boundary as bearing "South 83°30' West 54 rods [891 feet] in length," but no longer makes any calls to natural monuments.
4. Both parties acknowledge that each deed in the title chain for properties north and south of this boundary, from 1894 through 1954, repeat this legal description from the 1894 deed. Calls to natural monuments, initially found in the 1876 deed, but absent from the 1894 deed, are likewise not found in these subsequent deeds.
5. The District was deeded its property for the school in two deeds dated from 1960 and 1961. Both parties acknowledge that the 1960 and 1961 deeds modified the legal description from prior deeds that had repeated the 1894 description. The 1961 deed is identical to the 1960 legal description.
6. Both parties acknowledge that following conveyance of the school property in 1960 and 1961, subsequently recorded deeds of the properties north of the school, which include the properties of Mr. Salter and neighbors, continued legal descriptions that relied on the 1894 location of the boundary, and generally result in areas of overlap with the school's 1960 deed, according to the following surveys:
    a. In 1989, Peterson & Wanlass Engineering conducted a survey for property that neighbors the current Salter property, which was recorded as S1990-02-0077. The 1989 survey depicts the south boundary of that property based on the 1894 deed,

but is additionally annotated that "NOTE: There is an overlap with the Granite School District description along the south property line." This overlap is depicted on the survey with the notation: "Granite School District 6' Chain Link Fence," shown a short distance north of the surveyed boundary line.

b. In 1990, Peterson & Wanlass conducted another survey, filed as S1990-10-0446, for two additional tracts of property that neighbor the property surveyed in 1989, and which also describe boundaries consistent with the 1894 location and similarly depict a "6' Chain Link Fence" just north of the surveyed boundary line.

c. In 1999, the District granted two easements to TCI Cablevision, each of which included as an attachment to the description surveys conducted by John Stahl of Cornerstone Professional Land Surveys, Inc., and which described the district's boundary according to the 1960 deed, and consistent with the existing fence.

d. In 2005, Byron Curtis, of Curtis & Associates, Inc., prepared a survey of the Salter property just prior to the Salters purchasing the home, but which was not recorded, which depicted an "Existing Fence" and surveyed the property line as 7.2' south of existing fence at the west end of the property, and 6.8' south of the fence at the east end of the property.

e. In 2018, Patrick Harris of Ensign Engineering prepared an ALTA-NSPS Land Title Survey for the District which depicted the "Chainlink Fence" as correlating with the surveyed property line. It is also noted that the "legal descriptions contained within the following documents encroach upon the subject property: a) Warranty Deed recorded November 3, 2005 as Entry No. 9543751 in Book 9212 at Page 9258"—which appears to be the Salter's deed—and continues to list others. Other than this notation, the survey does not actually depict any described property line that differs from the fence line, which Mr. Salter contends, through evidence of a licensed surveyor, is not in conformance with ALTA standards.

ANALYSIS

Section 13-43-205 of the Property Rights Ombudsman Act provides a list of topics for which a written advisory opinion may be requested. One of those topics includes that a private property owner may request an opinion "to determine if a condemning entity . . . is in occupancy of the owner's property . . . for a public use authorized by law . . . without colorable legal or equitable authority," and whether continued occupancy of the property without the owner's consent "would constitute a taking of private property for a public use without just compensation." UTAH CODE § 13-43-205(2).

Inverse condemnation is the legal action a property owner may bring when the government has allegedly taken or damaged private property for public use without a formal exercise of the eminent domain power. *Pinder v. Duchesne Cty. Sheriff*, 2020 UT 68, ¶ 11 n.4 (internal quotations and citations omitted). A request for an Advisory Opinion under Subsection 205(2), then, asks for a determination of whether inverse condemnation has occurred by way of physical occupation. *See, Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (permanent physical occupation of an owner's property authorized by government constitutes a taking). We note, however, that this request for an advisory opinion to determine a physical occupation taking is a

matter of first impression for the Office since the subject was added to the list of advisory opinion topics by the legislature in 2014.

In responding to the Request for an Advisory Opinion, the District initially challenged the Office's jurisdiction in this matter, alleging that the property at issue being claimed as belonging to Mr. Salter was within the District's fence line and part of its campus for decades, and that the "District's choice to remove foliage and construct improvements on its own property" did not invoke a taking.[1]

However, as the first required element of any takings claim, including an inverse condemnation claim, is the possession of a "protectible interest" in property, the statutory jurisdiction of the Office of the Property Rights Ombudsman to resolve takings disputes includes the "authority to determine the issue of property ownership insofar as it relates to [a] takings claim." *Harold Selman, Inc. v. Box Elder County*, 2011 UT 18, ¶ 23. Accordingly, "the mere allegation of property ownership in a takings . . . dispute is sufficient to invoke the authority of the Ombudsman's Office." *Id*., at ¶ 31.

The informal nature of the advisory opinion, as an alternative dispute resolution tool, tends to limits the fact-finding capability of the Ombudsman to whatever information is willingly provided by the parties, in which case the Ombudsman will provide a statement of facts to support its opinion according to the evidence it found most persuasive. The advisory opinion is not binding on the parties, and either side may subsequently litigate the issue de novo, and with the benefit of formal discovery, in district court—the only body having authority to quiet title.

A. The Intent of the 1876 Deed Is Discerned by Its Call to Natural Monuments

In order to establish that he has a protectible property interest to support a claim for inverse condemnation, Mr. Salter must succeed in quieting title to disputed property against the District's adverse claim. Since each party claims to be the owner of the disputed portion, the burden is usually on each to make good by evidence of title, each party assuming the burden of establishing by competent evidence its title to the land respectively claimed. *Music Serv. Corp. v. Walton*, 20 Utah 2d 16, 20, 432 P.2d 334, 336 (Utah 1967).

The 1876 deed—which created the parties' common boundary—contains courses and distances acknowledged by both parties as measuring out approximately seven feet south of the existing fence. While the District argued that the 1876 measurements were inconsistent with subsequent deeds, and alleged that this reflected that the instruments used for measurements at the time of the 1876 deed were not as accurate, and improved with each subsequent deed (an assertion Mr. Salter disputes), the District nevertheless also provided expert testimony, through a licensed surveyor, that the 1876 deed also makes a monuments call to the top of the bluff, and that the point of beginning from this natural monument corresponds with the location of the current fence line, as well as harmonizing with the property lines of other adjacent property.

Mr. Salter did not rebut the District expert's evaluation of the deed's call to natural monuments as being harmonious with the fence line. Rather, in response, Mr. Salter attacks only the assertions of

[1] *Submission 1 - Letter from Matthew L. Anderson on behalf of Granite School District*, July 22, 2022.

inaccurate measurements, and reiterates that if the succession of deeds reflects inconsistent measurements, the 1876 deed, as the senior deed, controls. This, however, misses the point. The District does not dispute that the 1876 deed controls; rather, it argues that whereas the 1876 deed contains both course and distance as well as calls to monuments, the intent of the parties to the deed should be discerned by reference to calls to monuments.

We believe this is the correct way to read the 1876 deed. Regardless of whether forms of measurement have become more "accurate" over time,[2] the fact remains that when measured today, the course and distance in the deed conflicts with the calls to natural monuments, resulting in an ambiguity that must be resolved. *See*, *Gillmor v. Cummings*, 904 P.2d 703, 706 n.3 (Utah Ct. App. 1995) (ambiguity exists when metes and bounds call conflicts with a call to a monument).

In Utah, when interpreting a deed, the main object is to ascertain the intention of the parties, from the language used. *Hartman v. Potter*, 596 P.2d 653, 656 (Utah 1979). In doing so, Utah courts have "consistently adhered to the principle that a distance call yields to the monument call, the reason being that there is more likelihood of mistakes in courses and distances than in calls to fixed objects which are capable of being clearly designated and accurately described. *Achter v. Maw*, 27 Utah 2d 149, 155, 493 P.2d 989, 993 (Utah 1972).

The unrebutted expert testimony is that the calls to monuments in the 1876 deed align with the current fence line. Because of this, the District has presented the most persuasive evidence that the 1876 deed—which controls as the senior deed—establishes the parties' common boundary where the fence currently exists.[3] All subsequent deeds that abandoned the calls to monuments and describe course and distance that measures approximately 7' south of the fence line, must yield to the property line as established in the 1876 deed along the fence line.

B. <u>The Doctrine of Boundary By Acquiescence Supports the Fence as the Boundary</u>

The District also argues, in the alternative, that regardless of where the respective property deeds have identified the common boundary to be, the District has title to the disputed portion of property south of the fence through the doctrine boundary by acquiescence, which establishes the long-standing fence as the common boundary of the properties.

The doctrine of boundary by acquiescence is an equitable doctrine employed by Utah courts to resolve property line disputes, "which rests on the sound public policy of preventing strife and litigation and promoting stability in boundaries." *Holmes v. Judge*, 31 Utah 269, 87 P. 1009, 1014 (Utah 1906). Utah courts have noted that "its essence is that where there has been any type of a

[2] A reality acknowledged, at least *in dicta*, by Utah courts: "It can also be said in general that technological advances in survey techniques . . . is tipping the scales toward greater reliance on record title information and lesser reliance on boundary by acquiescence." *Halladay v. Cluff*, 685 P.2d 500, 504 (Utah 1984) (*holding overruled by Staker v. Ainsworth*, 785 P.2d 417 (Utah 1990)); *see also, Anderson v. Fautin*, 2014 UT App 151, ¶ 21, (mentioning "Physical boundaries established long ago [by] what are now considered primitive and imprecise surveying techniques").

[3] The District's expert testimony that the forms of measurement changed over time to become more accurate or consistent additionally provides an explanation of why the deeds produced a discrepancy in the first place, whereas the Salters, alternatively, have not provided any explanation for the deed discrepancy, instead focusing all argument on the fact that whereas the 1876 deed is senior, the course and distance—as they understood them to be measured—provided all the information necessary to resolve the dispute.

recognizable physical boundary, which has been accepted as such for a long period of time, it should be presumed that any dispute or disagreement over the boundary has been reconciled in some manner." *Baum v. Defa*, 525 P.2d 725, 726 (Utah 1974) (footnotes omitted).

The boundary by acquiescence doctrine requires a claimant to show:

(1) a visible line marked by monuments, fences, buildings, or natural features treated as a boundary;
(2) the claimant's occupation of his or her property up to the visible line such that it would give a reasonable landowner notice that the claimant is using the line as a boundary;
(3) mutual acquiescence in the line as a boundary by adjoining landowners;
(4) for a period of at least 20 years.

Anderson v. Fautin, 2016 UT 22, ¶ 31.

In this case, we have determined that the proper interpretation of the senior 1876 deed establishes the property line at the location of the existing fence. In light of this, a court may likely avoid addressing the issue of boundary by acquiescence in the interest of judicial economy. As for our purposes, however, because the Advisory Opinion is meant to "serve as a quasi-mediation tool," *Checketts v. Providence City*, 2018 UT App 48, ¶ 28, and the doctrine of boundary by acquiescence "exists to avoid litigation . . . by allowing parties to apply the doctrine to resolve matters outside of court," it is appropriate to briefly address the issue, primarily because application of the doctrine would only confirm the deeded property line by establishing the fence's status as the parties' common boundary.[4]

Starting with the first element, a fence is the quintessential boundary marker, i.e., "a visible line marked by monuments, *fences*, or other natural features treated as a boundary." *Anderson*, 2016 UT 22, at ¶ 31 (emphasis added). We note that the fence here ran the width of the Salter property and beyond to neighboring properties to divide the school property from several adjacent residential properties. In other words, the Salter property was completely fenced out of the "disputed" property that lies beyond the fence.

The second element requires the claimant to occupy up to the visible line in such a way as to give notice that the claimant is using the line as a boundary. The District, the claimant here, has asserted that it installed the fence and has regularly repaired and maintained it over the years; this is sufficient to satisfy the occupation element. Mr. Salter argues that the law places great emphasis on the actual *use* of the property in order to establish occupation, and cites to caselaw stating that "[the occupation] element can be satisfied, for example, where land up to the visible, purported

[4] In doing so, we note that the doctrine of boundary by acquiescence is restrictively applied in Utah, requiring the claimant to prove each of the above elements by clear and convincing evidence. *See, Huck v. Ken's House LLC*, 2022 UT App 64, ¶ 12. The advisory opinion process, with its volunteered informal discovery, is not generally well-equipped to consistently produce the kind of evidence normally required to meet that standard. However, the courts' restrictive application of the doctrine appears to be mostly due to the fact that, when applied, the doctrine can operate to alter recorded property lines. *See*, *id.* But because, in this case, the claimant turns to this doctrine merely to confirm the deeded property line, our comments will be informed by evidence that we found most persuasive, without any kind of opinion on whether the District would prevail on a boundary by acquiescence claim solely on the information that has been provided to the Office so far.

boundary line is farmed, occupied by homes or other structures, improved, irrigated, used to raise livestock, or put to similar use." *Huck v. Ken's House LLC,* 2022 UT App 64, ¶ 13 (internal quotations and citation omitted).

Mr. Salter alleges that there is no evidence that the District "maintained" the *small strip of land* south of the fence (for example, alleging that there is no irrigation or sprinklers on the disputed strip, or any evidence of the District trimming trees or overgrowth in the strip). However, this overlooks the clear and plain evidence provided by the District that it installed, maintained, and repaired the *fence itself.* We can think of no better example of putting a landowner on reasonable notice of a claimant's occupation than the District completely fencing off the disputed strip from Mr. Salter's property, and then continuing to maintain that fence over the years.

Mr. Salter provides no alternative explanation of where the fence came from, why the homeowners would have collectively installed (or agreed to the installation of) an interior fence running through their respective properties that, in at least Mr. Salter's case, completely severs off a small portion of his alleged property, or any assertion that the homeowners have maintained or taken any responsibility for the fence as their own. In contrast, the District has repeatedly asserted that it installed the fence, provided an explanation of the purpose for installing the fence (to enclose its own property), and evidence that it has continued to maintain the fence, which is not otherwise rebutted by Mr. Salter.[5] The evidence regarding the District's installation and maintenance of the fence itself therefore necessarily anticipates the occupation of property up to the fence, and gave Mr. Salter "notice that the [District] is using the line as a boundary." *Anderson*, 2016 UT 22, ¶ 31.

The third element, mutual acquiescence in the line as the boundary, requires "an objective determination based solely on the parties' actions in relation to each other and to the line serving as the boundary." *Linebaugh v. Gibson*, 2020 UT App 108, ¶ 26 (cleaned up). While "record property owners are not required to take legal action or otherwise 'oust' someone adversely occupying their property to maintain their legal rights in their property," they must "take *some* action manifesting that they do not acquiesce or recognize the particular line . . . as a boundary between the properties." *Id.* ¶ 20 (emphasis added). Even "mere conversations between the parties" can "refute any allegation that the parties have mutually acquiesced in the line as the property demarcation" if such conversations suggest that one or both parties do not view the purported visible line as a boundary. *See id*. ¶ 21.

[5] Mr. Salter does challenge the *credibility* of the District's proffered evidence regarding its alleged maintenance of the fence as unpersuasive. Specifically, the District provided a rudimentary spreadsheet document that it alleges to be a maintenance log depicting instances of the District maintaining the fence and the disputed property on its side of the fence. *See,* Exhibit C, *Submission 4 - Letter from Matthew L. Anderson*, September 7, 2022 (also provided as "Exhibit B" in Submission 6 from the District). Mr. Salter attacks the District's spreadsheet as unauthored, undated as to its creation, containing vague and ambiguous descriptions of alleged maintenance, lacking any witness attesting to the veracity of the document, and lacking other evidentiary support such as invoices. *Submission 7 - Letter from Matthew D. Moscon*, February 17, 2023. Again, were the parties engaged in district court proceedings under the Utah Rules of Evidence and Utah Rules of Civil Procedure, these would be valuable and relevant objections, because it would be assumed that the parties would have had the benefit of a full discovery process in order to establish the credibility and foundation of any evidence. However, in the advisory opinion's informal investigative process of party-volunteered facts, we necessarily accept the good-faith representations of the parties. The District has proffered that the provided spreadsheet is an official record of District maintenance activity, and that the information highlighted is relevant to the disputed property in question. Mr. Salter's challenge to credibility, alone, is not a rebuttal of the District's claim that it maintained the fence, especially without any sort of contrary evidence to show otherwise.

Here, the District alleges that neither Mr. Salter nor his predecessors ever voiced any objections or disagreement to the District's occupation and treatment of the fence as the common boundary until the District's recent development activity, and additionally alleges that nor has Mr. Salter provided any evidence that he has instead treated the disputed property as his own. Mr. Salter alleges that he has walked his dog beyond the fence in the disputed strip of property nearly every day for the 17 years that he has lived on the property, and that this establishes that there was no mutual acquiescence between the landowners. In rebuttal, the District argues that such behavior alone would not be sufficient to put the District on any contrary notice that the Salters believed the land to be theirs, noting that school campuses are open to the public and frequently used by many for walking.

In *Essential Botanical Farms, LLC v. Kay*, the Utah Supreme Court stated:

> Mutual acquiescence arises where neighbors do not *behave* in a fashion inconsistent with the belief that a given line is the boundary between their properties. A party's acquiescence in a visible line as a boundary may be shown by silence, or through failure by the record title owner to suggest or imply that the dividing line between the properties is not in the proper location. On the other hand, nonacquiesence in a boundary would be signaled where a landowner notifies the adjoining landowner of her disagreement over the boundary, or otherwise *takes action* inconsistent with recognition of a given line as the boundary. In either instance, recognition is displayed through specific actions, the existence of which is not determined by the actor's mental state. As a result, the determination of mutual acquiescence is based on the objective behavior of the adjacent landowners regardless of their subjective intent to act in such a manner.

2011 UT 71, ¶ 27 (emphasis in original) (internal citations and quotations omitted).

Again, mutual acquiescence is "an objective determination based solely on the parties' actions." *Linebaugh*, 2020 UT App 108, at ¶ 26. Whereas there has been no conversation between Mr. Salter (or his predecessors) and the District wherein it could have simply been voiced that there was no mutual acquiescence in the fence as the parties' common boundary, this silence leaves us with instead looking to what other actions have been taken by Mr. Salter and/or predecessors that would otherwise objectively notify the district that the strip was disputed. Dog-walking in the disputed strip, when the larger school campus beyond is generally open to the public and typically used for public walking and recreation purposes, does not objectively put the District on notice that there was no mutual acquiescence in the fence as the parties' common boundary.

Finally, the last element is a period of 20 years. It is undisputed the fence has existed since at least 1989, meaning that wherein the other above elements have been met since that time, any dispute as to whether the fence is established as the parties' common boundary has likely been settled for over a decade prior to the District's recent development activity. In this case, then, the doctrine of boundary by acquiescence's "very reason for being" appears to be relevant and applicable, which is that "in the interest of preserving the peace and good order of society the quietly resting bones of the past, which no one seems to have been troubled or complained about for a long period of

years, should not be unearthed for the purpose of stirring up controversy, but should be left in their repose." *Hobson v. Panguitch Lake Corp.,* 530 P.2d 792, 794 (Utah 1975).

CONCLUSION

Where inverse condemnation of private property is alleged to have occurred by a government's physical occupation, the property owner must first demonstrate that it has a protectible property interest in the land alleged to have been taken. Ownership of the subject property here is disputed as a result of inconsistent legal descriptions in the parties' respective property deeds causing a surveyed overlap over time, and the District has a colorable claim or defense for its development activity where it has relied on its legal description showing its ownership to extend to the existing fence.

The District has provided the better evidence of title to the disputed strip of property by establishing that the deeded property boundary, as intended by the parties that created it, coincides with the longstanding fence that has divided the parties' two properties for the last three decades. Calls to natural monuments in the original deed align with the current fence line, and take priority over course and distance that had changed in deeds over time and appear to place the boundary several feet south of the fence. Additionally, for a period of over 20 years since the fence was erected, the parties have behaved consistent with a recognition of the fence as the boundary. Therefore, the District's continued occupation up to the fence line is consistent with its property ownership, and the District has not taken Mr. Salter's private property.

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:

Office of the Attorney General
Attn: Rebecca Lee
350 North State St., Ste 230
Salt Lake City, Utah 84114

On this ___ Day of _____, 2022, 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