

Advisory Opinion #86

Parties: Peterson Development and City of West Jordan

Issued: May 5, 2010

TOPIC CATEGORIES:

R(v): Other Topics (Interpretation of Ordinances)

A local government has discretion to determine how and where new development connects to public utilities. Regulation by the Public Service Commission is not necessary to exercise eminent domain authority to acquire property for public utilities.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Peterson Development LLC
Victor Barnes

Local Government Entity: City of West Jordan

Applicant for the Land Use Approval: Peterson Development LLC

Project: Subdivision

Date of this Advisory Opinion: May 5, 2010

Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

- I. May the Office of the Property Rights Ombudsman issue an Advisory Opinion evaluating implementation of a condition imposed on a subdivision that has already been approved?
- II. May a local government select the connection point from a private development to a public utility, such as a municipal sewer?
- III. Are local governments prohibited from acquiring easements for sewer service, because they are not “public utilities” regulated by the Public Service Commission?

Summary of Advisory Opinion

Because the mandate granted to the Office of the Property Rights Ombudsman includes authority to evaluate conditions imposed upon land development, the Ombudsman’s Office has authority to issue Advisory Opinions on how those conditions are interpreted and implemented, even after final subdivision approval.

A local government has broad discretion over public utilities provided by the government entity. This discretion includes the authority to select how and where a new development connects to a public utility system. Selection of an appropriate connection point should involve consideration of a variety of factors. Cost to the developer may be considered, but cost should not be the sole determining factor. A local government may select any connection point that is rationally based and reasonably acceptable.

There is no basis for a conclusion that only public utilities regulated by the Public Service Commission may acquire property for a sewer system. Local governments are authorized to install and maintain public sewers and other utilities. They are also specifically authorized to exercise eminent domain authority to acquire property necessary for the operation of sewers. Furthermore, private developers also have the authority to exercise eminent domain to acquire property for sewer systems. In either event, the statutory procedures for eminent domain must be followed, and just compensation must be paid to the property owners. Regulation by the PSC is not required to exercise this authority.

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 Peterson Development LLC on February 25, 2010. A copy of that request was sent via certified mail to Melanie Briggs, City Recorder. The return certificate, indicating that the City of West Jordan received the copy of the Request, was received by the Office of the Property Rights Ombudsman on March 3, 2010. On March 9, 2010, a Response from the City was received. On March 30, the Office of the Property Rights Ombudsman received additional information from the City. Peterson Development submitted a reply, which was received on April 15. The City submitted a brief response, which was received on April 21, 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, submitted by Peterson Development, LLC on February 25, 2010, with attachments.
2. Response from the City of West Jordan, by Darien Alcorn, Deputy City Attorney, received on March 9, 2010.
3. Reply from Peterson Development, by Victor Barnes, received on March 22, 2010
4. Additional Response submitted by the City, received March 30, 2010.
5. Additional Reply from Peterson Development, received April 15, 2010.
6. Response from the City, received April 21, 2010.

Background

Peterson Development LLC (“Peterson”) is developing a commercial subdivision, known as “Peterson Commons” located at 4792 W. New Bingham Highway. The City of West Jordan granted subdivision approval in the summer of 2008. At the time of approval, the City indicated that the new subdivision was to connect to the City’s sanitary sewer system running along the New Bingham Highway on the opposite side of Peterson Commons. In order to connect to the sewer system, then, Peterson would be required to bore beneath the New Bingham Highway.

In 1997, Peterson had developed a residential subdivision near the Peterson Commons property. The residential subdivision, known as Copper Hills, is located across from Peterson Commons, and two areas are separated by 4800 West Street. The Copper Hills Subdivision is also served by the City’s sewer system, which was installed by Peterson in the late 1990s. The sewer lines run beneath the public streets of the subdivision, except, according to Peterson, for two “stub” lines, which were installed along the boundary lines between building lots. One of these stub lines is apparently located between lots 126 and 127, and is currently being used to connect an adjoining property to the City’s sewer system. The other stub is located between lots 107 and 108, and extends into a small open space area behind the two lots.¹ The plat for the Copper Hills Subdivision identifies an eight-inch PVC pipe between lots 107 and 108, and a ten-foot easement for public utilities and storm drainage is shown on both lots.²

After the Peterson Common commercial subdivision was approved, Peterson sought to change the sewer connection from the New Bingham Highway line to the stub line between lots 107 and 108. Peterson states that option is less expensive, apparently because the costs to install a connection line underneath the New Bingham Highway are more than the costs to install a line beneath 4800 West.

The City argues that the Copper Hills stub line is not within a sewer easement, and so Peterson would not have rights to use the stub line for sewer service. The City further claims the pipe

¹ There may be other stub lines in the Copper Hills Subdivision, but they were not identified in any of the materials submitted for this Opinion. It is unclear who owns the Open Space area. It appears from the plat that the area may have been dedicated to the public, but that is not explicit in the materials provided.

² All of the lots have utility easements along their boundaries. A plat for Copper Hills shows an 8 inch pipe buried between lots 107 and 108, and labels the end of that line “cap and end for future use.” Another plat submitted by Peterson identifies that line as a sanitary sewer, but it is not clear when that plat was prepared, as it shows the Peterson Commons commercial development as well as the Copper Hills Subdivision.

installed between lots 107 and 108 is not a sewer line at all. Although the City acknowledges the existence of an easement for public utilities and drainage, it claims that a sewer easement was not part of the subdivision or the lots, and accordingly, the easement for public utilities and drainage cannot be used for sewer service. However, the City also acknowledges that the Copper Hills Subdivision is served by the municipal sewer system.

Because the City insists that the public utility easements on lots 107 and 108 do not include sewer lines, they claim that neither Peterson nor the City has authority to install a line on the lots. The City cites § 54-3-27(2) of the Utah Code, and states that section prohibits Peterson from using the easement between lots 107 and 108, because Peterson is not a “public utility.” However, the City believes that it does not possess such authority either, because § 54-2-1(22)(b) of the Utah Code excludes public entities from the definition of “sewerage corporation.” According to the City’s explanation, the easement cannot be converted into a sewer line easement, unless the owners of lots 107 and 108 agree. The City believes that neither Peterson nor the City has authority to compel the lot owners to accept the easement.

The City also objects to this Opinion on the grounds that the Peterson Commons subdivision has already been approved and recorded. The City argues that the Office of the Property Rights Ombudsman lacks authority to issue an opinion in this matter, because a final decision on the subdivision application has been made. The City relies upon § 13-43-205, and argues that Advisory Opinions may not be prepared after a final decision on an application.

Analysis

I. Because There is a Question Related to Conditions on Land Development, the Office of the Property Rights Ombudsman May Issue an Advisory Opinion on this Matter.

In spite of the City’s vehement objections, the Office of the Property Rights Ombudsman may issue an Advisory Opinion on this matter, because it involves the application and interpretation of a condition imposed upon land development. The City correctly notes that § 13-43-205 generally delineates the topics for Advisory Opinions. That section also states that Advisory Opinions may be requested “[a]t any time before a final decision on a land use application by a local appeal authority.” UTAH CODE ANN. § 13-43-205. However, that provision does not necessarily block the ability to issue Advisory Opinions on issues which concern implementation of a land use application that has been approved. There is no requirement in that section that a land use application be pending before an Advisory Opinion can be requested. Indeed, some of the topics listed as appropriate for Advisory Opinions in UTAH CODE ANN. § 13-43-205 do not necessarily arise under land use applications, such as impact fees, and non-conforming uses/non-complying structures. Moreover, conditions, exactions, and application of ordinances are topics for which Advisory Opinions are available. See UTAH CODE ANN. §§ 10-9a-508, 10-9a-509. It follows that interpretation of an ordinance or a condition expressed during the land use approval process is a valid topic for an Advisory Opinion. By offering such opinions, the Ombudsman’s

Office is able to provide guidance to local government and property owners, help avoid litigation, and encourage resolution of disputes.³

Local governments may impose conditions on land uses. *See id.*, §§ 10-9a-509 and 17-27a-508.⁴ The Ombudsman's Office may issue Advisory Opinions on questions arising not only from imposition of conditions, but also concerning application and interpretation of conditions imposed pursuant to §§ 10-9a-509 and 17-27a-508. *See id.*, § 13-43-205. In order to fulfill the purposes of Advisory Opinions and the mission of the Ombudsman's Office, it is necessary that Advisory Opinions be prepared that focus on the implementation of conditions already approved by a land use authority.⁵

The Peterson Commons subdivision was approved by the City in the Summer of 2008. The City requires connection to the sewer line running along the New Bingham Highway. Peterson proposes changing that condition, although it appears that no formal application requesting a change has been submitted.⁶ Peterson objects to the City's refusal to approve its request. The City's position is based, at least in part, upon its interpretation of the condition imposed upon the Peterson Commons subdivision approval, and its understanding of the circumstances of the Copper Hills Subdivision. Since the issue at hand involves a condition imposed upon a land use application, the Ombudsman's Office may issue an Advisory Opinion evaluating the matter.

II. Local Governments may Determine How and Where Developments Connect to Public Sewer Systems, Provided the Determination is Rational and Reasonable.

The City has discretion to determine the location of the sewer connection for the Peterson Commons subdivision, provided that location is rationally based and reasonable under the circumstances. Cities are empowered to construct and operate sewer systems. *See UTAH CODE ANN.* § 10-8-38, *see also Rupp v. Grantsville City*, 610 P.2d 338, 340 (Utah 1980) (Municipalities have broad powers to protect public health and welfare); *see also Kiesel v. Ogden City*, 30 P. 758, 759, 8 Utah 237, 239 (1892) (Municipalities have "wide discretion" in the construction and operation of public works, such as sewers).⁷ A local government's decision regarding connection to any municipal service is within the discretion of the governing body.

³ The dispute resolution function of the Advisory Opinion, combined with the fact that Advisory Opinions are advisory and not binding upon either party, leads to the public policy conclusion that Advisory Opinions should be made available to more, rather than fewer, parties. Where an Advisory Opinion can help resolve a matter without the need for litigation, it ought to be available. Accordingly, it is the policy of the OPRO to interpret the limitations on availability of Advisory Opinions expansively where possible. Advisory Opinions remain unavailable when exclusion is explicit.

⁴ Local governments may impose conditions, provided they are expressed in statute, ordinance, or clearly stated in writing as part of the final approval.

⁵ Moreover, a decision by the land use authority regarding interpretation or application of a condition, and a dispute thereon, may arise long after the condition is imposed.

⁶ It is not clear what process, if any, the City has to consider changes to land use applications which have already been approved. Should an application be necessary, a decision on that land use application would be a new land use decision.

⁷ Other aspects of the *Kiesel* decision, dealing with governmental immunity, have been overturned or modified. *See Cobia v. Roy City*, 366 P.2d 986, 12 Utah 2d 375 (1961).

There are limits to local government discretion, however. The City's decision must be rationally based and reasonable. In addition, the City's decision must not give rise to an illegal exaction in violation of UTAH CODE ANN. § 10-9a-508. Each decision must be evaluated on a case-by-case basis. It would not be rational, for example, to require a developer to connect at a point some distance away when there is an acceptable connection point nearby. It would also be unreasonable to select a connection point that requires a great deal of additional equipment, when a more accessible connection is available, without some rational basis to favor the less accessible connection point.

A local government may consider the cost to a developer, but cost should not be the controlling factor. A government may weigh various considerations, such as ease of accessibility (including accessibility for maintenance), capacity of the system, anticipated future needs, possible disruption of traffic or other services due to construction, disturbance of existing residents' property, etc. "The City, in an expansion movement involving the furnishing of essential public services, has a generous latitude for controlling and administering such expansion and services to advance the public welfare, and a concomitant latitude of discretion to approve plans affecting other citizens and interests." *Seal v. Mapleton City*, 598 P.2d 1346, 1347 (Utah 1979). If there is more than one acceptable connection point, a local government has discretion to choose any one of those connections—provided the choice is reasonable—even if it results in greater costs to the developer.

As long as the City's decision is rationally based and not unreasonable, it may dictate the location of the sewer connection from Peterson Commons. However, only limited information was provided about the two possible connection points. Peterson states that crossing the New Bingham Highway would be more costly than its preferred connection across 4800 West and through the Copper Hills Subdivision. However, other factors may certainly play in the decision.⁸ A choice between the two should consider the cost and other burden imposed upon Peterson, and should also consider how the system as a whole would be affected by the new development. Ultimately, the City has broad discretion, and may determine the best location for a connection within established limits.

III. The City May Already Possess an Easement Between for A Sewer Line in Copper Hills; if There is no Easement, the City may Acquire One by Eminent Domain.

Apparently, the City's decision to prohibit connection across 4800 West and require connection across the New Bingham Highway is based upon two factors. First, the City believes that there is no stub sewer line running between lots 107 and 108. If true, this could be considered a sufficiently reasonable basis to deny Peterson's request. However, as will be discussed below, the existence of the line may be easily confirmed. Second, the City bases its decision on its belief that there is no easement for a sewer line beneath those lots, and that neither the City nor the Developer has authority to obtain or establish one. However, there does appear to be an easement

⁸ As shown below, the reasons given by the City for refusing to permit the Developer's preferred connection are unjustified. However, other rational bases may exist, unexpressed here, for the City to require connection under the New Bingham Highway.

for a sewer line. And if not, the City does have authority to establish one through the power of eminent domain, and very soon the Developer will likewise.

The City and Peterson dispute the existence of a stub sewer line running between lots 107 and 108 of the Copper Hills Subdivision. The City denies that there is a line or an easement between the two lots, while Peterson, who developed Copper Hills, is positive that the stub line exists, and it is part of the City's sewer system.⁹ It is relatively simple to ascertain whether or not the stub sewer line exists. According to Peterson, the stub line terminates in an open space behind the two lots. Assuming that the Open Space is publicly and not privately owned, the end of the line could be excavated at Peterson's expense, and equipment then run down the pipe to establish, to the City's satisfaction, its connection to the sewer system.¹⁰ If the line exists and is part of the sewer system, then it was dedicated to the City when the Copper Hills Subdivision was completed. A corresponding easement for the stub line, beneath lots 107 and 108, would also belong to the City by dedication.¹¹ There would thus be no need for a "public utility" to acquire an easement, because the City already owns one. Connection would therefore be possible.¹²

The City also argues that only a "public utility," as governed by Chapter 54-2 of the Utah Code, has authority to install a sewer line or acquire an easement on private property. Unfortunately, the City's reasoning is misplaced. In the first place, as stated above, the stub line may exist, and because it was dedicated to the City under the public utility easement, it would have an associated easement belonging to the City. Secondly, even if the stub line does not exist, the City may acquire an easement through eminent domain. A local government which operates a sewer system has authority to acquire property needed for that system, including underground easements for piping. UTAH CODE ANN. § 78B-6-501(9) (Eminent domain authority may be exercised for sewage service). If needed, the City may purchase easement rights from the affected property owners, by paying just compensation.

Moreover, Section 78B-6-501 was amended by the 2010 Utah Legislature, adding language granting private developers authority to use eminent domain for sewage service for "an existing or proposed development." See Eminent Domain Revisions, S.B. 122 (Adams, J.S.) *2010 Utah Legislature* (available online at www.le.utah.gov. As of the date of this Opinion, the 2010 Legislative Journals had not been prepared). The 2010 Amendment has an effective date of May 11, 2010. Thus, beginning on that date, Peterson will have authority to acquire an easement for a sewer line beneath lots 107 and 108, if necessary. Like any public agency, Peterson would need to pay just compensation for any property right acquired through eminent domain.

⁹ As developer of Copper Hills, Peterson's understanding of the factual situation must be given some measure of credibility. At the very least, Peterson's assertion warrants further investigation as to whether the line exists.

¹⁰ Obviously, if the open space is privately owned, authorization of the property owner or some other legal right would need to be obtained in order to excavate the property.

¹¹ The materials submitted for this Opinion show that all of the lots in the Copper Hills Subdivision are encumbered by utility easements, which run along all property boundaries. It is possible, then, that the easement already in place along the boundary between lots 107 and 108 includes the right to install sewer lines. There has not been enough information provided to determine the extent of the utility easements in this Opinion, however.

¹² The City may still in this event be able to provide a rational basis for requiring connection across the New Bingham Highway, such as concerns about the capacity of the system, etc. However, apart from its contention that the line is not there and no easement exists, no other rational basis has been expressed.

The City argues that only “public utilities” may acquire easements for sewer lines, and that neither the City nor Peterson is a “public utility,” as that term is defined in Chapter 54-2. It is true that government entities providing sewer service are not public utilities as that term is used in Title 54, but that is because the state’s Public Service Commission (PSC) does not regulate such government-operated services. *See* UTAH CODE ANN. 54-2-1(22); *see also id.* § 54-4-1 (General jurisdiction of Public Service Commission).¹³ This exclusion from PSC regulation, however, does not mean that the City lacks authority to acquire easements, rights of access, or other property rights for its sewer service. That authority is explicitly granted in § 78B-6-501, as discussed above.¹⁴

The City’s position that only “public utilities” regulated by the PSC have the right to cross private property with sewer lines is thus misplaced. The City operates a municipal sewer system, and may acquire whatever property rights deemed necessary to carry out the operation of that system. It does not need permission from the PSC, or authorization from any provision of Title 54, because its sewer system is not regulated by the PSC. Furthermore, as has been discussed, beginning May 11, 2010, Peterson will have the specific authority to acquire property for a sewer line through eminent domain. Given these provisions of the Utah Code, the City’s position that only “public utilities” possess the right to install and maintain sewer lines across private property is untenable.

Accordingly, the rational basis so far provided by the City for requiring connection across the New Bingham Highway is unsupported. If the City is to remain insistent that the connection be made across the New Bingham Highway rather than the less expensive and possibly less disruptive alternative across 4800 West, it will need to provide an additional rational basis for doing so.

Conclusion

The Office of the Property Rights Ombudsman has authority to evaluate the interpretation and implementation of conditions imposed upon a land use application. Section 13-43-205 lists the statutory provisions approved for Advisory Opinions. One of those provisions deals with conditions imposed upon land development. The Ombudsman’s Office may issue an Advisory Opinion evaluating how conditions on a subdivision are interpreted and implemented, even after final approval.

Since it owns and maintains a sewer system, the City has wide latitude to determine how and where new development connects to the system. The City may consider a variety of factors to determine where a new connection should be made, including future needs and the impact of a connection on the overall system. The cost to the property owner may be considered, but should not be the controlling factor. As long as the City’s determination of a connection point is rationally based and reasonable, it may determine where the connection to the sewer system is made.

¹³ The Public Service Commission also does not regulate municipal water systems. UTAH CODE ANN. § 54-2-1(29).

¹⁴ It must also be noted that just because the City has this authority does not mean that the City is obligated to use it.

As a public entity, the City has been granted specific authority to acquire property necessary for the operation of its sewer system. In addition, beginning May 11, 2010, private developers may exercise eminent domain authority to acquire property for sewer facilities. There is no reason to conclude that only public utilities regulated by the Public Service Commission are entitled to acquire easement rights for sewer lines.

Brent N. Bateman, Lead Attorney
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.

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 Ann. § 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:

Melanie Briggs, City Recorder
West Jordan City
8000 S. Redwood Road
West Jordan, Utah 84088

On this _____ day of May, 2010, 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