Advisory Opinion # 152

Parties: Chad Clifford (Snow Hound, LLC) and the City of Moab

Issued: January 7, 2015

TOPIC CATEGORIES:

Development Bonds

The amount of a development bond should be based on the reasonable costs to complete required improvements. The costs may include anticipated administrative costs if a local government assumes responsibility for completion.

A local ordinance conflicts with state law if the ordinance imposes an obstacle to the accomplishment of the legislative purpose. State law provides developers with an option to either use a completion bond, or postpone plat recording. The City's ordinances impose an obstacle to accomplishing that law, since a subdivision plat that is not recorded with six months is voided, effectively eliminating the developer's option to post a bond.

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ADVISORY OPINION

Advisory Opinion Requested by:	Chad Clifford Snow Hound Moab, LLC
Local Government Entity:	City of Moab
Property Owner:	Snow Hound Moab, LLC
Type of Property:	Residential Subdivision
Date of this Advisory Opinion:	January 7, 2015
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

May a City require a completion bond equal to 150% of infrastructure cost?

Summary of Advisory Opinion

Local governments have fairly broad discretion to determine the amount of completion bonds, but that discretion must be limited to the reasonably necessary costs to complete the improvements. The purpose of a completion bond is to provide funding to complete public infrastructure if the developer is unable to finish. Therefore, the amount of the bond must be based upon the reasonably necessary costs to complete the improvements. Those costs may include anticipated administrative costs for the City to assume responsibility for the project.

A local ordinance conflicts with state law if the ordinance imposes an obstacle to the accomplishment of the statute's legislative purpose. The state law indicates the intent to allow developers the option of either using a completion bond, or waiting to record a subdivision plat until required improvements are installed. Since the City's ordinances void a subdivision plat if it is not recorded within six months of approval, the City's approach effectively eliminates the option for developers, imposing an impermissible obstacle to the legislative purpose.

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. 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 Chad Clifford on November 3, 2014. A copy of that request was sent via certified mail to Rachel Stenta, Moab City Recorder at 217 East Center, Moab, Utah. According to the return receipt, the City received the Request on November 7, 2014.

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, with attachments, submitted by Chad Clifford, received by the Office of the Property Rights Ombudsman on November 3, 2014.
2. Response from Donna Meztler, Moab City Manager, received November 25, 2014.

Background

Chad Clifford, through his company, Snow Hound Moab, LLC, applied for approval of a 45-unit town home development in Moab.[1] The City approved a preliminary plat in March of 2014, and proceeded to final approval. If the required public infrastructure cannot be completed within six months of development approval, the City requires a bond to ensure completion of the improvements within two years, along with a one-year warranty to cover needed repairs. The City requires that the bond be equal to 150% of the estimated cost to complete the infrastructure, which includes 10% as a warranty.[2]

The City notes that the amount of the completion bond is not based on the total cost of the improvements, but on the amount needed to complete whatever improvements have not been

[1] Mr. Clifford had submitted a revised plat shortly before requesting this Opinion in the fall of 2014, but it had not yet been approved.

[2] A developer is only required to post one bond, which covers the completion guarantee and the 10% warranty. Upon completion of the improvements, the bond obligation is released, except for the 10% warranty, which is released after one year. The improvements must be completed within a two-year period.

finished after six months.[3] The City drafted a "Subdivision Improvements Agreement" with Mr. Clifford's company, to memorialize the bond requirements, and establish procedures for release of the bonds.[4]

Mr. Clifford objects to the amount of the bonds, arguing that the Utah Code limits completion bonds to 110% of improvement costs. He also complains that the City is requiring completion of all improvements within six months, which is difficult and impractical. The City responds that the Utah Code places no limit on the amount of completion bonds, and that several cities in Utah require higher amounts than 110%. In addition, the City explains that it does not require that infrastructure be completed in six months, but it provides that a completion bond may be avoided if improvements are completed. Otherwise, a bond would be required.[5]

Analysis

I. The City Has Discretion to Set a Reasonable Amount for the Completion Bond, But the Amount Must be Based on the Costs Necessary to Complete the Improvements.

Because the Utah Code does not establish a limit on the amount of completion bonds, the City has discretion to choose a reasonable amount. The Utah Code allows local governments to authorize completion bonds, but places no limit on the amount of a bond.

> (a) A land use authority shall require an applicant to complete a required landscaping or infrastructure improvement prior to any plat recording or development activity.
>
> (b) [Subsection (a)] does not apply if:
>
> i. upon the applicant's request, the land use authority has authorized the applicant to post an improvement completion assurance in a manner that is consistent with local ordinance; and
>
> ii. the land use authority has established a system for the partial release of the improvement completion assurance as portions of the required improvements are completed and accepted.

[3] *See* MOAB CITY CODE, § 16.20.060(A) (bond amount equal to 150% of improvements not previously installed); *see also* Response Letter from Donna Meztler, dated November 25, 2014, at 3. Apparently, the warranty amount would still be based on the total cost.

[4] The "Subdivision Improvements Agreement" would be required at the time of plat approval. It provides that improvements can be completed within six months (prior to the required recording).

[5] The City also requires that subdivision plats be recorded within six months of approval, or else the approval lapses, and the plat is void.

UTAH CODE ANN. § 10-9a-604.5(2). This section authorizes cities to allow "improvement completion assurance"[6] as a means to guarantee completion of required improvements. The language used in the statute indicates that an improvement completion assurance is an option that may be provided which allows developers to record (and market) plats before the improvements are complete. However, the statute contains no language establishing a limit on the amount that may be required for improvement completion assurance.[7]

Because state statutes set no limit to the amount may be required for improvement completion assurance, the City has discretion to set the appropriate amount. However, this does not mean that a land use authority is free to choose *any* amount. Local governments are generally given broad discretion to carry out their functions, within the limits of state and federal authority.

> When reviewing a local government action [appellate courts] give local government great latitude in creating solutions to the many challenges it faces unless the action is arbitrary, or is directly prohibited by, or is inconsistent with the policy of the state or federal laws, or the constitutions of Utah or of the United States.

Price Development Co. v. Orem City, 2000 UT 26, ¶ 10, 995 P.2d 1237, 1243 (citation and alteration from original omitted). That latitude is not unlimited, however, and operates not only within the confines set by state or federal laws, but also by the objectives and policies to be accomplished by the laws. "Specific grants of authority [from the legislature to local governments] may serve to limit the [exercise of power by local governments], for some limitation may be imposed . . . by directing the use of power in a particular manner." *State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980).

The question boils down to this: Is the City's choice to require a bond amounting to 150% of the cost to complete the improvements justified? The answer lies in determining the purpose of completion assurances and § 10-9a-604.5.

> When interpreting statutes, [the] primary objective is to give effect to the legislature's intent. To discern legislative intent, . . . look first to the statute's plain language. In doing so, . . . presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning. Additionally, . . .read the plain language of the statute as a whole and interpret its provisions in harmony with other statutes in the same chapter.

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[6] "'Improvement completion assurance' means a surety bond, letter of credit, cash, or other security required by a municipality to guaranty the proper completion of landscaping or infrastructure that the land use authority has required as a condition precedent to:

(a) recording a subdivision plat; or
(b) beginning development activity."

UTAH CODE ANN. § 10-9a-103(18). The City Code allows a developer to post a bond or deposit money with an escrow holder to satisfy the completion assurance requirement. There is nearly identical language applicable to counties found in Chapter 17-27a.

[7] A warranty, on the other hand, is limited to no more than 10% of the improvement costs. *See id.*, § 10-9a-604.5(3).

Selman v. Box Elder County, 2011 UT 18, ¶ 18, 251 P.3d 804, 807 (citations and alterations from original omitted). The purpose of an "improvement completion assurance" is therefore derived from the language adopted by the Utah Legislature.

According to the plain language of the Utah Code, the purpose of an improvement completion assurance is to "guaranty the proper completion" of required improvements by providing a source of funding if the developer is unable to complete them. *See* UTAH CODE ANN. § 10-9a-103(18). This reflects a policy determination that assuring completion of public infrastructure is an important government objective.

Although the City enjoys fairly broad discretion to determine the amount of a completion assurance bond, its discretion is limited by the policy expressed in the Utah Code. Since the purpose of completion assurance is to provide "backup" funding to complete improvements, it is consistent with the state statute to limit the amount of the assurance bond to the reasonable costs needed to finish the required infrastructure.[8] Any value substantially higher would be inconsistent with the legislature's policy, and would impose an unreasonable burden on the developer. In this matter, in order to require an assurance bond equal to 150% of completion estimates, the City must show that the cost to complete the improvements will increase by 50% if it assumes responsibility for completion.

II. Because a Developer's Option to Use a Completion Bond is Taken Away, the City's Approach Impermissibly Conflicts with State Law.

The City's overall approach effectively eliminates a developer's option to choose a completion bond, and so impermissibly conflicts with the state statute. "Local governments may legislate by ordinance in areas previously dealt with by state legislation, provided the ordinance *in no way conflicts with existing state law.*" *Redwood Gym v. Salt Lake County*, 624 P.2d 1138, 1144 (Utah 1981) (emphasis added). In the *Price Development* case, the Utah Supreme Court adopted guidelines to help determine when a local ordinance conflicts with state or federal law. The court used the same analytical approach used by the United States Supreme Court.[9] Under those guidelines, a local law conflicts with state law when "the local law [stands] as an obstacle to the accomplishment and execution of the *full purposes and objectives* of the legislature." *Price Development*, 2000 UT 26, ¶ 12, 995 P.2d at 1243 (emphasis added, alterations in original omitted).[10]

Section 604.5 does more than simply authorize improvement completion assurance bonds. Under that section, a land use authority may require completion of required infrastructure and landscaping before a subdivision plat may be recorded. Section 604.5 also provides that a developer may choose to provide completion assurance (when the option is available), enabling

[8] The costs not only include the costs of materials and labor, but also the City's anticipated costs to assume responsibility to complete the improvements. For example, it may be necessary to hire new contractors to complete the work, which may increase costs.
[9] *Price Development*, 2000 UT 26, ¶ 12, 995 P.2d at 1243.
[10] The court quoted *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996).

them to record a plat before completing the improvements.[11] This shows that the Utah Legislature intended to provide developers with the choice of either (1) completing required improvements before a plat is recorded, or (2) taking advantage of a land use authority's completion assurance option.[12]

The City's current approach effectively eliminates that choice. A developer may opt out of providing completion assurance, but only if the improvements are completed in less than six months.[13] Because the City's subdivision approval lapses if a plat is not recorded within six months, for many developers the option provided in § 604.5 becomes a Hobson's Choice—either post a completion assurance bond or forfeit the subdivision.[14] This eliminates any viable alternative, imposing an obstacle to the accomplishment and execution of the ***full*** purposes and objectives of the legislature. The City's approach thus impermissibly conflicts with § 10-9a-604.5.

This conclusion does not extinguish the City's authority to require installation of improvements or landscaping, or to allow completion bonds as an option for developers. The City could possibly eliminate the conflict by modifying its approach so that developers have a greater opportunity to choose whether or not to use the City's completion assurance option. This could be accomplished by allowing more time to record a plat, or even the possibility of extending the recording deadline when reasonably necessary.[15] This would allow developers time to complete improvements, while still permitting them the option of using a completion assurance bond.

Conclusion

The City's discretion to choose the amount for a completion bond should be limited to what is reasonably necessary to complete the improvements. The purpose of an improvement completion assurance is to provide funding for required improvements if the developer is unable to complete them. The amount must therefore be roughly equal to what would be needed for completion; the costs could include any anticipated administrative costs that may be required should the City assume responsibility for the improvements.

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[11] The statute uses the language "upon the applicant's request," indicating an intent to allow developers (or applicants) the choice of whether or not to provide completion assurance when a local government has adopted an ordinance governing completion assurance. *See* UTAH CODE ANN. § 10-9a-604.5(2)(b).

[12] A developer would not be able to sell (or even market) lots within a subdivision until the plat is recorded, providing an incentive to either complete the improvements, or provide completion assurance.

[13] The City indicates that a developer should apply for approval of a completion assurance bond if the improvements are not completed within five months, to ensure that the plat approval will not be forfeited.

[14] A "Hobson's Choice" is "the choice of taking either that which is offered or nothing; the absence of a real alternative." Dictionary.com, *Hobson's Choice*, http://dictionary.reference.com/browse/Hobson's%20Choice?s=/ (December 24, 2014).

[15] This Opinion in no way suggests that a deadline to record subdivision plats is invalid or should be extended indefinitely. To the contrary, promptly recording plats fulfills important public objectives, by eliminating "stray" plats, facilitating development, and promoting finality and reliability in property descriptions. The proposed modifications are offered as suggestions, and should not be interpreted as imposing any sort of requirement upon the City.

A local ordinance conflicts with state law if the ordinance imposes an obstacle to accomplishing the full purposes and objectives of the state statute. The language of § 604.5 indicates an intent that developers may choose whether or not use an improvement completion assurance. The City's approach effectively eliminates that option, since a subdivision plat will expire if it is not recorded within six months. If the option is eliminated, the City's ordinances impermissibly conflict with § 604.5.

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.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

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:

Rachel Stenta, City Recorder
City of Moab
217 East Center Street
Moab, Utah 84532

On this _____ Day of January, 2015, 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