

# Advisory Opinion #82

Parties: John Lee and City of Springdale

Issued: January 19, 2010

## TOPIC CATEGORIES:

J: Requirements Imposed upon Development

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

The City properly designated a private drive as an “historic access.” A water line within the private drive was owned by the City, which had discretion to approve new hookups. All property is subject to entry in emergency situations.

## 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

Advisory Opinion Requested by: John Lee  
By Daniel A. Schenk, Attorney for John Lee

Local Government Entity: Town of Springdale

Applicant for the Land Use Approval: John Lee

Project: Single Family Home

Date of this Advisory Opinion: January 19, 2010

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

### Issues

- I. Did the City properly designate a privately-owned driveway as a “private lane” or “historic access?”
- II. Is it proper for the City to retroactively apply its private lane ordinance to the privately-owned driveway?
- III. Is the City entitled to a utility easement, an emergency vehicle access easement, and ownership of a water line within the driveway?
- IV. Is the water line an extension of the City’s water main system?

### Summary of Advisory Opinion

The City’s designation of Dixie Lane as an “historic access” with the same rights and privileges as a “private lane” was proper, and did not impair any of the owners’ property rights. The City’s ordinance acknowledged the existence of existing privately-owned driveways and accesses. This designation did not change the circumstances on Dixie Lane, which was created by a recorded

easement. There is no need to determine if the City's ordinance applied retroactively, because other applicable ordinances settled the access questions.

The water line which was installed within Dixie Lane was an extension of the City's water main system, and City ordinances in place when the line was installed provided that the water line became the City's property. Since the City owns the water line, water meter, and fire hydrant, it has the right to access the property for maintenance. Moreover, since it owns the water line, it may approve hookups to serve other properties.

The City is also entitled to a right for access by emergency vehicles. Public agencies have the right to enter property in emergency situations. Such entry is not considered trespassing, and does not constitute a property taking. The easement was created to provide access to neighboring properties, who may allow access by emergency vehicles. Finally, access by emergency or public safety vehicles in the course of their duties is not a large expansion of the easement, since the City already has an access right for utility maintenance.

## **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 Daniel A. Schenck, Attorney for John Lee, on June 29, 2009. A copy of that request was sent via certified mail to Pat Cluff, Mayor of Springdale City. The return certificate, indicating that the City received the copy of the Request, was received by the Office of the Property Rights Ombudsman on July 6, 2009. The City submitted a response that was received on August 31, 2009. The parties have also supplemented their responses.

## **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 29, 2009 with the Office of the Property Rights Ombudsman by Daniel A. Schenck, attorney for John Lee.
2. Response from Springdale City, received on August 31, 2009, by J. Gregory Hardman, Attorney for the City.

3. Reply from Daniel A. Schenck, received September 8, 2009. A follow-up letter was also received from Mr. Schenck on September 14, 2009.
4. Reply from Springdale City, received November 12, 2009, submitted by J. Gregory Hardman, Attorney for the City.
5. Copy of a May 19, 2009 letter submitted to Springdale City, faxed by John Lee, property owner, received via facsimile on November 17, 2009.
6. Reply from Daniel A. Schenck, received November 23, 2009.

## **Background**

John and Sunny Lee own property located in Springdale City. The property is located on a hillside, and is accessed by “Dixie Lane,” which is not a public road. Dixie Lane is located on a 33-foot wide easement that encumbers the Lee property. The Deed to the parcel reserves the easement as a right-of-way for two other properties, and references a 1990 survey, which apparently describes the easement.

In 1999, the Lees obtained a building permit, and constructed a home on the property. In order to satisfy the City’s building and fire code requirements, the Lees installed an eight-inch line to provide water service to their home, including a fire hydrant, from the City’s water system. The water line ran beneath the Dixie Lane right-of-way, and was connected to the City’s system.<sup>1</sup> The eight-inch line replaced a two-inch line that had been installed in 1978 or 1979.<sup>2</sup> The new line was installed at the Lees’ expense, although the City was aware of and approved the work.

In 2006, the City enacted section 10-25-10(K) of the City Code. That section designates certain “private lanes” as “historical accesses,” and allows those historic accesses “all of the rights and privileges enjoyed by private lanes.” SPRINGDALE TOWN CODE, § 10-25-10(K). Dixie Lane was specifically listed as an existing historical access. An historical access may not be extended, unless it meets the City’s minimum standards. Another subsection provides that new private lanes may be established, but only through conditional use approval. *See id.*, 12-30-100

Beginning in 2003, the Lees began to have a dispute with a neighbor, who also used Dixie Lane to access his property.<sup>3</sup> The Lees and their neighbor had entered an agreement governing the use of Dixie Lane, but the dispute arose because the Lees felt that the neighbor was expanding the easement without permission. Specifically, the Lees objected to the neighbor using more than one access point from the easement, and connecting to the water line and sewer line without permission. The neighbor contended that the access was an acceptable use of the right-of-way easement that burdened the Lee property; and that the utility lines were publicly owned, so the Lees could not control who connected to them. The Lees maintain that access is restricted to one point only, and that they own the utility lines, which provide service to their property.

The dispute escalated to the point that the Lees attempted to block the neighbor’s access to Dixie Lane. Following that, the neighbor filed a lawsuit, requesting an order enjoining the Lees from

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<sup>1</sup> A sewer line was also installed, and a portion of that sewer line runs beneath Dixie Lane.

<sup>2</sup> The two-inch line was not large enough to provide adequate water service to a home. The two-inch line was disconnected and capped.

<sup>3</sup> Evidently, the neighbor owns property that is entitled to the right-of-way easement described in the Lee’s deed.

blocking the access.<sup>4</sup> The Lees counterclaimed, and also requested damages and injunctive relief (presumably to restrict the neighbor's access and prevent connection to the utility lines). As of the date of this Opinion, that litigation has not been resolved.

In November of 2008, the City filed a Complaint against the Lees, requesting a declaratory judgment that the City owns the eight-inch water line, and an easement on Dixie Lane for installation and maintenance of public utilities, as well as access by emergency and other governmental vehicles. According to the City, the Complaint was filed as an attempt to resolve questions regarding the scope of the right-of-way easement on Dixie Lane, and the ownership of the water line serving the Lee property.<sup>5</sup> As of the date of this Opinion, that litigation also remains unresolved.

## **Analysis**

### **I. An Advisory Opinion is Non-binding, and is Not Admissible as Evidence in a Dispute.**

Advisory Opinions issued by the Office of the Property Rights Ombudsman are non-binding, and are not admissible in a land use dispute. The Utah Legislature established Advisory Opinions as a means by which questions involving land use may be analyzed and resolved without the expense of litigation. These Opinions are “advisory,” and are not considered binding upon government entities or property owners. “An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to, nor admissible as evidence in, a dispute involving land use law . . .” UTAH CODE ANN. § 13-43-206(11).

This evidentiary restriction promotes the dispute-resolution activities of the Ombudsman's Office. Section 13-43-204 provides that the Office of the Property Rights Ombudsman may mediate disputes between governmental entities and property owners. An Advisory Opinion which evaluates an action or ordinance may be part of the mediation process. A mediation is more likely to be successful if all parties are free to openly discuss their respective positions, without fear that any statements will wind up as evidence in litigation. For this reason, no Advisory Opinion issued by the Ombudsman's Office should be introduced as evidence.<sup>6</sup>

### **II. The City's Designation of Dixie Lane as a Private Access Does Not Deprive the Lees of any Property Rights.**

In 2006, the City recognized that several “historic accesses” had been created or allowed before the City began to more carefully regulate creation of private lanes in 1992.<sup>7</sup> The City therefore enacted a new provision recognizing those historic accesses, and granting them the same status

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<sup>4</sup> The suit also requested damages and attorney's fees.

<sup>5</sup> According to the City, it became clear that ownership of the water line was a very important aspect of the lawsuit and counterclaim between the Lees and their neighbor. The City took the rather unusual step of requesting a declaratory judgment hoping to avoid entanglement in the landowner's lawsuit. The Lees have requested that this Opinion evaluate ownership of the water line and possible utility easement along Dixie Lane.

<sup>6</sup> There are some limited exceptions, which are not at issue here. *See* Utah Code Ann. § 13-43-205(12).

<sup>7</sup> In 1992, the City enacted an ordinance allowing creation of private lanes, if approved as a conditional use. The Lee parcel had already been created, and was accessed by a narrow strip leading to a public street. An easement was created on that strip, ensuring access to neighboring properties.

as private lanes, even though they had not been approved as conditional uses. The ordinance specifically granted the historical accesses the same “rights and privileges” as private lanes. *See* SPRINGDALE TOWN CODE, § 10-25-10(K). Dixie Lane, the “historic” access to the Lee parcel (and the neighboring properties), was specifically designated in the ordinance.

Designating Dixie Lane as a “historical access” private lane does not alter the property rights enjoyed by the Lees, nor does it impose any greater burden on the Lees’ property. The 2006 ordinance simply acknowledges that there were several accesses or driveways that functioned as private lanes, and so the City granted those accesses equal status to private lanes. This ensures that properties served by historic accesses may be developed in the same manner as those that have approved private lanes, and that those properties are not required to obtain conditional use approval for a private lane.<sup>8</sup>

The special status granted by the 2006 ordinance did not change the circumstances on Dixie Lane, and does not impose any greater requirement on the Lees’ property. The easement was created by the 1990 deed, and provided access to neighboring properties. The utility lines were installed in 1999, when the Lees’ home was constructed. Nothing changed after 2006, except the dispute between the Lees and their neighbor. Simply put, the 2006 ordinance did not change anything about Dixie Lane.<sup>9</sup>

The City argues that the ordinance may apply retroactively to preexisting historic accesses such as Dixie Lane. Retroactively applying the City’s ordinance to Dixie Lane would require dedication of the eight-inch water line to the City.<sup>10</sup> Although the City may have a valid argument in favor of a retroactive application, that approach does not appear to be necessary. As is discussed below, other ordinances in place also required dedication of the water line and water meter. Since those ordinances definitely applied when the Lees installed the water line, there is no need to determine whether the private lane ordinance retroactively applies.

### **III. The Lees Granted the City a Utility Easement When They Installed the Water and Sewer Lines.**

By installing water and sewer lines within the easement, the Lees granted the City a utility easement. In 1999, the Lees obtained a building permit, and constructed a home on their property. In order to gain approval for the permit, the Lees installed an eight-inch water line and a sewer line from existing City lines to the property. Both lines were located, at least partially, within the easement. The water line includes a water meter on the Lee property. The Lees also installed a fire-hydrant near their property, which is served by the eight-inch line. The plans

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<sup>8</sup> The City notes that the 2006 ordinance codifies a long-standing practice of recognizing existing historic accesses. In fact, the City allowed the Lees to develop their property in 1999 without requiring conditional use approval for Dixie Lane. A property owner must obtain conditional use approval to extend an “historic access.”

<sup>9</sup> The easement was created by deed before any “private lane” regulation—and it will continue to exist even if the City repeals its “private lane” regulation. The scope and extent of the easement would not necessarily be dependent upon the City’s ordinances, but upon the purpose and use of the easement.

<sup>10</sup> Section 12.30.100, dating from 1992, provides that utility lines located in private lanes become City property, even if they are installed by the property owner.

submitted by the Lees referred to the lines as “extensions” of sewer, culinary water, and irrigation water.

The City’s contention that the eight-inch water line is an extension of a water main appears to be correct. The former section 14-143 of the City’s ordinances provides that the City’s water mains may be “extended” within the City, to provide service to new development. The term “extension” is not specifically defined by the City’s code, so the plain meaning of the term must be followed. Statutory interpretation begins with the language of the ordinance. *See Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14, 993 P.2d 875, 879. The “primary goal . . . is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.” *Foutz v. City of South Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171, 1174. The plain language of the statute as a whole must be interpreted so as to be in harmony with related statutes. *See Bluffdale Mountain Homes, LC v. Bluffdale City*, 2007 UT 57, ¶ 30, 167 P.3d 1016, 1026.

The word “extension” means “prolongation; enlargement . . . an additional part of anything . . .” OXFORD DICTIONARY AND THESAURUS, AMERICAN EDITION, pp. 511-12. Synonyms include elongation, enlargement, expansion, increase, augmentation, development, amplification, broadening, widening, lengthening, and stretching. *See id.*<sup>11</sup> The word is derived from a Latin word meaning “stretch” *Id.* (under definition for “extend”). With this definition providing the plain meaning of the term “extension,” it is reasonable and justifiable to consider an “extension of a utility line” to be an elongation, increase, or lengthening of the utility line. Thus, the City correctly determined that the eight-inch water line is an extension of the City’s water main.

When the Lees obtained their building permit, the City’s ordinances required that any extensions of water lines become the City’s property. “Any such extension [of a water main] shall be deemed the property of the Town.” SPRINGDALE TOWN CODE, § 14.147.<sup>12</sup> In addition, a water meter is specifically deemed to be City property. *See id.*, § 14-136(C).<sup>13</sup> The City states that it has maintained the water line, sewer line, and fire hydrant since 1999, when the Lee property was developed. All these together lead to a conclusion that the utility lines, water meter, and fire hydrant all became the City’s property when they were installed in 1999. Since the City owns those improvements, they also are entitled to reasonable access for maintenance. In addition, since the eight-inch water line is owned and controlled by the City, it may be used to serve other properties, upon approval by the City.

#### **IV. The City May Use Dixie Lane for Emergency Access.**

Because the City incurs no liability for entering any private property for emergency purposes, and because Dixie Lane provides access to other properties, there is no question that the City

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<sup>11</sup> There are other meanings for “extension,” which also convey the sense of “an additional part of something,” such as telephone extension, or extension courses from a university.

<sup>12</sup> Title 14 of the Springdale Town Code has been renumbered, but it was in effect in 1999, when the building permit was granted. The language quoted is currently found at § 8-1-10 of the Town Code.

<sup>13</sup> The City also notes that only a public entity has the right to use a fire hydrant. There was nothing in the materials submitted indicating that a fire hydrant was to be dedicated to the public. However, § 14-142 of the City’s code states that property owners shall grant a right-of-way or easement to the City to install and maintain fire hydrants.

may use the lane for access by emergency vehicles. A government entity—any citizen, in fact—may enter and even destroy private property in order to prevent loss of life or great destruction of property. *See Colman v. Utah State Land Board*, 795 P.2d 622, 628 (Utah 1990).<sup>14</sup> In such an emergency situation, the person entering the private property is excused from liability for damage or trespass.

Along the same lines, emergency entry by a government entity would not be considered a taking, even if private property were permanently damaged. *See id.*, 795 P.2d at 628-29. The mere entry by public safety personnel also would not constitute a taking. Thus, with or without an easement, the City may use Dixie Lane for access in emergency situations.

In addition, the easement on Dixie Lane provides access to at least two neighboring properties. The owners of those properties may allow access by public safety personnel. Since the purpose of the easement is to provide access to the neighboring properties, the owners of the easement may allow access to their properties by any persons they wish. Restricting access would constitute an impermissible restriction of the easement, because the neighboring properties already enjoy the right of access to their properties.<sup>15</sup> Allowing reasonably limited use by public safety vehicles would not constitute an unreasonable expansion of the easement, particularly when the pre-existing access right belonging to the neighboring properties is combined with the utility access that has already been granted.

## Conclusion

Designating Dixie Lane as an “historic access” does deprive the Lees of any property rights in the lane. In 2006, the City enacted an ordinance which recognized existing driveways and accesses as “historic accesses.” That designation did not change the circumstances of the easement, which was created by a deed. There is no need to decide whether the 2006 ordinance applies retroactively.

The Lees granted a utility easement to the City when they installed the water and sewer lines within the easement. The City’s ordinances provided that the utility lines, along with the fire hydrant and water meter, become the City’s property. The water line was an extension of the City’s main, which is considered property of the City. That ownership includes an easement to maintain the utilities. Since the City owns the water lines, it may allow the neighboring properties to connect to the water line.

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<sup>14</sup> In *Colman*, the Utah Supreme Court held that a government entity or any private citizen may cause or order the destruction of private property when necessary to prevent greater harm, without incurring liability for the destruction. This exemption, of course, promotes important public interests. It also presumes that a person may *enter* property for emergency purposes. When acting in an official capacity, public safety personnel may enter private property in emergency situations or when authorized and reasonable without incurring liability for damage or trespass. This does not excuse public safety personnel from constitutional safeguards against warrantless search and seizure however.

<sup>15</sup> *See Carrier v. Lindquist*, 2001 UT 105, ¶ 19, 37 P.3d 1112, 1117-18 (“It is a long-held tenet of property law that a servient estate cannot unreasonably restrict or interfere with the proper use of an easement.” (citations and alterations omitted)).

The City may use the easement for access by public safety and emergency vehicles. There is an implied right to enter any property for the purposes of preventing loss of life or severe property damage. Such entry would not be considered trespassing or a property taking. Furthermore, the easement already grants access to the neighboring properties. Those property owners may grant an access right to the City if they choose. Allowing reasonable access by public safety vehicles would not be an impermissible expansion of the easement, especially because the City already enjoys access for utility maintenance.

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:

Pat Cluff, Mayor  
Town of Springdale  
118 Lion Blvd.  
PO Box 187  
Springdale, Utah 84767

On this \_\_\_\_\_ Day of January, 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.

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Office of the Property Rights Ombudsman