

Legal Summary re: Grading and Landscape Easement

Subdivision Plat Requirements. The City approves subdivision plats by virtue of the provisions in Title 7 of the City Code and pursuant to state statute, including 65 ILCS 5/11-15-1. Subdivision plats are frequently approved by the City Council, however if the proposed subdivision plat meets certain criteria, it may be approved administratively. (Section 7-2-5 of the Naperville Municipal Code). When the City approves subdivision plats (which includes plats of consolidation such as the plat proposed to be approved by Mr. Mayor), it is not enforcing easements shown on the plat; it is only requiring that they be reflected on the plat.

Section 7-2-1 of the City Code sets forth minimum Subdivision Plat requirements. Subsection 7-2-1:1.2 requires “All content as required by the Transportation, Engineering and Development Business Group, as stipulated on a checklist provided by the City, as may be amended from time to time.” The City subdivision plat checklist, available on the City website, requires existing easements to be shown on subdivision plats. The Grading and Landscape Easement and Public Drainage Easement in question is a recorded easement of record and has been since June 15, 2004. If a title commitment were run on the Mr. Mayor’s property today, that easement would show as a current easement of record.

The Grading and Landscape Easement in question (recorded with the DuPage County Recorder under Document Number R2004-159735) provides that it is:

“For the benefit of and granted to the Homeowners Association and its respective successors and assigns over lots where the area is shown on the plat and marked Grading and Landscaping Easement. Such easement shall be for the purpose of screening, protecting, and separating said lots from ___ with trees, shrubs, bushes and other forms of vegetation. No permanent building, structure or other means of vehicular access to such slots shall be constructed or maintained on, through, or over the area designated on the landscape easement except as shown on the landscape plans shown herein.” [Emphasis added.]

Specific City Action Requiring the Grading and Landscape Easement for Jefferson Estates. In addition to the Code requirements regarding minimum subdivision plat requirements, in this instance the City also affirmatively took legislative action to require a grading and landscape easement as part of the “Jefferson Estates Final Development Plans” approved by Ordinance 03-214. (See Section 3(b)). No City Council action has been taken to modify or reverse the City’s 2003 decision to require the Grading and Landscape easement.

Validity of the Grading and Landscape Easement. Mr. Mayor has objected to the City’s requirement to show the Grading and Landscape Easement on the proposed plat of consolidation. He contends that the recorded Grading and Landscape Easement is not valid. The basis for his contention is that the Grading and Landscape Easement was recorded on the subject property (which includes his property) after the owner of the subject property (Charleston Classic Homes)

conveyed title to the property by warranty deed to the Catholic Diocese of Joliet. The deed to the subject property and the Grading and Landscape Easement affecting the subject property, both conveyed or granted by Charleston Classic Homes, were recorded within the same minute on June 15, 2004. Since the deed was the first of the two documents to be recorded, Mr. Mayor argues that the easement could not have been effectively granted by Charleston Classic Homes.

The City has been provided with two legal opinions regarding the validity of the Grading and Landscape Easement; one drafted by Kevin Gensler, one of Mr. Mayor's attorneys, and one by Paul Mitchell, legal counsel for Charleston Classic Homes. Not surprisingly the opinions come to opposite conclusions. It is my opinion that with recordation of the relevant documents occurring within the same minute, a court being asked to make a decision on the issue would look to the intent of the parties to determine whether such an easement was intended to not.

The deed to the subject property (recorded immediately before the Grading and Landscape Easement) included a provision making the conveyance "Subject to" a number of items listed on Exhibit B of the deed, including item #11: "Grant of Grading and Landscape Easement, Conservation Easement, and Public Utility and Drainage Easement dated the date hereof". It seems clear that the intent of both the Catholic Diocese and Charleston Classic Homes was for the Grading and Landscape Easement to attach to the subject property.

Furthermore, City Ordinance 03-214 "Approving the Final Plat of Subdivision, Plat of Easement, and the Development Plans for Jefferson Estates" was also recorded with the DuPage County Recorder (R2004-171706 on June 25, 2004) making it clear that it was the City's intent that there be a grading and landscape easement (specified in Section 3(b) of the Ordinance).

Finally, Mr. and Mrs. Mayor were conveyed a portion of the subject property by deed recorded on May 14, 2013 with the DuPage County Recorder as R2013-070153. The deed provides, in part, that the property was conveyed "subject only to: Covenants, conditions and restrictions of record; private, public and utility easements and roads and highways..." The Grading and Landscape Easement was of record, as was Ordinance 03-214, at the time the Mayors purchased the property; thus they acquired the property with full knowledge of the existence of the Grading and Landscape Easement.

Conclusion. While the legal opinions articulated by Mr. Gensler and Mr. Mitchell may both have merit on the issue of the validity of the Grading and Landscape Easement, the decision as to which opinion, if either, is correct, should not be made by the City Council. The legal issue is one that should be determined by a court of law, particularly since it affects the rights of a homeowner's association and homeowners not before the City Council for whose benefit the easement was granted.

Until such time as a court of law makes a determination as to the validity of the Grading and Landscape Easement in question, it is legal staff's opinion that the City should require that

the Grading and Landscape Easement be reflected on the proposed plat of subdivision submitted to the City for approval by Mr. Mayor.