Advisory Opinion #10

Parties: Shawn Warnke, Grand County Administrator and Grand County

Issued: February 7, 2007

TOPIC CATEGORIES:

D: Exactions on Development
J: Requirements Imposed Upon Development

It is reasonable to interpret the County's Ordinance as requiring improvement to existing roads, if they related to a new development. Since the improvements are to an existing road that directly serves the new lots in the subdivisions, it does not appear that the requirement is an improper exaction.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

Advisory Opinion

Advisory Opinion Requested by:	Shawn Warnke Grand County Administrator
Local Government Entity:	Grand County
Applicant for the Land Use Approval:	Kyle Kimmerle Brad Mimlilz
Project:	Desert Mesa Subdivision (Mimlilz) Kimmerle Subdivision
Date of this Advisory Opinion:	February 7, 2007

Issue: Are the street dedications and improvements proposed by Grand County for the Desert Mesa and Kimmerle Subdivisions legal?

Review

The request for an advisory opinion in this matter was received by the Office of the Property Rights Ombudsman on December 11, 2006. A letter with the request attached was sent by certified mail, return receipt requested, to Kyle Kimmerle on December 18, 2006. A receipt for delivery of the certified letter was dated December 23, 2006.

In telephone conversations the parties requested that the Office of the Property Rights Ombudsman proceed to prepare the opinion. I visited with Kyle Kimmerle on December 27, 2006, and was told to proceed. I have also visited about the matter with Brad Mimlitz, Shawn Warnke, and Mary Hofhine, Grand County Zoning Administrator.

Summary of Advisory Opinion

The road requirements imposed by Grand County on the Desert Mesa Subdivision and the Kimmerle Subdivisions are legal. While the applicable ordinances and standards could be more clearly written, the interpretation the County has made would most likely be deemed by a court to constitute a correct reading of the applicable ordinances and standards. Any past interpretation or application of these ordinances and standards which varies from the current interpretation and application does not control the current situation. Under the facts of this case, the applicants for subdivision approval have not relied on past interpretations in the manner required by the courts to trigger the application by a court of the common law equitable doctrines of waiver and estoppel. Absent those remedies, the ordinances and standards can be enforced as written in the future, even if the County has not done so in the past.

Evidence

The following documents were reviewed prior to completing this advisory opinion:

1. Request for an Advisory Opinion, filed with the Office of the Property Rights Ombudsman by Shawn Warnke on December 11, 2006, which included as attachments:
   a. Memo from Shawn Warnke to Craig Call dated December 1, 2006
   b. Copy of email from Tim Keogh, engineer, dated December 5, 2006.
   c. Memorandum to the planning commission dated October 27, 2006 re Desert Mesa Subdivision Preliminary Plat – Bradley Mimlitz, applicant
   d. Memorandum to the Grand County planning commission dated October 3, 2006 re Kimmerle Sketch Plan.
   e. Memorandum to Kyle Kimmerle dated October 12, 2006 re: Kimmerle Sketch Plan Follow-up.
   f. Five pages of email messages between Richard Grice and Tim Keogh and others, the most recent dated Friday, December 1, 2006 at 3:38 p.m.
   g. Memorandum dated December 1, 2006 to Shawn Warnke from Richard Grice re: road improvement standards and history.
   h. Copy of Grand Construction Standards, dated May 25, 1999.
   i. Preliminary Plat for Desert Mesa Subdivision, dated 5-19-2006 by Keogh Land Surveying.
   j. Sketch Plan for Kimmerle Subdivision, undated, prepared by Keogh Land Surveying.
2. Email dated December 3, 2006 from Tim Keogh to Craig Call.

3. Email dated December 18, 2006 from Kyle Kimmerle to Craig Call, with attachments:
   a. "To all Grand County Council Members" undated statement of Kyle Kimmerle.
   b. "Mary" undated statement of Kyle Kimmerle.
   c. "Quoting Richard Grice" undated list of 24 subdivisions with added comments from Kyle Kimmerle.
4. Email dated December 26, 2006 from Tim Keogh to Craig Call.
5. The Grand County land use ordinance found at www.grandcountyutah.net.
6. The Grand County Subdivision Standards (Undated – provided by Mary Hofhine).
7. The Grand County Construction Standards (September 3, 2003). (Undated – provided by Mary Hofhine).
8. Minutes of the Planning Commission meeting held October 11, 2006.
9. Emails received February 7, 2007 from Richard Grice, Kyle Kimmerle, and Timothy M. Keogh.

Assumed Facts

1. Kimmerle Subdivision is a six-lot subdivision proposed for Grand County.

2. Desert Mesa subdivision is a four-lot subdivision proposed for Grand County.

3. In the process of approval for these two subdivisions, the County has required or intends to require that, where any part of any lot abuts a county road, the existing pavement of the road be extended toward the land to be subdivided to a point where curb and gutter will be required along the edge of the county road, thus requiring that half of the county road right of way be reconstructed and improved to new condition.

4. Section 6.7.2 of the Land Use Code requires that "all improvements shall be constructed in accordance" with the Grand Construction Standards.

5. Section I Roads and Streets in the Grand Construction Standards states "All roads and streets including access roads within and/or pertaining to the subdivision shall be paved with asphaltic concrete or equivalent and chip sealed according to the standards and specifications of the County Engineer, except as specifically allowed in these Standards."

6. Section 5.1.1. of the Grand Construction Standards provides that "All plats and subdivision of land within the unincorporated portion of Grand County shall conform to the following rules and regulations."

7. According to the Grand Construction Standards attached to the land use ordinance as Exhibit "A", "All lots shall have frontage on a street that conforms to the standards of this section."

8. The minimum width of a "local" street shown on Table 1, "Minimum Street Construction Standards" in the Grand Construction Standards at Section I (A)(1) is 56 feet, with a 38 foot surface width.

9. The Grand Construction Standards at Table 1 also provides for minimum compacted sub-base, compacted road base, pavement, curb and gutter, and other standards and specifications for street improvements.

10. In the Grand County Subdivision Standards at Title 16, Article 1, Section 5.3.4 the code provides that "Half streets shall be prohibited except where essential to the reasonable development of the subdivision and where the Planning and Zoning Commission finds it would be practicable to require the dedication of the other half of a street where the adjoining property is subdivided."

Issue

There appears to be no dispute that the County can require a subdivider to construct newly created streets within a subdivision so that those streets comply with the Grand Construction Standards. Can the County also legally require a subdivider to improve preexisting county roads where new lots created by the subdivision front upon those preexisting County roads?

Analysis

Does Past Non-Enforcement Constitute a Waiver for Future Enforcement?

Those who have participated in the exchange of information leading up to the publication of this advisory opinion have provided an extended discussion of the interpretation and application of the county's land use code and the Grand Construction Standards over the past years. While this can be very persuasive in the political arena, and may be helpful in encouraging County officials to continue with past practices and not make abrupt changes in interpretation, it is not determinative of how the law must be applied in this case.

There are cases that support the idea that the county cannot reinterpret its ordinances to the disadvantage of the applicant for a land use permit after it has already approved a project, issued the permits, and construction has begun, but they would not apply where there has been no work commenced. For example:

> An additional requirement generally considered in zoning estoppel cases is that of the existence of some physical construction as an element of substantial reliance. Preconstruction activities such as the execution of architectural drawings or the clearing of land and widening of roads are not sufficient to create a vested right, nor generally are activities that are not exclusively related to the proposed project.

Western Land Equities v. Logan City, 617 P.2d 388 (Utah 1980). Indeed, there are several Utah Supreme Court decisions that specifically state that past lack of enforcement does not prohibit a government entity from applying an ordinance as written at the present or in the future:

> Estoppel, waiver or laches ordinarily do not constitute a defense to a suit for injunctive relief against alleged violations of the zoning laws, unless the circumstances are exceptional. Zoning ordinances are governmental acts which rest upon the police power, and as to violations thereof any inducements, reliances, negligence of enforcement, or like factors are merely aggravations of the violation rather than excuses or justifications therefor.

Utah County v. Baxter, 635 P.2d 61 (Utah 1981).

> Ordinarily a municipality is not precluded from enforcing its zoning regulations, when its officers have remained inactive in the face of such violations. The promulgation of zoning ordinances constitutes a governmental function. This governmental power usually may not be forfeited by the action of local officers in disregard of the ordinance.

Salt Lake County v. Kartchner, 552 P.2d 136, 138 (Utah 1976).

> Similarly, the Alta town clerk's issuance in this case of three lodging facility licenses does not estop Alta from denying use of BHC's (Ben Hame Corporation's) residence as a lodging facility contrary to the Alta zoning ordinance. Additionally, failure to enforce zoning for a time does not forfeit the power to enforce. (Citation omitted). BHC has shown neither an act or omission by Alta justifying good faith reliance nor a substantial detrimental change in

> BHC's position in reliance on Alta's acts. Hence, BHC has not shown any exceptional circumstances constituting an estoppel defense to the injunction action.

Town of Alta v. Ben Hame Corp., 836 P.2d 797, 800 (Utah Ct. App. 1992). I do not need to come to any conclusion based upon the contradictory information provided by those who have commented to me about whether the County's past interpretation of the ordinances and standards was correct. It appears under the Utah legal precedents that even if the County had not been consistent in the interpretation or application of the standards in the past, it can apply a correct reading of the standards in the future. This is not to say that the County can misread the ordinance as written – indeed it may only enforce what the law provides, and if a challenge had been brought in the past to an incorrect interpretation made then, that challenge could easily have prevailed. Those past errors (assuming there may have been some) according to the relevant case law, do not control what a court would do today, however.

Interpretation of the Standards and Ordinances - Existing Streets Must Be Improved:

The Grand Construction Standards apply to "all roads and streets including access roads within and/or pertinent to the subdivision." With regard to the Desert Mesa Subdivision, Mesa Road and Desert Road, which are existing public streets are, without a doubt, "pertinent" to the subdivision because each of the lots depend on those streets for direct access. With regard to the Kimmerle Subdivision, Plateau Drive and Starbuck Lane, which are existing public streets, are also, without a doubt, "pertinent" to the subdivision. As with the Desert Mesa Subdivision, the Kimmerle Subdivision will create lots which use these existing public streets for access.

The standards were apparently drawn up with the principle goal of defining construction standards for new streets that occur within new subdivisions, and do contain some ambiguities when read to determine how they apply to existing public streets that are not being created by the subdivider. I believe, however, that the language cited above would lead a court to conclude that the standards do indeed apply to existing County streets. This is not to say that the wording of the standards and the ordinance are perfectly crafted; only that if the court were looking as I have at the language in an attempt to determine whether the language could be reasonably interpreted to require the same improvements to existing public streets as would be required of new public streets or lanes, the result would cut in favor of the County in this specific situation.

This is also consistent with the general practice of other communities throughout the state. It is common to impose a requirement to improve existing roads that abut new subdivisions.

I believe that the imposition of requirements for road improvements on the Kimmerle and Desert Mesa Subdivisions as outlined in the request for an advisory opinion would be upheld by a court as being legal.

Width of Road Improvements

The Grand Construction Standards are somewhat unclear as to the pavement standards because it uses the word "may" instead of "shall" to describe whether streets in areas where the lots are one half acre or more can be improved to public lane standards. Where there is such ambiguity, the wording would likely be interpreted to provide that 24 feet of pavement is all that can be required in such a subdivision. Ironically in this case, where the County could require 24 feet in a full roadway improvement, it has given the subdivider the benefit of allowing only a half street improvement. I do not find in the standards that the County has the ability to do that. In Section I (A)(17) of the Grand Construction Standards, it provides that the amount of right-of-way dedicated for a street can be less than the full amount stated in the Standards, but requires the full pavement width and curb and gutter on both sides. By waiving the requirement of full pavement width and half the curb and gutter requirement, the County continues to avoid the full enforcement of the Standards as written, even though those developing these two subdivisions argue that the partial enforcement in their cases is still too harsh.

This waiver of the harsh reading of the Grand Construction Standards is somewhat understandable in light of the provisions in the Subdivision Standards at section 5.3.4 which allows for half streets without the full improvements mandated by the Grand Construction Standards. Indeed, while the applicants claim that the County should not be able to impose half- street width requirements on them, it appears they misread the ordinance. The alternative to imposing the half-street requirement is not to impose no street requirements. The option if no half street is allowed is to require the subdivider to improve the full street width.

The failure to enforce the standards as written may be symptomatic of a general consensus that the standards are simply too harsh.

There appears to be some concern about a requirement to move power lines and utility poles. I do not have enough information to know if that is being required in this case or even if the relevant ordinances and standards provide for the moving of utility poles when the road right of way is extended. Indeed there are many situations around the state where the power lines are not located at the edge of a right of way; sometimes they are between the sidewalk and the curb or in other locations. Absent some specific requirement in the standards or ordinances, a requirement to widen a roadway does not necessarily mandate the moving of utility poles and the standards may not be as harsh as they are assumed to be.

Illegal Exactions on Development

In the comments he made to assist with the preparation of this advisory opinion Kyle Kimmerle raised an issue that the street requirements in this case may constitute an illegal exaction, as being disproportionate and unfairly burdensome on the applicant for subdivision. If so, the "taking" clause of both the United States and Utah constitutions would require just compensation to be paid for the taking of private property for a public use. An inquiry into that issue would certainly be appropriate if the County were imposing the requirement to build an arterial road as a condition of approval of a four or six lot subdivision, but it is not justified where the requirement is the improvement of half a local street width where new lots front upon that local street and where those new lots use that local street for access. I know of no legal case which has held that a requirement for a half street of local road width is disproportionate.

Equal Protection

The constitutional principle of equal protection has also been raised by those challenging the County's actions in this case, and allegations of past inconsistencies have been used to support this argument. While such arguments are compelling, the Utah Supreme Court has simply dismissed such claims out of hand in the planning and zoning arena.

> Federal courts have clarified that to make out a prima facie case for violation of equal protection . . . "the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position." (citations omitted) A showing of "uneven" enforcement of the law is not sufficient: what is required is a showing of a "'totally illegitimate animus toward the plaintiff by the defendant.'" (citations omitted) The burden of proving discriminatory intent . . . is "'an onerous one.'" (citations omitted) . . . See *Bartell v. Aurora Pub. Schs.*, 263 F.3d 1143, 1149 (10th Cir. 2001) (holding that to make a

> claim under "class of one" theory plaintiff must prove "he was singled out for persecution due to some animosity" on the part of defendant). Critical to demonstrating an intentional denial of equal protection is a specific allegation that the defendant had some irrational motive for treating the plaintiff differently from other similarly situated persons. . . (we) hold that (the) allegations of unfair treatment in this "run of the mill" zoning case do not amount to equal protection violations.

Patterson v. American Fork City, 2003 UT 7, para 33, 34. However frustrating the situation may be for the applicants here, the facts do not support a conclusion that the County specifically singled out either property owner in this case for special treatment based on some personal animus against him or her.

Conclusion

A requirement that those seeking subdivision approval for the Desert Mesa Subdivision and the Kimmerle Subdivision improve the adjoining County streets can be legally imposed because those streets "pertain" to the subdivisions. Since the lots in both subdivisions are one half acre or more, the Standards impose a "public lane" requirement of a minimum of 24 feet of asphalt, but the County appears willing to allow a lesser half street improvement of 19 feet, which is half of the 38 foot "local" street standard. Considering the ordinances and standards as written can be correctly interpreted to allow for this requirement, these street improvement conditions are legal and enforceable.

Any past interpretation of the ordinance that allowed for a different application of the standards to the approval of other subdivisions in the County is not binding on the approval of these two subdivisions. The facts of this case do not trigger the essential requirements the courts have relied upon to use the equitable doctrines of estoppel or waiver to set aside otherwise legal land use ordinances and standards. The constitutional principles guaranteeing equal protection and just compensation for the taking of private property for a public purpose do not apply in this factual situation.

Craig M. Call, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, 13-42-205. 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

Utah Code Annotated Section 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. Section 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:

Judy Charmichael, Commissioner
Grand County
125 East Center Street
Moab, UT 84532

On this _____ Day of February, 2007, 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