Advisory Opinion #50

Parties: Blake Hazen and Perry City

Issued: September 15, 2008

TOPIC CATEGORIES:
R(ii) Other Topics (Subdivision Plat Approval)

The Utah Code imposed an obligation on the City to ensure that the amended plat for Plat I was recorded. The property owner was materially injured by the amendment, which reduced the area of the commercial lot, and significantly changed the size of the building that could be built. A plat amendment should not be approved if it materially injures any property owner.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Amendment to Subdivision Plat, Causing Loss of Usable Lot Area, in order to Accommodate Design of Newer Subdivision Application

Advisory Opinion Requested by:	Blake Hazen
Local Government Entity:	Perry City
Applicant for the Land Use Approval:	Blake Hazen
Project:	Residential Subdivision
Date of this Advisory Opinion:	September 15, 2008
Opinion Authored By:	Brent N. Bateman, Lead Attorney, Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

May a local government require amendment of a recorded subdivision plat in order to align a road with a newer subdivision plat, particularly where the amendment diminishes the size and value of a lot?

Summary of Advisory Opinion

The agreement to amend the recorded plat may or may not have been authorized, because the person agreeing to the amendment and representing himself as the owner of the property may not have had any ownership interest or authority to enter into such an agreement. Nevertheless, without regard to whether the person that entered into the agreement to amend the plat was an actual owner, or whether the City may had good reason to rely on his representations of ownership, the City had a statutory duty to ensure that the plat is recorded. Doing so would have verified that the plat amendment was authorized and safeguarded the interests of future purchasers. The amended plat was never recorded, and the City should not have permitted development activity in reliance on the amended plat until it was recorded.

Subsequent circumstances necessitate that a plat amendment be carried out. However, amending the plat as contemplated would impose a material injury upon the present owners, because it requires reduction in the usable area of a commercial lot. Because the City did not ensure that he plat was recorded, the City is liable for damages arising from that failure. The City cannot impose the amended plat without compensation to the present owners.

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 § 13-43-205. 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 Blake Hazen on June 5, 2008. A letter with the request attached was sent via certified mail, return receipt requested, to Mayor Jerry Nelson, Perry City, at 3005 S. 1200 West, Perry, Utah 84302. Mayor Nelson's name was listed on the State's Governmental Immunity Database as the contact person for the City. The City submitted a response, which was received by the Office of the Property Rights Ombudsman on July 15, 2008. The City submitted additional materials on August 11, 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 filed June 5, 2008 with the Office of the Property Rights Ombudsman by Blake Hazen, with attachments.
2. Response from Perry City, submitted by Duncan Murray, City Attorney, received July 15, 2008
3. Additional information from Perry City, received August 11, 2008.

Background

In 2005, the Davis Creek Estates subdivision was approved by Perry City, and properly recorded with Box Elder County. The subdivision includes 31 lots, and is located at approximately 2175 South Highway 89 in Perry, on the western side of the highway. Almost all of the lots are located some distance from the highway, behind other properties with existing buildings. The original access from the highway was by a proposed street, designated "2200 South." Lot #1 was "flag shaped," with the bulk of the lot about 150 feet from Highway 89, and a narrow strip about 30-40 feet wide along the south side of 2200 South, leading back to the highway. The

current owner, Blake Hazen, states that Lot #1 was intended to be used as a commercial property, and the narrow strip was intended to provide access and parking. The north side of 2200 South bordered another property that was not included in the subdivision.

Although the Davis Creek Estates plat was approved and recorded, the original owner was unable to begin construction. By the spring of 2008, ownership of the property passed to Blake Hazen and his partner, Var Calder.[1] No improvements were started prior to 2008.

By the summer of 2006, another subdivision, entitled "Wasatch Hills" had been proposed on the eastern side of Highway 89, opposite Davis Creek Estates. The access point for the Wasatch Hills subdivision was very close to where the proposed 2200 South roadway would connect to the highway, but the two streets did not align. The City noted that the roads should align, thus creating a four-way intersection that could be controlled by traffic signals.[2] The City states that it initiated the discussions with the developers to realign the access points, and that it would not accept any further applications for building permits or other approvals unless the road issue was resolved.

In July of 2006, the owner of the Wasatch Hills subdivision, Roger Knowles, met with an individual named Jerry Preston. Mr. Preston represented to Mr. Knowles and City Officials that he had an ownership interest in Davis Creek Estates.[3] In a memo dated August 16, 2006, Mr. Knowles states that Mr. Preston was a "lienholder" on the property, but the plat "has not been recorded into his name." It appears that Mr. Preston represented to Mr. Knowles and City Officials that he was planning on initiating construction on Davis Creek Estates, including 2200 South. Mr. Knowles and Mr. Preston agreed that the two access roads should be aligned, and Mr. Preston agreed that the Davis Creek plat should be amended to move the access road slightly to the south.[4] The road into the Wasatch Hills subdivision was also moved slightly.

The new road alignment eliminated the narrow strip of Lot #1 in the Davis Creek plat, and left a small portion on the north side of the road. This small portion is too small to be used as a

[1] The recent ownership history is not clear from the information provided for this Opinion. Mr. Hazen states that he purchased the property from the original developer. Another individual, Jerry Preston, represented to Perry City that he had an ownership interest.

[2] Because Highway 89 is a state-controlled highway, the Utah Department of Transportation approves the location of access points. UDOT expressed concern that the two separate roads would be too close together (less than 600 feet), raising safety concerns. The City states that the Davis Creek Estates plat had UDOT approval for its access point when the plat was first recorded, but that approval had expired after six months.

[3] The City maintains that Mr. Preston was the "predecessor in interest" on the property, although it acknowledges that Mr. Preston's failure to sign the amended plat indicated that he "was most likely no longer the owner of the subdivision." The City also submitted a receipt from Hansen & Associates, which acknowledges delivery of documents, presumably from Jerry Preston, pertaining to the Davis Creek Subdivision. This document does not identify that Jerry Preston is the owner. Another document submitted is a City form which states that Jerry Preston, identified as the "developer" has notified the owners of utility easements that the Davis Creek Estates subdivision plat was to be recorded. This form is dated August 11, 2006.

[4] The owner of the Wasatch Hills subdivision agreed to pay for the cost of preparing the amended plat.

building lot, and according to Mr. Hazen, cannot be used for anything other than landscaping, or possibly transferring it to the neighboring property owner.[5]

On September 15, 2006, the Perry City Planning Commission approved the amendment to the Davis Creek plat. The City Council approved the amendment on October 12, 2006. However, the amended plat was not signed by the plat owner, and it was never recorded. The original applicant for the Davis Creek plat states that he was not aware of the City's action, and did not approve it. He also states that Jerry Preston had no ownership interest in the property or authority to approve an amendment to the plat. In reliance on the new road alignment that had been approved, the City approved the Wasatch Hills Subdivision plat. Construction based on the final Wasatch Hills Subdivision plat is presently underway.

After the City's action approving the plat amendment, Mr. Hazen acquired ownership of the Davis Creek property, and planned to develop the property based on the recorded plat. He subsequently discovered, however, that the City had approved an amendment, which altered Lot #1. Because the amended plat was not recorded, Mr. Hazen was unaware of the changes until after he acquired the property.[6] Because of the advanced stage of development of the property across the highway, Mr. Hazen will not be able to develop his property in accordance with the recorded plat, because doing so will cause misalignment of access points to Highway 89. Mr. Hazen acknowledges that amendment of the plat will be necessary in order to gain UDOT approval of the Highway 89 access point.

Analysis

I. The City Had A Statutory Obligation To Ensure That The Davis Creek Estates Subdivision Amended Plat Was Recorded, And Should Not Have Approved Development Activities On The Wasatch Hills Subdivision In Reliance On The Amended Plat Until The Amended Plat Was Recorded.

Conflicting information has been provided regarding whether Mr. Preston ever had an ownership interest in the Davis Creek Estates Subdivision, or was authorized to enter into an agreement to amend the Davis Creek Estates Subdivision plat. Mr. Preston may or may not have had such an interest. More importantly, the City may have been fully justified in relying on Mr. Preston's representations of ownership. However, the question of Mr. Preston's actual ownership, or the City's justified reliance on Mr. Preston's representations, is not determinative of this issue.

Municipal governments may approve amendments to subdivision plats in accordance with Section 10-9a-609 of the Utah Code:

[5] The parties agreed that the amended plat was to include a foot-wide protection strip along the northern edge of the road, so that the developer (Jerry Preston) could recoup a portion of the road costs from the neighboring property, which was supposedly going to be divided into two commercial lots. It is not clear whether the protection strip was included. The information submitted by the City includes a note that "Utah does not allow for reimbursement of roads."

[6] Mr. Hazen states that the previous owner was not aware of the City's action.

> (1) If the land use authority is satisfied that neither the public interest nor any person will be materially injured by the proposed vacation, alteration, or amendment, and that there is good cause for the vacation, alteration, or amendment, the land use authority may vacate, alter, or amend the plat or any portion of the plat, subject to Section 10-9a-609.5.
> (2) The land use authority may approve the vacation, alteration, or amendment by signing an amended plat showing the vacation, alteration, or amendment.
> (3) The land use authority shall ensure that the amended plat showing the vacation, alteration, or amendment is recorded in the office of the county recorder in which the land is located.
> (4) If an entire subdivision is vacated, the legislative body shall ensure that a legislative body resolution containing a legal description of the entire vacated subdivision is recorded in the county recorder's office.

UTAH CODE ANN. § 10-9a-609.[7] This statute states that the City may amend a plat when (a) neither the public interest nor any person will be materially injured by the amendment; and (b) there is good cause for the amendment. Approval is given by the City signing the amended plat, and once amendment has been approved, this statute imposes a duty upon the City to ensure that the amended plat is recorded.

There are multiple reasons behind the placing the obligation on the City to ensure that a plat is recorded. A properly recorded plat gives notice of its contents to all, including subsequent purchasers. Unrecorded plats give no such notice. *See Id.* § 17-21-11.[8] Accordingly, had the amended plat been recorded, the present circumstances would not have arisen, because Mr. Hazen, as a subsequent purchaser, would have had notice of the changed plat. In addition, recording the plat would have verified, at least as far as necessary for the City's reliance, that the amendment was authorized by the property owner, since the City would have required the owners' signature on the amendment. Although it may not be the City's responsibility to actually record the document, the statute clearly imposes a duty to ensure recording upon the City.

Accordingly, until the City is sure that the document has been recorded, the City should not treat the document as if it has been recorded. The City should not grant subsequent approvals or building permits that assume that the document has been properly recorded if the amendment has not been recorded. The record indicates that the City knew there was a problem with the plat shortly after the plat amendment was approved, because Mr. Preston never signed the amended plat. Nevertheless, the City approved the subdivision plat for Wasatch Hills in reliance on the amended plat, and also provided further development approvals and building permits that make compliance with the recorded original plat impossible.[9] As soon as the City was aware that there

[7] *See also* UTAH CODE ANN. § 17-27a-609 (applicable to counties).
[8] Section 17-21-11 provides that recording a document places all subsequent purchasers on notice of the information in the document.
[9] There is no question that the Davis Creek subdivision was originally platted and recorded before the Wasatch Hills subdivision was approved. This raises the obvious question of why the City simply did not require the road for the Wasatch Hills subdivision to align with the road which had already been approved for the Davis Creek subdivision.

was a problem, and that the plat was unrecorded, the City should have stopped development on both subdivisions, until the issue could be resolved, and the correct plats recorded. The City did not fulfill its obligation to ensure that the amended plat was recorded, without regard to their justified reliance on Mr. Preston's representations.

II. An Amendment of the Plat Will Materially Injure the Property Owner of the Davis Creek Estates Subdivision

As cited above, Section 10-9a-609 of the Utah Code states:

> (1) If the land use authority is satisfied that neither the public interest nor any person will be materially injured by the proposed vacation, alteration, or amendment, . . . the land use authority may vacate, alter, or amend the plat or any portion of the plat.

Accordingly, a City may only amend a plat when no person will be materially injured by the amendment. Because of the approvals granted and the completeness of construction on the Wasatch Hills Subdivision, it appears that construction cannot occur on the Davis Creek Estates Subdivision as it is currently recorded, due to the non-alignment of access points. Accordingly, it appears that an amendment of the Davis Creek Estate Subdivision Plat will be necessary.

However, the amendment to the Davis Creek Estate Subdivision Plat will materially injure the owner of the Davis Creek Estates subdivision. The amendment reduces the usable area of Lot #1 without replacing the lost area elsewhere. Mr. Hazen states that the original lot configuration allowed a larger commercial building, because the narrow strip could be used as parking. Without that strip, the larger building cannot be built. The plat's owner was forced to give up commercially valuable land, or at least parking, to accommodate a public road. The land area gained on the opposite side of the realigned road does not appear to be commercially valuable, because it is too small for anything except landscaping. Thus, there appears to be a material injury to the property owner.

This presents a conundrum. Approval of the amendment appears to be necessary. However, the City cannot approve the plat without causing material injury. The amendment to the Davis Creek Estate Subdivision is not one that is sought by the subdivision owner. It is necessitated by the current alignment of the Wasatch Hills Subdivision, approved by the City after the Davis Creek Estates Subdivision was recorded. The City failed to ensure that the amended plat was recorded, but went on to approve the Wasatch Hills Subdivision, and grant building permits thereon, as if recording of the Davis Creek Estate Subdivision had taken place. Therefore, it is the City's responsibility to remove, or at least mitigate, the material injury to Mr. Hazen so that the amended plat can be approved. This may be done in a variety of ways, including but not limited to financial compensation,[10] development approvals that justify Mr. Hazen's original economic

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Rather than requiring future plats to comply with the existing configuration, the City elected to require an amendment to an already recorded plat. By doing so, the City contributed to the problem that presently exists.

[10] This case closely resembles an eminent domain case, and could be treated as one by the parties. The Davis Creek Estates Subdivision has a recorded and legal plat (disregarding the unrecorded amendment). In order for the road to

expectations for Lot #1, or granting Mr. Hazen other permissible entitlements of value. The Office of the Property Rights Ombudsman believes that the parties can resolve this matter through a mutually beneficial agreement. If this Office can take any action to facilitate such an agreement, please let us know.

Conclusion

The owners of the Davis Creek Estates subdivision will suffer a material injury if their plat is amended. However, it appears that a plat amendment is necessary. This problem is primarily due to due to City's failure to ensure that the amended plat was recorded prior to giving approvals to subsequent development in reliance on that amendment. Since the Plat must be amended, the City must make sure that the Davis Creek Estates owners do not suffer material injury. The City must do so, due to the City's liability for failing to meet its statutory duty, by compensating the owners of the property.

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

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align with the road across the street, the City is requiring that a road be build across a lot in the original subdivision. The owner of that lot would therefore be entitled to just compensation for the loss in value of that lot due to the construction of the road.

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:

Mayor Jerry Nelson
Perry City
3005 S. 1200 West
Perry, UT 84302

On this _____ Day of September, 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