Advisory Opinion #29

Parties: Woodside Homes Corporation and City of Kaysville

Issued: February 4, 2008

TOPIC CATEGORIES:
J: Requirements Imposed upon Development
R(vii): Other Topics (Development Bonds)

Local governments may require completion bonds in order to guarantee that public improvements will be completed. The City may only use bond funds for the purposes expressed in the bond documents. Conditions not expressed in ordinances, statutes, or in the approval process cannot be enforced.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Woodside Homes Corporation By Gregory Simonson, Attorney
Local Government Entity:	Kaysville City
Applicant for the Land Use Approval:	Woodside Homes Corporation
Project:	Residential Subdivision/Conditional Use
Date of this Advisory Opinion:	February 4, 2008
Opinion Authored By:	Brent N. Bateman & Elliot R. Lawrence, Attorneys, Office of the Property Rights Ombudsman

Issues

May the City apply funds from a Subdivision Bond to construct improvements on a privately-owned park developed as part of a subdivision?

Summary of Advisory Opinion

State law provides that local governments may impose conditions on new development, provided those conditions are expressed in the land use permit or related documents, in local ordinances, or in the Utah Code. In this matter, the Subdivision Bond was required by City ordinance. The amount of the Bond was determined by the City, based on the estimated costs of the improvements that the Bond was intended to guarantee. The calculation of the Bond amount does not include any improvements to the open space or park proposed by the developer. Since there is no such reference, the City may not access the Bond funds for construction of improvements to the open space or park.

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 § 13-43-205 of the Utah

Code. The 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.

The request for this Advisory Opinion was received from Woodside Homes Corporation on November 27, 2007. A letter with the request attached was sent via certified mail, return receipt requested, to Linda Ross, Kaysville City, at 23 E. Center, Kaysville, Utah 84037. The return receipt was signed and was received on November 28, 2007, indicating that the City had received it. A response was received from the Kaysville on December 21, 2007, and Woodside Homes submitted a reply on January 4, 2008. The City submitted an additional response on January 17, 2008.

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 received November 23, 2007 by the Office of the Property Rights Ombudsman by Gregory Simonsen attorney for Woodside Homes Corp., including exhibits.
2. Response letter from Felshaw King, Attorney for Kaysville City, received December 21, 2007, including exhibits.
3. Reply letter from Gregory Simonsen, received January 4, 2008, including exhibits.
4. Letter from Felshaw King, received January 17, 2008.

Statutes and Ordinances

1. Chapters 17-30; 17-34; and Sections of Titles 18 and 19 of the Kaysville City Code.

Background

Woodside Homes first sought approval for a development called “Quail Crossing” in late 2002. The proposed subdivision would be “clustered,” meaning that the building lots would be smaller than ordinarily allowed, but more open space would be included. Woodside Homes submitted a plat creating 38 quarter-acre lots, along with about 6.5 acres in open space. The developer explained that two acres of the open space would be landscaped as a traditional park, with a playground, picnic areas, and soccer field. The remaining 4.5 acres would be “informally” landscaped with native grasses and no improvements.[1] The entire open space would be owned

[1] The “informal” area would be irrigated and would have some walking trails.

and maintained by a homeowners association (HOA). Although the park facilities would be owned by the private HOA, it would be maintained as open space.[2]

In January and February of 2003, the Kaysville City Planning Commission considered the subdivision proposal. Among other issues, Woodside Homes explained their ideas for the open space. When asked if the City could acquire the area as a public park, the developer said that was a possibility, but that the City was probably not interested in owning a park at that location. On February 13, 2003, the Planning Commission unanimously approved the preliminary plat for the subdivision, "with the conditions stated in the conditional use permit." The Planning Commission also approved the conditional use permit at the February meeting, with the following stated conditions: (1) a maximum setback of 30 feet; (2) improvements to 350 East and 50 East; and (3) a vinyl fence along the north adjoining the Shephard Lane lots. The conditional use permit passed by a vote of 4 to 1. The motion did not include any reference to the open space or any landscaping requirements.

As required by the City code, Woodside Homes obtained a Subdivision Bond in December of 2003.[3] The Bond would provide funds to complete public improvements if Woodside Homes could not complete construction themselves. If Woodside Homes satisfactorily completed the improvements, the City would release all but 10% of the bond. That 10% would be maintained for an additional two years, to provide funds if repairs to the improvements were necessary. After the two years, the Bond would be released altogether. Woodside Homes obtained the Bond through The Insurance Company of the West. The City calculated the Bond amount to be $295,878.27. The amount was based on estimated costs from an itemized list of improvements, such as sidewalk, storm drains, streets, sewer, etc.[4] The calculation of the Bond amount did not include any proposed improvements to the park or the open space.

Woodside Homes proceeded with the subdivision development, including the open space. By the fall of 2007, the subdivision was completed. According to Woodside Homes, all public improvements listed in the Bond were completed as well. The open space had been improved, with native grasses and wildflowers planted on the 4.5 acre "informal" portion, and more extensive landscaping and improvements on the "formal" portion. The improvements included a play structure, pavilion, and trails. Woodside Homes also installed an irrigation and drainage system for both portions. In response to objections from the HOA, Woodside Homes installed additional improvements, including a larger pavilion and some additional trees. Although a soccer field had been discussed, Woodside Homes did not install goals or prepare an area for a field.

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[2] The City Code requires that the developer grant an open space easement to the City. *See* Kaysville City Code, § 17-34-7(f).

[3] *See* Kaysville City Code, § 19-6-4. As a condition of final plat approval, the City requires that developers provide a surety to gurantee that improvements will be constructed. Specifically, § 19-6-4(1)(c) states that a developer may furnish a bond "in an amount equal to one hundred fifteen (115%) of the estimated costs . . . plus ten percent (10%) of the cost of all the improvements of the subdivision as determined by the [City] Engineer. . . .." A developer may also fulfill the requirement by depositing funds into an escrow account, or by obtaining a letter of credit.

[4] The list of improvements was not attached to the bond documents themselves, but provided the basis for the amount of the bond

In a letter dated October 19, 2007, the City accepted the public improvements for the subdivision, which began the two-year warranty period. The Bond amount was reduced to $96,988.00 for the duration of the warranty period. The City Council indicated that it intended to condition release of the remaining bond amount to additional improvements in the open space. The council expressed concern about the adequacy of the irrigation system, the need for a soccer field, and neighborhood requests for a larger pavilion. If the improvements to the open space were not completed, the City Council expressed a desire to access the Bond funds for the improvements. In its motion to accept the public improvements, the City Council voted to "ascertain . . . whether the obligations of the developer were met" for the open space, including installation of soccer fields and goalposts, the type of landscaping, and the adequacy of irrigation. *See* City Council Minutes from October, 2007, Kaysville City. The motion passed unanimously.

The City contends that it may apply the Subdivision Bond to complete and guarantee the improvements to the open space, including such things as reseeding, installation of new irrigation, and completion of a soccer field. The City's position is based on § 17-34-7(h) of its City Code. That subsection requires that "[c]ompletion of all common facilities shall be guaranteed as set forth in Section 19-6-4 of the Subdivision Ordinance." The City contends that provision authorizes it to apply bond funds to completion of any improvement associated with a new subdivision, regardless of whether or not the improvement was identified when the bond amount was calculated. Woodside Homes argues that the Bond is limited to only those improvements specifically identified when the Bond was created.

Analysis

I. Whether or not Improving the Park and Open Space was a "Condition" of Approval is not Essential to this Dispute

In its Request for Advisory Opinion, Woodside Homes asked the OPRO to determine whether the Conditional User Permit granted by Kaysville in its February 13, 2003 Planning Commission meeting imposes any enforceable conditions beyond those conditions set forth in the motion granting the conditional use permit. Based on the records available, the Office of the Property Rights Ombudsman is not able to definitively answer this question. However, for the reasons stated below, an answer to this question is not essential to this dispute.

The Utah Code prohibits a local government from imposing conditions on approval of a land use application.

> A municipality may not impose on a holder of an issued land use permit a requirement that is not expressed:
>
> (i) in the land use permit or in documents on which the land use permit is based; or
>
> (ii) in [chapter 10-9a] or the municipality's ordinances.

UTAH CODE ANN. § 10-9a-509(e).[5] According to this statute, conditions must be *expressed* to be imposed. Conditions may be expressed in four ways: (a) in the land use permit, (b) in the documents on which the permit is based, (c) in the state Land Use and Development Management Act, or (d) in the municipality's ordinances.

Improvements to the open space were not expressed as conditions in the land use permit. When it approved the conditional use permit in 2003, the City did not include mention of the open space. The information made available in the Planning Commission's minutes indicates that the City did not seem overly concerned about how the open space area would be developed. The Planning Commission appeared satisfied with Woodside Homes' proposal, including transferring ownership of the open space to an HOA.

Therefore, the relevant question concerns whether conditions were imposed in the documents on which the permit is based.[6] Woodside may have submitted materials indicating improvements to the open space. To the extent that those improvements are expressed on the documents submitted by Woodside, and to the extent that the approval is based upon those documents, then those improvements can be said to be conditions of approval. To the extent that those documents show the details of those improvements, then those details can be said to conditions of approval. Conversely, details not shown on those documents, and not elsewhere expressed, cannot be conditions of development approval.[7]

It is difficult to now recreate the approval process. The OPRO is unable to determine which documents the conditional use permit is based upon, or which details of the park improvements are shown on those documents and submissions of Woodside. However, this question may be largely moot. By all accounts, the developer did improve the park, largely in accordance with the discussion reflected in the minutes, and appears to have exceeded its original proposal in some respects. The majority of the conditions that may have been expressed therefore appear to have been fulfilled. Only those details expressed in the documents on which the approval is based (if any), but not fulfilled, remain as unfulfilled conditions.

II. The City may not use the Subdivision Bond to Fund Improvements to the Park.

Without regard to whether unfulfilled conditions remain, the City may not use the money from the Subdivision Bond for improvements to the open space, because the open space improvements were not part of the calculation for the Bond amount. While the City may require a subdivision

[5] A parallel provision, applicable to counties, is found at § 17-27a-508 of the Utah Code.
[6] This method of expressing conditions perhaps recognizes that it is impractical, if not impossible, for a municipality to expressly mention every detail of the conditions for approval in the motion to approve a land use permit. According to the statute, conditions expressed in the documents upon which the permit is based suffice. However, the statutory requirement that conditions be *expressed* in the documents remains. Details of improvements that are discussed orally, formally or informally, cannot be imposed as conditions without some documented *expression* that the City considers those improvements as conditions.
[7] To illustrate, if none of the documents upon which the approval was based show a soccer field, then a soccer field cannot be a condition of approval.

or development bond to provide surety for new improvements, the bond must be limited to only those improvements specifically identified in the bond documents.

Subdivision or development bonds are valid means to guarantee that public improvements will be built when new development is approved.[8] Local governments require bonds (or some form of surety) to ensure that public improvements will be completed. The bond amount is typically determined by the estimated costs of unfinished public improvements. If a developer is unable to finish such improvements as streets or water systems, the bond furnishes money for completion. Kaysville properly required the Bond as a condition on Woodside Homes' subdivision, because the surety requirement is expressed in the City's ordinances.

Even though the surety requirement is imposed by the City's ordinance, the specifics of the surety must be defined and expressed in a written document. As discussed above, state law mandates that any condition imposed by a local government be expressed in the land use permit, or in documents on which the permit is based. UTAH CODE ANN. § 10-9a-509(e).

Therefore, a local government may only use the funds from a subdivision or development surety for the purposes expressed in the surety documents.[9] Concluding otherwise would mean the government would have unfettered access to funds for any purpose deemed related to public improvements. Section 10-9a-509(e) prohibits local governments from imposing conditions not expressed at the time of development approval. To permit a municipality to utilize bond or surety funds for improvements not identified when the bond was obtained is equivalent to permitting the municipality to add and enforce unexpressed conditions. Such unfettered access to surety funds conflicts with the prohibition against unexpressed requirements provided in § 10-9a-509(e), and exposes developers and property owners to unanticipated financial liabilities.

This conclusion is not only compelled by the language § 10-9a-509(e), but it is also implicit in the ordinance which establishes the requirement. That ordinance allows for three methods of providing the surety: (1) an escrow account; (2) an irrevocable letter of credit; or (3) a bond. *See* Kaysville City Code, 19-6-4. Each of these acceptable methods requires that the amount of the surety be based on the estimated value of the improvements which are guaranteed. Since the amount of the surety is tied to specific improvements, the surety may only be used to fund those improvements. Otherwise, it would be impossible to determine the value of the surety.[10]

As the City points out, changes to a project may occur over the course of construction, and it would not always be feasible to recalculate the bond amount each time a change occurred.

[8] Development bonds are not specifically authorized in the current Utah Code, but they are not prohibited either. Since requiring some sort of surety is a reasonable means of accomplishing the legitimate government objective of guaranteeing completion of public improvements, requiring development bonds tied to specific improvements is within the power of local governments.

[9] There is no requirement that the improvements guaranteed by the bond be the same as those conditions set forth at the time of conditional use approval. The Bond is a contract, and the parties are free to agree that the bond will guarantee more or fewer improvements than those which are conditions of approval.

[10] This conclusion protects the guarantor as well as the property owner/developer, by delineating the parameters of the surety.

However, a distinction needs to be drawn between changes the parties agree to and those which are imposed by the municipality. If the parties agree to changes, the parties presumably can agree that the security will apply to those changes, or agree to change the bond amount.[11] The law, however, disfavors the unilateral imposition of unexpressed conditions. The City cannot unilaterally determine that the security will guarantee an improvement that is not expressed as a guaranteed improvement, just as a lender cannot unilaterally impose a new debt upon a borrower.

As stated above, a local government must express its requirements or conditions in the land use permit, the documents upon which the permit is based, local ordinances, or the Utah Code. The Subdivision Bond required by the City contained no reference to any improvements or structures required for the open space or park. Since the open space improvements were not expressed as part of the Subdivision Bond, or the part of the basis for the bond amount, the City cannot use the Bond to fund improvements to the open space. The City's ordinances as well as § 10-9a-509(e) must be read to prohibit the use of the Bond funds for "any improvement" that the City would like to impose. Only those improvements identified to determine the Bond amount are eligible to be funded by the Bond. To conclude, there is no basis for the City to access money from the Bond to fund the unidentified improvements to the park.

Conclusion

The City has no basis to apply the Subdivision Bond to fund improvements for the Open Space or Park. Section 10-9a-509 of the Utah Code allows local governments to impose conditions which are clearly expressed in land use permits, in local ordinances, or in the Utah Code. In this case, the Subdivision Bond makes no reference to park improvements. By its express language, the Bond was intended to guarantee construction of public improvements such as streets, water pipelines, storm drains, and sewers. Section 10-9a-509(e) prohibits the City from accessing the Bond funds for improvements not anticipated in the Bond documents.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

[11] The Office of the Property Rights Ombudsman recognizes the practical need for some flexibility in the amount of surety funds accessed, due to unknown or unanticipated conditions. However, unanticipated conditions cannot be unilaterally imposed and enforced. An additional surety agreement could provide the needed flexibility.

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, §13-43-205. 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

U.C.A. §13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. §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:

Linda Ross, City Recorder
Kaysville City
23 E. Center Street
Kaysville, UT 84037

On this _____ Day of February, 2008, 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