

# Advisory Opinion #70

Parties: Craig Rasmussen, Property Owners in Beaver Creek Subdivision and Carbon County

Issued: June 30, 2009

## TOPIC CATEGORIES:

- E: Entitlement to Application Approval (Vesting)
- J: Requirements Imposed Upon Development
- R(v): Other Topics (Interpretation of Ordinances)

The County could withhold approval of building permits until the property owners showed that there was perpetual access to the properties from a public road. Access is a legitimate concern for the County, because proper vehicle travel serves important public interests. The County does not possess the authority to determine if the property owners have a right-of-way across the public lands.

## 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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# State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

## ADVISORY OPINION

### Imposing Access Requirement as a Condition of a Building Permit

Advisory Opinion Requested by: Craig Rasmussen

Local Government Entity: Carbon County

Applicant for the Land Use Approval: Property Owners in Beaver Creek Subdivision

Project: Beaver Creek Subdivision

Date of this Advisory Opinion: June 30, 2009

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

### Issues

May a local government refuse to issue building permits on lots in a subdivision until property owners in the subdivision prove that they have permanent and perpetual access to the lots from the public road system, even if the subdivision is primarily served by private roadways?

### Summary of Advisory Opinion

A local government may impose regulations and conditions on new development, if those regulations are expressed in statutes or ordinances, or are made part of the written record of the approval process. Since access and traffic flow are legitimate public interests, the County may validly require that new development show that permanent access has been established. Property is owned subject to zoning regulation, so the owners of lots in the subdivision cannot claim that their vested rights override the County's ordinances.

The County cannot assume that a permanent right of access to the properties exist and grant building permits on that basis. The County is justified in requiring that the property owners show a permanent right of access across every parcel the road crosses by easement, deed, or court order, removing any uncertainty. Until the property owners can establish that a legal and permanent right of access exists, the properties are ineligible to receive building permits.

## **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. 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.

A request for an Advisory Opinion was received from Craig Rasmussen, President of the Beaver Creek Landowner's Association, on November 12, 2007. A copy of that request was sent via certified mail to Robert Pero, Carbon County Clerk/Auditor. The return receipt indicated that the County received the materials on November 21, 2007. The County submitted a response to the Office of the Property Rights Ombudsman, which was dated January 7, 2008. A copy of the City's response was mailed to Mr. Rasmussen. The County and Mr. Rasmussen met with Office of the Property Rights Ombudsman in an effort to resolve the dispute, but the efforts were unsuccessful.

## **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 November 12, 2007 with the Office of the Property Rights Ombudsman by Craig Rasmussen, with Attachments.
2. Response from Carbon County, submitted by Christian B. Byner, County Attorney, dated January 7, 2008.
3. Letter from Carbon County to Craig Rasmussen, dated April 23, 2008.
4. Email from Craig Rasmussen, received June 2, 2009.

## **Background**

In 1974, the Beaver Creek Subdivision was established in the eastern part of Carbon County. The properties are located in Beaver Canyon, which is accessed from Highway 6 by an unpaved road that leads to the canyon. The road is not maintained by any public entity, and the County does not consider it a publicly owned road. In fact, there are no public services in the area, and the properties are primarily used for limited recreational purposes. Based on the information provided for this Opinion, it is not clear whether the original subdivision plat included a road.<sup>1</sup>

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<sup>1</sup> The Office of the Property Rights Ombudsman is aware of subdivision plats approved and recorded without inclusion or reference of public roads (particularly subdivisions of recreational properties).

A few cabins were built in Beaver Creek, but sometime around 1985, the County withheld permission to build, because of concerns that the road had not been properly surveyed, described, and located with specificity. A related concern was that some lots did not have properly recorded access easements across the road.

Beginning in about 2004, the Landowner's Association began discussions with the County, hoping to resolve the concerns about road access, and obtain permits for new cabins. The Landowners commissioned a survey in 2005, which established the location of the road, and the relation of the subdivision lots to the road. The Landowners conducted research on each of the lots, and established that the deed to most of the lots had reserved ingress and egress easements to the road. The deeds on a few of the lots did not have the specific language, but the Landowners obtained signatures on "easement letters," which, along with prescriptive rights, apparently satisfied the County.<sup>2</sup>

Although the access issue for the individual lots was resolved, the County still questioned the legal existence of the road itself. The road through Beaver Creek Canyon does not connect to a public road, but is accessed via "Bristlecone Canyon Road," described as a private road connecting to Highway 6 in Utah County. Officials in Utah County do not consider Bristlecone Canyon Road to be a public roadway, and it is not publicly maintained. Moreover, the Beaver Canyon Road crosses lands owned by the State of Utah and the Federal Government.<sup>3</sup> The County states that the perpetual right to use the roadway across those parcels has not been satisfactorily shown. Accordingly, the County will not issue new building permits until the perpetual right of access across the state and federal lands is established.

Establishing access across the publicly owned lands is problematic, because of the difficulty in obtaining approval for a road. The federal land is governed by the Federal Land Policy and Management Act (FLPMA), which was enacted in 1976. Under FLPMA, the Landowners would need to obtain permission for the road from the Bureau of Land Management (BLM). However, if the Landowners could show that the road was established and used by the public prior to 1976, the right of the public to use the road would probably be recognized by the BLM.<sup>4</sup> The Landowners claim that the road on the state-owned parcel has been permitted or approved by SITLA, however, SITLA denies this claim, and informed Carbon County that it does not recognize prescriptive roads on trust lands. According to the information provided by the County, the Landowners could purchase a 30-year lease for a roadway across the SITLA lands.

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<sup>2</sup> The easement issue arose because several of the lots are "sandwiched" between other lots, with no direct access to a road. The information provided for this Opinion does not include any further information about the easements or what was required by the County. It does appear, however, that the County has accepted the existence of the easements (or the existence of a prescriptive easement through lots providing access) but contends that the road itself has not been properly established across state and federal lands.

<sup>3</sup> According to the County, the Beaver Canyon Road crosses parcels under the jurisdiction of the School and Institutional Lands Trust Administration (SITLA), the state agency responsible for trust lands granted to the State of Utah when it entered the Union. The federal parcel is administered by the Bureau of Land Management (BLM). It appears that these parcels are located near the northern end of the road.

<sup>4</sup> See *Kane County v. Salazar*, 562 F.3d 1077, 1078 (10<sup>th</sup> Cir. 2009) ("any valid . . . rights of way existing on the date of approval [of FLMPA] would continue in effect.").

The County, however, states that it would not consider a 30-year lease to be a permanent road, so it still would not approve building permits.<sup>5</sup>

## **Analysis**

### **Requiring Property Owners to Establish Access is a Valid Requirement Found in the County's Ordinances.**

The County's requirement that the Landowners show that access is established and perpetual is valid. Local governments may impose reasonable requirements on development:

A county may not impose on the holder of an issued land use permit or approved subdivision plat a requirement that is not expressed:

- (i) in the land use permit or subdivision plat documents on which the land use permit or subdivision plat is based, or the written record evidencing approval of the land use permit or subdivision plat; or
- (ii) in this chapter [Chapter 17-27a] or the county's ordinances.

UTAH CODE ANN. § 17-27a-508(h).<sup>6</sup> Accordingly, a county may impose conditions or requirements that are expressed in statutes, or imposed during the approval process itself.

In this case, the subdivision was approved in 1974. It is not clear if access was discussed at the time of approval. However, it would appear that access was not part of the original subdivision approval and plat, because the County raised the issue later. However, a requirement may be expressed by the County's ordinances. Section 10.1.2 of the Carbon County Development Code provides that new development must comply with zoning regulations.

No building permit shall be issued for construction within the County until the application therefore has been approved by the Zoning Administrator. The Zoning Administrator shall not give such approval until he is satisfied that the proposed construction and subsequent use of the building proposed to be constructed will comply with the requirements of the zone in which the building will be situated.

CARBON COUNTY DEVELOPMENT CODE, § 10.1.2.

The Beaver Creek Subdivision is evidently governed by Chapter 5.2 of the County's Development Code, "Planned Mountain Home Developments."<sup>7</sup> Development of the

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<sup>5</sup> There was no information provided for this Opinion indicating if SITLA would consider selling the right-of-way. The County's Development Code requires a perpetual access easement on all intervening property owners when access to a subdivision is over a private right-of-way.

<sup>6</sup> See also UTAH CODE ANN. § 10-9a-509 (applicable to municipalities).

<sup>7</sup> Such developments are defined as "[a] subdivision in which the roads, travel easements, water lines, and open spaces are not dedicated to the public, but are retained as private facilities." CARBON COUNTY DEVELOPMENT CODE, § 9.2 (definition of "Planned Mountain Home Developments").

Subdivision must therefore comply with the requirements expressed in that chapter. One of those requirements concerns access:

Each development cluster and each lot within a development cluster shall front upon and have access to an existing County road or private vehicular travelway constructed to County standards. Where access to a development is over a private travelway, right of **perpetual** access to the development shall be guaranteed by a recorded surface easement with all intervening property owners.

*Id.*, § 5.2.5(E) (emphasis added). Thus, if the Beaver Creek Subdivision is a “Planned Mountain Home Development,” it must satisfy these access requirements. The County has indicated that it will require proof of a perpetual easement across the federal and state lands. This is consistent with the requirement expressed above.

Access to any property is a legitimate public concern. Emergency vehicles must be able to reach properties. Efficient traffic flow allows all property owners the ability to fully enjoy their property rights, and promotes economic development and the general welfare. For this reason, local governments require new development to show that access is established before development may begin. Carbon County has enacted an ordinance which requires each lot to have access to a public road or private travelway. Since this requirement is reasonable and promotes a legitimate public interest, it may be imposed by the County.

The Landowners’ rights in the subdivision do not override the County’s requirement. A property owner has the right to develop property, but that development must still comply with regulation from local, state, and even federal authorities. “[A]n owner of property holds it subject to zoning ordinances enacted pursuant to a state’s police power.” *Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 390 (Utah 1980).<sup>8</sup> A property owner’s right to develop vest when a complete development application, which complies with local regulation, is submitted. Carbon County’s Development Code requires that development have perpetual access across private lands. As has been discussed, that requirement is within the County’s authority. The Landowners must comply with the requirement in order to obtain a building permit.

### **The County May Lack Authority to Grant the Property Owners the Right to Use the Road.**

The Property Owners may have legal theories that, if successful, would give them the right to use the road to cross federal, state, or privately owned lands to access their properties. However, the County has neither the responsibility, nor the authority, to decree that any of those theories are valid against the opposing claims of the underlying land owners. The proper forum for resolving

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<sup>8</sup> See e.g., *Stucker v. Summit County*, 870 P.2d 283 (Utah Ct. App. 1994) (Building permit denied because proposed development was not permitted under zoning ordinance, even though the development would have been permitted under previous ordinance. The property owners did not apply until after the zoning regulation had changed).

disputes over an easement or right to access property is in the courts. *See generally Harold Selman, Inc. v. Box Elder County*, 2009 UT App 99.

At a minimum, SITLA has indicated that it does not recognize that the property owners have a permanent right to use the portion of the road that crosses its property. There appears to be no means to access the subdivision that does not cross SITLA land. The County has the obligation to protect the health, safety, and welfare of all property owners within its boundaries. In light of this fact, the County should not approve a building permit on property where the right to access is in dispute. The County is justified in requiring that the property owner produce either a definite writing or agreement establishing perpetual right to cross the property, or a court order establishing a permanent right-of-way before issuing a building permit.

### **Conclusion**

The County's requirement that the property owners in the Beaver Creek Subdivision show that they have permanent or perpetual access from a public road to each lot is a reasonable condition that promotes a legitimate public interest. Because the requirement is expressed in the County's ordinances, it may be validly imposed as a condition on building permits. The vested rights doctrine does not override the County's authority to enact reasonable regulations, because property owners are subject to zoning regulation.

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:

Robert Pero, County Clerk/ Auditor  
Carbon County  
120 East Main  
Price, Utah 84501

On this \_\_\_\_\_ Day of June, 2009, 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.

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Office of the Property Rights Ombudsman