

OFFICE OF THE ATTORNEY GENERAL



94-00147

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ATTORNEY GENERAL
STATE OF ALABAMA

APR 22 1994

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Honorable Robert W. Ennis, IV
City Attorney, City Council of
City of Tuscaloosa
Legal Department
City Hall Building
P. O. Box 2089
Tuscaloosa, AL 35403-2089

Municipalities - Subdivisions
- Streets

1. A municipality may authorize water mains, sewers or connections to be laid within public easements on private streets within territory for which the Planning Commission shall have adopted a major street plan if the private street is on a subdivision plat approved by the Planning Commission, or on a street plat made and adopted by the Commission.

2. A building may be erected on any lot within the Planning Commission's territory, and a building permit may be issued therefor on a private street if the private street is on a subdivision plat approved by the Planning Commission or on a street plat made and adopted by the Planning Commission.

Prior opinions in conflict
with the conclusion reached
herein are overruled.

Dear Mr. Ennis:

This opinion is issued in response to your request for
an opinion from the Attorney General.

QUESTIONS

1. May a municipality, in accordance with § 11-52-34, Code of Alabama 1975, authorize water mains, sewers or connections to be laid within public easements on a private street within any portion of the territory for which the Planning Commission shall have adopted a major street plan if the private street is on a subdivision plat approved by the Planning Commission, or on a street plat made and adopted by the Commission?

2. May a building be erected on any lot within the Planning Commission's territory or part thereof, and may a building permit be issued therefor on a private street giving access to the lot upon which such building is proposed to be placed if the private street is on a subdivision plat approved by the Planning Commission or on a street plat made and adopted by the Planning Commission in accordance with § 11-52-35, Code of Alabama 1975?

FACTS, LAW AND ANALYSIS

Code of Alabama 1975, § 11-52-34 states, in pertinent part:

"The municipality shall not accept, lay out, open, improve, grade, pave, curb or light any street or lay or authorize water mains or sewers or connections to be laid in any street within any portion of territory for which the planning com-

mission shall have adopted a major street plan unless such street shall have been accepted or opened as or shall otherwise have received the legal status of a public street prior to the adoption of such plan or unless such street corresponds with a street shown on the official master plan or with a street on a subdivision plat approved by the planning commission or with a street on a street plat made by and adopted by the commission."

Code, § 11-52-35 provides:

"From and after the time when a planning commission shall have adopted a major street plan of the territory within its subdivision jurisdiction or part thereof, no building shall be erected on any lot within such territory or part nor shall a building permit be issued therefor unless the street giving access to the lot upon which such building is proposed to be placed shall have been accepted or opened as or shall otherwise have received the legal status of a public street prior to that time or unless such street corresponds with a street shown on the official master plan or with a street on a subdivision plat approved by the planning commission or with a street on a street plat made by and adopted by the commission or with a street accepted by council after submission to the planning commission by the favorable vote required in section 11-52-34."

This office previously concluded at Quarterly Report of the Attorney General, Vol. 151, p. 12, that pursuant to the above-cited provisions, a municipal planning commission may not approve a subdivision of territory unless the map thereof shows a dedication of public streets. It was also concluded in this opinion that no building permit may be issued by a municipality for a subdivision of territory unless the map thereof shows a dedication of public streets. These conclusions were upheld in an opinion of the Attorney General to Honorable J. Wagner Finnell, City Attorney, City of Tuscaloosa, dated May 1, 1978. You request a reconsideration of

the conclusions of the above-mentioned opinions because the City of Tuscaloosa is now receiving requests from developers to utilize the "private street concept" which would permit development of residential areas with private streets.

The City of Tuscaloosa has the following requirements which would have to be met for planned unit development with private streets:

"1. The private streets would be designed and constructed prior to final approval, and to the same standards required for design and construction of public streets.

"2. Adequate access would be provided to public authority for police and fire protection, public utilities and other public services.

"3. The PUD plat would dedicate public easements for water, sewer and other utilities.

"4. There would be a Homeowner's Association which would have an agreement for the maintenance of private ways and common areas to the same level and standards as that practiced by the City for maintenance of public ways, including traffic control devices.

"5. There would be noted on the plat recorded in the Probate Judge's office, a provision for the dedication of any of the private streets to public streets if the governing body of the City determined in the future that the same was required for adequate public access for adjacent or other property or required for the public health, safety and welfare.

"6. No private street would be permitted if the street were shown on either the major street plan of the City or of any metropolitan planning organization.

"7. No development with private streets would be permitted except in accordance with a PUD plan approved by the Planning and Zoning Commission and the governing body of the City."

For the reasons stated below, the Attorney General is of the opinion that the opinion found at Quarterly Report of the Attorney General, Vol. 151, p. 12, is due to be overruled, and the opinion to Honorable J. Wagner Finnell, dated May 1, 1978, is modified to the extent it conflicts with the conclusions reached herein.

The first reason is the reading of the statutes involved. Code, § 11-52-34 and § 11-52-35 prohibit a municipality from engaging in certain activity unless such street has been accepted or opened or otherwise received the legal status as a public street, or unless such street corresponds with a street shown on the official master plan or with a street on a subdivision plat approved by the planning commission or with a street on a street plat made and adopted by the planning commission. It is the opinion of this office that the wording of § 11-52-34 and § 11-52-35 shows alternative methods by which streets can be created and utilized in a subdivision.

Secondly, my research reveals that although the Alabama appellate courts have not ruled on the questions presented here, the courts clearly appear to recognize the validity of private roads in subdivision plats. For example, in CRW, Inc. v. Twin Lakes Property Association, 521 So.2d 939 (Ala. 1988), the Alabama Supreme Court ruled regarding streets considered to be private in a subdivision: (1) recordation of a subdivision plat alone did not constitute statutory dedication of subdivision roads, and (2) the use of these roads by utility, emergency and commercial vehicles did not convert them to public roads.

Thirdly, although condominium ownership is governed by distinct laws, this office stated in an opinion to Honorable Earl Mitchell, State Representative, District No. 89, dated September 16, 1980, A.G. No. 80-00577, that an alternative interpretation of Code, § 11-52-35, could be reached allowing condominium areas, which include private drives and access ways as part of the "common elements" of the property, provided that such private drive gives access to a public street.

CONCLUSION

1. A municipality may, under Code, § 11-52-34, authorize water mains, sewers or connections to be laid within public easements on private streets within territory for which the Planning Commission shall have adopted a major street plan if the private street is on a subdivision plat approved by the Planning Commission, or on a street plat made and adopted by the Commission.

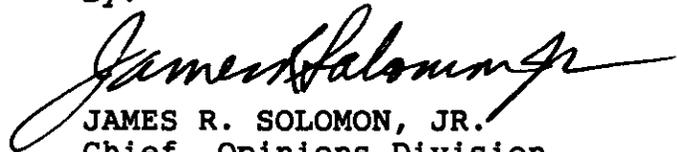
2. A building may be erected on any lot within the Planning Commission's territory, and a building permit may be issued therefor on a private street if the private street is on a subdivision plat approved by the Planning Commission or on a street plat made and adopted by the Planning Commission in accordance with Code, § 11-52-35.

Opinion found at Quarterly Report of the Attorney General, Vol. 151, p. 12, is due to be overruled, and the opinion to Honorable J. Wagner Finnell, dated May 1, 1978, is modified to the extent it conflicts with the conclusions reached herein.

I hope this sufficiently answers your questions. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

JIMMY EVANS
Attorney General
By:


JAMES R. SOLOMON, JR.
Chief, Opinions Division

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