Advisory Opinion #121

Parties: Matthew M. Stewart and Provo City

Issued: March 15, 2013

TOPIC CATEGORIES:
D: Exactions on Development

A government entity may require a developer to contribute to public facilities, but only to the extent necessitated by the impact of the development. Any required contribution over and above what is needed is an exaction, Voluntary contribution to public facilities would not be considered an exaction, and a developer could not claim compensation. A suit claiming compensation for a property taking should not be unduly restricted by statute or rule.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Matthew M. Stewart
Local Government Entity:	Provo City
Applicant for the Land Use Approval:	Bilogio, LLC Sunridge Development, LLC
Type of Property:	Residential Subdivision
Date of this Advisory Opinion:	March 15, 2013
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

When is a developer entitled to compensation for construction of public facilities?

Is a new developer entitled to compensation for work completed by a prior owner?

May a person or entity pursue a lawsuit claiming compensation for a property taking?

Summary of Advisory Opinion

It is not possible for this Opinion to determine if the developer is entitled to compensation, because not enough information has been provided. Utah Law is very clear that a local government may only require dedication or construction of public facilities to the extent necessitated by the impact of the new development. Any required dedication over and above what is needed due to the development's impact is excessive, and would possibly require compensation. However, compensation would only be required if the dedication were mandatory. Voluntary contribution to a public facility would not necessarily require compensation.

A new developer would not automatically be entitled to compensation for work done by the previous owner, unless an agreement provides otherwise. A new developer, however, may assume responsibility for a specific development that has already been approved, and would be entitled to any privileges extended to the previous owner.

A person or entity may pursue a lawsuit claiming compensation for a property taking, based on constitutional protections. Because a takings claim is based on constitutionally-protected rights, a suit may not be unduly restricted by statute or rule, although there are procedural requirements that must be followed.

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 Matthew M. Stewart on June 14, 2012. A copy of that request was sent via certified mail to Janene Weiss, City Recorder for Provo City, at 351 W. Center Street, Provo, Utah. 84601. The City received that copy on June 18, 2012.

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 Matthew M. Stewart, of Bilogio, LLC, received by the Office of the Property Rights Ombudsman on June 14, 2012.
2. Response from Provo City, submitted by Wayne C. Parker, Chief Administrative Officer, received July 6, 2012.
3. Letter from Bruce R. Baird, attorney for Sundridge Development, LLC, received on September 24, 2012.
4. Response from Provo City, submitted by Robert Trombly, Assistant City Attorney, received on October 30, 2012.

Background

For many years, Sunridge Development, LLC ("Sunridge") had an interest in property located near Slate Canyon, in the foothills on the eastern side of Provo. The property is directly in the path of the natural drainage from the canyon. Because stormwater runoff is a particular problem, any development on the property must accommodate drainage. When the property was acquired

in 1981, the property could be potentially be accessed from seven different streets. Because of economic conditions, development activity on the property was repeatedly delayed. Bilogio LLC, the current owner objects to the City's assessment of impact fees on the development.

The property was used for gravel extraction up until 1981, when Sunridge's predecessor company acquired it, intending to develop the property for residential uses.[1] According to Sunridge, when the property was acquired in 1981, it was unsafe and unsightly, due to the gravel extraction activities. Sunridge began to rehabilitate the property, and Provo City granted a zoning change and preliminary approval of a development including a maximum of 774 residential units. Although Sunridge intended to develop the area, economic conditions forced them to suspend activity for several years. It is not clear what, if any, development approvals were granted in 1981.

In the mid-1990s, Sunridge was again able to consider development, and proposed a subdivision similar to the 1981 plan. The Provo City Planning Commission reduced the number of units, and also eliminated five of the seven possible access routes. Later, the City's Board of Adjustment restored one of the access points, meaning that the property had three possible access routes. As part of the approval, the City required that Sunridge construct a new road, connecting Slate Canyon Drive to 300 South Street. Sunridge objected to that requirement, pointing out that three separate traffic studies had each concluded that the connection was not necessary for the development, and that the City had eliminated four alternative access points. However, in the spring of 1997, the City and Sunridge agreed to split the cost of the new road, and construction was completed. Sunridge claims that the City should reimburse it further for that road.[2]

Sunridge also completed improvements to accommodate drainage on the property. A drainage channel was moved to carry runoff to the City's stormwater system. Sunridge maintains that the City originally agreed to assist with the channel realignment by providing construction equipment. However, Sunridge states that the City eventually withdrew from participating, because the City's equipment was not suitable for the type of work being done.[3] Sundridge eventually completed work on the channel at its own expense, including rental of heavy equipment.

After the channel was relocated, the City informed Sunridge that the channel was too small, particularly for debris.[4] Sundridge states that the City required additional drainage and control

[1] According to the applicant for this Opinion, the predecessor company was Bow Valley Development Corporation, which acquired the parcel through a foreclosure sale. Bow Valley became Sunrdige Development, LLC, which was the entity involved in most of the history regarding the property. The present owner of the property is Bilogio, LLC, which has applied for development approval. For the sake of clarity, the property owner will be referred to as Sunridge, because that company's activities appear to be central to the dispute.

[2] The City explains that the Slate Canyon Connector was built before the City charged road impact fees, and that the City has already granted a "100% credit" towards road impact fees for the Sunridge development. Sunridge evidently still objects to the road alignment, and feels that it is entitled to reimbursement for its share of the construction costs.

[3] According to the materials submitted for this Opinion, the City felt that its equipment would be damaged by the work, which involved removal of concrete and large rocks.

[4] Sunridge states that the City approved the design of the relocated channel prior to construction, and that the channel's capacity is 850 cubic feet per second.

facilities to handle runoff. Sunridge objects to this additional requirement because it feels that had the City been more conscientious about the design of the channel, it would have been designed with a larger capacity, and the additional construction would not have been necessary. Sunridge feels that this is the City's mistake, and that Sunridge should not be obligated to build additional facilities to handle runoff. The City maintains that there was no agreement in place between it and Sunridge regarding relocation of the channel, or for credits toward impact fees.[5] The City also notes that the channel relocation made space for additional homes in the development.[6]

In addition, Sunridge states that it constructed other offsite facilities to control runoff from Slate Canyon. The developer maintains that these facilities benefit other properties (and the City in general), and so Sunridge should receive credit from the City's impact fees. Sunridge claims this additional work cost approximately $140,000.00. Sunridge objects to being charged impact fees after it has already contributed significant facilities to the City.[7]

Finally, Sunridge claims that that the City's impact fees are unfair, and were incorrectly calculated. Sunridge states that since most of the City's infrastructure was paid for many years ago, it is not fair to impose cost of new infrastructure on new development. Sunridge also implies that the City impact fees are unfair because they are being used to fund facilities that only benefit specific areas, rather than the City as a whole. Aside from these general statements, Sunridge presents no other analysis of the City's impact fees.

The City maintains that its impact fees are fair and correct, and that Sunridge is not entitled to any additional credits. The City notes that it has already reduced the total impact fees, in recognition of the facilities constructed by Sunridge. It also point out that the current applicant, Bilogio, LLC is a different entity than Sunridge. The City argues that it cannot grant impact fee credits to a different entity than the company that supposedly "earned" the credits.

Analysis

Sunridge—and Bilogio, LLC, the applicant for development approval—claim entitlement to impact fee credits or other compensation for construction of public improvements that benefit other properties (and the City in general), exceeding what was necessary for the Sunridge development. Although the issue presented for this Opinion refers to impact fees, the proper analysis appears to be the rough proportionality test adopted by the U.S. Supreme Court for exactions. Sunridge's claims for compensation are essentially claims for invalid exactions, and rough proportionality analysis would apply even if the construction occurred prior to the Utah

[5] The City did not charge stormwater impact fees at the time of the channel relocation. The Utah Legislature adopted the Impact Fees Act (currently §§ 11-36a-101 to -705 of the Utah Code) in 1995. However, several cities had a form of impact fees (or property dedication) prior to that enactment. *See e.g.*, *Call v. West Jordan*, 606 P.2d 217 (Utah 1979) (required dedication of land for stormwater runoff and/or parks).

[6] The City states that space for as many as 12 additional homes were made possible by relocating the channel, but Sunridge claims that only one additional home was made possible.

[7] Evidently, the City participated in the construction of a berm, providing fuel and some material for the project. The developer claims that there was an agreement with the City Engineer that Sunridge would receive credit for storm water impact fees. However, there was no formal agreement between the City and Sunridge.

Impact Fees Act or the U.S. Supreme Court's decision in *Dolan v. City of Tigard*.[8] The City stands by its impact fees, and maintains that the credits it has already granted are appropriate and fair, and that the developer is not entitled to additional compensation.

I. A Local Government May Not Require A Property Developer to Dedicate More Than What is Needed Due to the Development's Impact.

The law in Utah is firmly established that a local government may not require a property owner or developer to construct (or contribute to) public facilities beyond what is needed due to the development activity.

> [I]f the burden cast upon the subdivider is *reasonably* attributable to his activity, the requirement [of dedication or fees in lieu thereof] is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power. *Insofar as the establishment of a subdivision within a city increases the . . . needs of the city, then to that extent the cost of meeting that increase indeed may reasonably be required of the subdivider.*

Call v. West Jordan, 614 P.2d 1257, 1259 (Utah 1980) (*quoting Home Builders Association of Greater Kansas City v. City of Kansas City*, 555 S.W.2d 832, 835 (Mo. 1977))(First and last alterations added, emphasis in original Missouri Supreme Court opinion).[9] *Call* is particularly applicable to this matter, because it also concerned dedication of property and improvements for flood or stormwater control. *See Call*, 614 P.2d at 1258; *see also Call v. West Jordan*, 606 P.2d 217, 218 (Utah 1980) (earlier decision on the same matter).[10]

The policy explained in the *Call* decisions underpins the rules governing exactions and impact fees.[11] Simply and broadly put, a required exaction or impact fee "must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred." *Banberry Development Corporation v. South Jordan City*, 631 P..2d 899,

[8] 512 U.S. 374 (1994). The Court's analysis in *Dolan* adopted the Utah Supreme Court's reasoning in *Call v. West Jordan*, 606 P.2d 217, 220 (Utah 1979). *See Dolan*, 512 U.S. at 390-91.
[9] *See also Dolan v. City of Tigard*, 512 U.S. 374, 390-91 (1994)(*citing Call v. West Jordan* as representative of the "rough proportionality" test adopted to analyze development exactions).
[10] The two *Call* decisions concerned a city's requirement that a developer dedicate land (or pay fees in lieu of dedication) for "flood control and/or parks and recreation facilities." *Call*, 606 P.2d at 218.
[11] Impact fees are a type of exaction, *Salt Lake County v. Board of Education of Granite School District*, 808 P.2d 1056, 1058 (Utah 1991), which are directly governed by the Impact Fees Act.

903 (Utah 1981).[12] This policy, however, applies to land dedication or fees required as a condition of development approval.[13]

As Sunridge points out, a developer has the responsibility of controlling increases to stormwater runoff caused by development on the property. A local government may require construction of pipelines, canals, or water retention basins to ensure that stormwater is controlled or conveyed away from the development without causing flooding or other damage. These onsite facilities usually connect to a public system that controls stormwater for the entire community. A local government may only require a development to install those facilities reasonably needed to address stormwater runoff attributable to the new development. Any requirement over and above that which is necessary to address the development's impact is an improper exaction.[14]

Thus, if it is proven that Sundridge was required to construct public facilities over and above what was necessitated by the proposed development in order to gain approval for a development, then Sunridge may possibly claim entitlement to compensation for the additional work. On the other hand, if the work was not a government-mandated condition of development approval, it is not a development exaction, which means that Sundridge may not necessarily claim compensation.[15] It must be shown that the construction was required by the City rather than voluntarily undertaken by Sunridge.[16]

II. It is Impossible for This Opinion to Determine if Sunridge is Entitled to Compensation.

A. There Is Not Enough Information to Properly Evaluate Sunridge's Claims

Because the parties have not provided enough information, it is impossible for this Opinion to determine whether or not Sunrigde is entitled to compensation for the claimed dedications. In particular, there is no attempt to measure the impact of the new development, which is crucial to determining the validity of required exactions. Moreover, it has not been clearly established which, if any, of the proposed construction projects were *required* as a conditions for

[12] The *Banberry* decision proposed seven factors to consider when determining whether an exaction or fee is equitable, although the decision took care to point out that those seven were not the only factors that could be considered. *See Banberry*, 631 P.2d at 903-04. Those factors were eventually adopted as part of the Impact Fees Act, and form the heart of impact fee analysis. *See* UTAH CODE ANN. §§ 11-36a-301 to -306.

[13] *B.A.M. Development, LLC v. Salt Lake County*, 2012 UT 26, ¶ 16, 282 P.3d 41, 45 ("*BAM III*") ("A development exaction is a *government-mandated* contribution of property imposed as a condition of approving a developer's project.") (emphasis added).

[14] If required construction or land dedication is an improper exaction, the local government may modify the requirement so that it is roughly equivalent to the impact of the development, or it may pay for the additional work itself. In order to be valid, exactions must satisfy rough proportionality analysis. *See B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 46, 128 P.3d 1161 ("*BAM I*").

[15] A similar approach would apply to roads or other public facilities required in order to gain development approval. A developer may only be required to construct or dedicate roads to the extent necessary due to the impact of the new development.

[16] Voluntary construction and dedication of facilities, even if they benefitted the public, would not necessarily be considered a taking.

development approval. In fact, there appears to be some dispute on the motivation for the berm construction and channel relocation.

From the facts provided, it can be established that Sunridge undertook improvements to the property starting in 1981, when it first acquired the parcel. Those improvements included stabilizing and rehabilitating the former gravel operations, including control of stormwater runoff from both the property and Slate Canyon. It is not clear if that work was required by the City, or was performed as part of an agreement. After some time, Sunridge again proposed development on the property, and apparently submitted a subdivision plan. In 1997, the City and Sunridge agreed to share the costs for extending Slate Canyon Drive to 300 South. At about the same time, Sunridge relocated the drainage channel and constructed a berm to divert drainage from Slate Canyon. Although Sunridge claims that City officials verbally committed to either participate or provide reimbursement for construction of these stormwater control facilities, there is no evidence of formal agreements between Sunridge and the City for those projects.[17]

Even if the construction projects undertaken by Sunridge were considered to be required exactions (and this Opinion makes no conclusion on whether or not they were), the validity of the exactions depends upon how the cost of the construction projects compares to the measure of the development's impact. *See B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, ¶¶ 10-12, 196 P.3d 601, 603-04 ("*BAM II*").[18] Without evidence of the development's impact, it is impossible to determine if Sunridge may claim compensation or not.

B. A New Property Owner Is Not Automatically Entitled to Compensation or Other Privileges for Work Done by the Prior Owner, but May Succeed to Rights and Responsibilities for Specific Developments.

Although this Opinion cannot conclude whether compensation is owed or not, it will address the City's question of whether a successor owner would be entitled to compensation for work done by a previous owner. At first glance, the answer seems obvious: Unless there is some agreement or provision that states otherwise, a new owner would not automatically be entitled to any compensation due to a prior owner. However, it stands to reason that a successor owner who assumes responsibility for a specific development would "step into the shoes" of the prior developer insofar as the development was concerned, succeeding to any conditions and privileges associated with the development's approval. In that situation, the successor owner

[17] The City and Sunridge did enter a formal agreement governing construction of the Slate Canyon Road, and an even allocation of construction costs. There has been no evidence presented indicating a breach of that agreement, or a failure to perform. Since the agreement was signed and performed in 1997, an action based upon it may be barred by the statute of limitations.

[18] The Utah Supreme Court explained that a valid exaction must be roughly proportionate in nature and extent to the impact of the development. An exaction is roughly proportionate in nature if the exaction "solves" a "problem' created by the new development. The exaction is roughly proportionate (or roughly equivalent) in extent if the cost of the exaction is roughly equal to the cost necessary to address the impact attributable to the new development.

would assume responsibility for completing improvements, and would also claim entitlement to any credits available for improving public facilities.[19]

In the factual situation presented for this Opinion, it would appear that Bilogio, as a new owner, should not be able to claim compensation for work done several years ago by Sunridge, unless some provision provides otherwise. Bilogio, as the current development applicant, would have the same rights as any developer would, at least as far as current approvals and conditions are concerned. This does not limit Sunridge from paying any award it might receive to Bilogio, because the City would have no control over an award after it has been paid.

III. Sunridge May Need to Pursue a Takings Claim to Resolve This Dispute.

As this Opinion cannot determine if Sunridge is entitled to compensation, or even if the construction that it performed were required by the City, it may be necessary for Sundridge to pursue a claim under the Takings Clauses of the Federal and State Constitutions.[20] Exactions are property takings. *B.A.M. I*, 2006 UT 2, ¶ 34, 128 P.3d at 1169. Filing and prosecuting a lawsuit based on a takings claim may be complicated and presents many other issues that are beyond the scope of this Opinion. Nevertheless, a property owner has the right to pursue a takings or inverse condemnation claim if compensation has been denied. *See Wintergreen Group, LC v. UDOT*, 2007 UT 75, ¶ 10, 171 P.3d 418, 421. (Claim not ripe until administrative remedies have been exhausted). Because a takings claim is based on constitutionally protected rights, it may not be unduly preempted by statutes, although a claim must adhere to some procedural rules.

> A constitutional cause of action rooted in the organic law of our state is presumptively superior to and must displace any statutory iteration that either conflicts with it or gives it less than full effect. Owing to its different lineage, a constitutional cause of action can never be preempted by statute, regardless of how fully the statute honors the contours of the constitutional claim.

Id., 2007 UT 75, ¶ 14, 171 P.3d at 422 (holding that claimant could pursue an independent claim for compensation). Thus, Sunridge could pursue its claims in an independent lawsuit, although it must comply with statutory and procedural rules. As has been stated, this Opinion offers no insight on the validity of a possible Sunridge claim, because the evidence needed for properly analysis is lacking.

Conclusion

It is not possible for this Opinion to determine if the property developer is entitled to compensation, because not enough information has been provided. There is no question that a local government may not require new development to construct or dedicate public facilities over

[19] It should also be recognized that it is a common practice for a developer to create a new legal entity for a specific project, even though the new entity has the same owners or directors. It is not clear whether this is the case in this situation, although there appears to be a close relationship between the owners of Sunridge and Bilogio.

[20] *See* U.S. CONST. Amend. V, and UTAH CONST., art I, § 22 ("Private property shall not be taken or damaged for public use without just compensation.")

and above what is necessary to address the impact caused by the development. The impact therefore measures the validity of the required dedication.

A mandatory dedication or construction of public facilities is an exaction, and excessive exactions may require compensation to the developer. However, compensation would only be owed if the dedication is required by the public entity. Voluntary contributions are not exactions and would not necessarily require compensation.

Absent an agreement or some other provision, a new property owner may not claim compensation for work performed by a previous owner. However, a new owner may assume the rights and responsibilities for an approved development, and may therefore be entitled to the same privileges extended to the prior developer.

A person may pursue a lawsuit claiming compensation for a property taking, as provided by constitutional protections. While there are some procedural rules which must be followed, a takings claim may be pursued independently. Furthermore, because a takings claim is based on protection of a constitutionally-guaranteed right, a suit may not be unduly restricted by statute or procedural rules.

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 Utah 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 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 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 be awarded 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:

Janene Weiss, City Recorder
Provo City
351 West Center Street
Provo, UT 84601

On this _____ day of March, 2013, 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