Advisory Opinion #53

Parties: Tim & Nancy Kriser and City of Mapleton

Issued: October 22, 2008

TOPIC CATEGORIES:

D: Exactions on Development
E: Entitlement to Application Approval (Vesting)
G: Proceeding with Reasonable Diligence
J: Requirements Imposed Upon Development
R(ii): Other Topics (Subdivision Plat Approval)

A city ordinance which voided a subdivision plat for failure to record was valid. Local governments may require construction and dedication of improvements, subject to rough proportionality analysis. Requiring construction and dedication of a curb and gutter for one property, when none of the neighboring properties is required to do so, does not seem proportionate to the impact of a single home.

The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Dedication for Street to Access One New Home

Advisory Opinion Requested by:	Tim & Nancy Kriser
Local Government Entity:	Mapleton City
Applicant for the Land Use Approval:	Tim & Nancy Kriser
Project:	New Home Construction
Date of this Advisory Opinion:	October 22, 2008
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

May a local government require dedication of property to widen and realign an existing roadway, and require installation of curb, gutter, and sidewalk, because a single home will be built on the property?

Summary of Advisory Opinion

A local government may require exactions, such as dedication of property or installation of improvements, as conditions of development approval. Such exactions, however, must satisfy the "rough proportionality" analysis required by § 10-9a-508 of the Utah Code. There must be an essential link between the exaction and a legitimate public interest, and the exaction must be related, both in nature and extent, to the impact caused by the development. The "nature" aspect of the analysis is satisfied if the exaction addresses a problem, or impact, caused by the proposed development. If it does not, the exaction is invalid. The nature of the conditions at issue in this Opinion are not related to any impacts attributable to the proposed development, because the City has not identified any "problems" that are "solved" by the conditions. The "extent" aspect is likewise unsatisfied because the City has not shown that the cost of the exaction is roughly equivalent to the cost to the City to assuage the impact of the Kriser's home.

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. The 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 Tim & Nancy Kriser on August 25, 2008. A copy of that request was sent via certified mail to Camille Brown, Mapleton City Recorder. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on September 25, 2008. A copy of the City's response was mailed to the Krisers.

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, filed August 25, 2008 with the Office of the Property Rights Ombudsman by Tim and Nancy Kriser, with Attachments.
2. Response from Mapleton City, submitted by Cory Branch, City Planner, received on September 25, 2008.
3. Site visit by the Office of the Property Rights Ombudsman.

Background

Tim and Nancy Kriser own a 2.3 acre parcel located at approximately 605 North 2000 East in Mapleton. The property is undeveloped, and has no structures on it, although there are homes nearby. The Krisers have used the parcel to store equipment and materials for their business. The parcel and the nearby homes are accessed by a narrow drive, which is paved with asphalt. There are no other improvements to this drive, which is evidently a public easement across private land. There is no dispute about the existence or continued use of the drive, which is identified as "2000 East." The drive is approximately 30 feet wide, far narrower than the 56-foot standard desired by the City. The existing homes are located along the eastern edge of this drive. There are two properties along the western edge of the drive: The Kriser parcel, and a neighboring property to the south, which is accessed from another street.

An undeveloped and unused right-of-way, identified on the 2004 plat map as "2000 East" runs along the Kriser property to the east. This right-of-way, including the underlying land, appears to be owned by Mapleton City, although it has never been used or developed as a roadway, and is indistinguishable from the neighboring properties. The right-of-way ends abruptly at about the

midway point of the Kriser parcel. There are no signs, monuments, or fences that mark the location of the right-of-way. The end of the undeveloped right-of-way corresponds to the end of the drive, also known as 2000 East, and the location of the northernmost home on the east of the Kriser parcel. There is no paving and no visible evidence that the right-of-way has ever been used by traffic beyond the paved drive. The right-of-way does not connect to a paved road anywhere near the Kriser property.

Beginning in 2000, the Krisers applied for subdivision approval, so they could construct a home on the parcel.[1] On November 3, 2004, the Mapleton City Council approved the final plat for the Kriser lot. One of the conditions imposed for approval of the subdivision was dedication of .18 acres to the City for a street. This dedication would shift the existing drive to the west (toward the Kriser parcel) and away from the homes on the eastern side of the drive.[2] The City also required the Krisers to improve 175 feet of the road, which is just over one-half of the total length of the dedication.[3]

Although the City approved the subdivision application in 2004, the plat was not recorded. Section 17.04.080 of the Mapleton City Code states that a subdivision plat becomes null and void if it is not recorded within three years of approval. Since the 2004 plat was not recorded, it "expired" in November of 2007. In the early part of 2008, the Krisers approached the City, requesting final plat approval. On March 5, 2008, the City's Development Review Committee (DRC) met to consider the request. They pointed out that the 2004 plat had been approved, but was never recorded, so it was void, pursuant to § 17.04.080.

The DRC concluded that the Krisers would need to resubmit their subdivision application, and obtain approval from the planning commission and city council. The DRC also proposed several conditions, including dedication of the "unimproved right-of-way adjacent to the property." The City states that the dedication is necessary "to ensure that a hard surfaced travel-way of at least 33 feet be constructed."[4] The City states that its transportation plan calls for 2000 East to be a 56-foot wide street between 400 North and 1600 North (the Kriser parcel is located at approximately 605 North). The City did not state that it planned to widen the rest of the 2000 East drive, or if it has current plans to construct any portion of the street in that area.

Another condition proposed by the DRC was construction of curb, gutter, and sidewalk along the *entire* length of the Kriser parcel, including the portion beyond the end of the paved drive. None of the other properties along the drive have curb and gutter. Other than the DRC

[1] The Krisers did not submit a site plan showing where any new buildings would be located. The drive continues about 156 feet past the Krisers south property line, which is not quite half of the distance of the eastern property line.
[2] Mr. Kriser stated that the City wanted to realign the driveway because the homes on the eastern side of the drive are too close to the roadway.
[3] The area to be dedicated is "flag shaped," with a narrow strip (180.85 feet x 11.37 feet) running along the undeveloped 2000 East right-of-way, and a wider portion (152.02 feet x 30.3 feet) taking in about one-half of the existing drive. Mr. Kriser states that he does not own the narrow strip, but only the wider portion. The improvements would apparently include paving, as well as curb, gutter, and sidewalk. (*see* Mapleton City Code, § 17.24.020(C)).
[4] The City's standard for roadways is 56 feet, but the City code allows applicants to request permission construct a 33-foot right-of-way, which is slightly more than one half of the standard width.

recommendations, no other action has been taken on the subdivision, and the Krisers have not submitted a new application for the subdivision.

Analysis

I. The Krisers Must Resubmit Their Subdivision Application, Because the Previous Plat was not Recorded.

The subdivision plat approved in 2004 expired because it was not properly recorded within three years, as required by the City's ordinances. An applicant is entitled to approval of development that satisfies applicable zoning ordinances at the time of application, unless a compelling, countervailing public interest justifies denial. *See Western Land Equities v. City of Logan*, 617 P.2d 388, 396 (Utah 1980). Section 10-9a-509 codifies and clarifies the "vested rights" rule established in *Western Land Equities*:

> [A]n applicant is entitled to approval of a land use application if the application conforms to the requirements of the municipality's land use maps, zoning map, and applicable land use ordinance in effect when a complete application is submitted and all fees have been paid.

UTAH CODE ANN. § 10-9a-509(1)(a).[5] An application may be denied if denial is warranted by a compelling, countervailing public interest, or if the municipality is actively considering an ordinance change that affects the application. *Id.* The Utah Code expands on the "vested rights" rule, by prohibiting municipalities from imposing conditions not expressed in statute, ordinance, or expressed and imposed during the approval process. *Id.* § 10-9a-509(1)(h). Furthermore:

> A municipality may not withhold issuance of a certificate of occupancy or acceptance of subdivision improvements because of an applicant's failure to comply with a requirement that is not expressed:
>
> (i) in the building permit or subdivision plat, documents on which the building permit or subdivision plat is based, or the written record evidencing approval of the land use permit or subdivision plat, or
>
> (ii) in [Chapter 10-9a of the Utah Code] or the municipality's ordinances.

Id. § 10-9a-509(1)(i). It follows, then, that a municipality may withhold or withdraw approval if an applicant fails to comply with a requirement that *is* expressed in that municipality's ordinance.

The Krisers submitted their subdivision application in 2004, seeking approval so they could construct a home on the property. The City granted approval in November of 2004. That approval was subject to § 17.04.080 of the Mapleton City Code, which voids any plat not

[5] *See also* § 17-27a-508 (applicable to counties).

properly recorded within three years of the final approval date. Although the operation of that section impinges on the owners' rights to develop their property, it is not an unreasonable restriction, and promotes important public interests. Requiring proper recording of a plat promotes certainty and finality in subdivision plats, and helps avoids unnecessary problems caused by "phantom," or unrecorded plats and land titles. These are legitimate public concerns, and the City is within its authority to impose and enforce § 17.04.080. Accordingly, the previous plat and plat approval is void by operation of § 17.04.080. The Krisers must begin the development process anew if they desire to subdivide their property.

II. The Dedication Required by the City is an Exaction, Which Must Comply with Section 10-9a-508 of the Utah Code.

A. The Dedication is an Exaction, which is subject to "Rough Proportionality" Analysis.

The City's requirement that Mr. and Mrs. Kriser dedicate a portion of their property for roadway widening constitutes an "exaction" under Utah law. "Exactions are conditions imposed by governmental entities on developers for the issuance of a building permit or subdivision plat approval." *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 34, 128 P.3d 1161, 1169 ("*B.A.M. I*").[6] The term "exaction" includes any condition on development, including not only dedication of property, but also payment of money, installation of specific improvements, or other requirements imposed by a public entity. Furthermore, the term "exaction" includes conditions imposed by a general legislative enactment as well as those imposed by decisions or negotiations on specific proposals. *Id.*, 2006 UT 2, ¶ 46, 128 P.3d at 1170. Since the City is asking the Krisers to dedicate a portion of their property as a condition of approval for a subdivision, the City is requiring an exaction, which must satisfy § 10-9a-508(1) of the Utah Code.

In 2005, the Utah Legislature enacted § 10-9a-508 of the Utah Code, which authorizes cities to impose exactions on new development, within established limits:

> (1) A municipality may impose an exaction or exactions on development proposed in a land use application provided that:
> (a) an essential link exists between a legitimate governmental interest and each exaction; and
> (b) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

UTAH CODE ANN. § 10-9a-508(1).[7] The Utah Supreme Court observed that the language of this statute was borrowed directly from the U.S. Supreme Court analyses in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S 374, 114 S.Ct. 2309 (1994). (*See B.A.M. I*, 2006 UT 2, ¶ 41, 128 P.3d at 1170) In those two landmark

[6] *See also Salt Lake County v. Board of Education, Granite School District*, 808 P.2d 1056, 1058 (Utah 1991) (holding that "development exactions" are "contributions to a governmental entity imposed as a condition precedent to approving the developer's project.")
[7] There is a corresponding statute applicable to counties found at § 17-27a-509 of the Utah Code.

cases, the U.S. Supreme Court promulgated rules for determining when an exaction may be validly imposed under the federal constitution's Takings Clause.[8] This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis has been codified in § 10-9a-508.

The Utah Supreme Court further honed the "rough proportionality" analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 45 ("*B.A.M. II*"), which was a second appeal stemming from the same development project at issue in the earlier decision. This opinion explained that rough proportionality analysis "has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent." *B.A.M. II*, 2008 UT 45, ¶ 9. The "nature" aspect focuses on the relationship between the purported impact and proposed exaction. The court agreed that the approach should be expressed "in terms of a solution and a problem . . . . [T]he impact is the problem, or the burden which the community will bear because of the development. The exaction should address the problem. If it does, then the nature component has been satisfied." *Id.*, 2008 UT 45, ¶ 10.

The "extent" aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost:

> The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively. The impact of the development can be measured as the cost to the municipality of assuaging the impact. Likewise, the exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction.

Id., 2008 UT 45, ¶ 11. The court continued by holding that "roughly proportional" means "roughly equivalent." Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the cost that a local government would incur to address (or "assuage") the impact attributable to a new development.[9]

B. The Dedication Satisfies the First Prong of the Rough Proportionality Test

In order to be a valid exaction, the City's dedication requirement must satisfy all aspects expressed in § 10-9a-508(1). First, there must be an essential link between a legitimate interest and the requirement. The City has a legitimate governmental interest in safe and efficient traffic flow.[10] Requiring dedication of a portion of the Krisers property is a reasonable means of

[8] *See* U.S. CONST., amend. V. ("nor shall private property be taken for public use, without just compensation"). The Supreme Court has interpreted the Takings Clause as limiting a government's ability to impose conditions on development. Furthermore, "[t]he Utah Constitution reinforces the protection of private property against uncompensated governmental takings . . . ." *B.A.M I.*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. *See also* UTAH CONST. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation").

[9] As of the date of this Opinion (fall 2008), Salt Lake County has requested that the Utah Supreme Court reconsider the *B.A.M. II* decision. Readers are advised that the decision may be changed or superseded.

[10] *See Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117 ("In order for a government to be effective, it needs the power to establish or relocate public throughways . . . for the convenience and safety of the general public.") *also* UTAH CODE ANN. § 10-8-8.

accomplishing the City's objectives.[11] In addition, installation of curbs, gutters, and sidewalks improves aesthetics and helps control stormwater. Since the City's legitimate interests are promoted by the dedication, the first prong of § 10-9a-508 is satisfied.

C. The Dedication Requirement does not Satisfy the Nature Aspect of the Analysis

The dedication does not meet the "nature" aspect of the analysis. The dedication is not a solution to a problem caused by the impact of the home proposed for the Kriser property. Legal public access to the property presently exists. The construction of a home will result in a very slight increase in traffic, but it there has been nothing submitted to indicate that that the existing access is insufficient to meet the impact of the new home. The addition of a single new home does not create a problem that the dedication is necessary to solve. The City states that the dedication is necessary to ensure a hard surfaced travel-way.[12] However, the drive is a dead end, not a through street. The drive is presently paved up to Kriser's property. The construction of a single home—even if the property is also used for business purposes—does not appear to cause a need to widen or realign a roadway.

D. The Curb, Gutter, & Sidewalk Requirement does not Satisfy the Extent Aspect of the Analysis

Assuming that installation of the curb, gutter, and sidewalk would satisfy the nature aspect of the rough proportionality analysis,[13] the curb, gutter, and sidewalk exaction does not appear to satisfy the extent aspect of the analysis. As has been discussed, the *B.A.M. II* court held that the extent analysis must include a comparison of the burden incurred by the City resulting from the impact of the development against the cost to the developer to provide the improvements. If the cost of the right-of-way and construction of the curb, gutter, and sidewalk is roughly equivalent to the cost the City would spend to assuage the impact from one home, the condition is a proper exaction. If the costs are not roughly equivalent, the exaction violates § 10-9a-508.

This analysis has not been provided, but it appears patent that requiring the installation of curb, gutter, and sidewalk, along with the roadway dedication, along the entire length of the Kriser's 2.3 acre parcel, would exceed the cost to the city to assuage the impact from one home. Unless a

[11] Note that the first step of the evaluation under § 10-9a-508(1)(a) requires an essential link between the requirement and a legitimate governmental interest. This first prong of the test does not require a connection between the exaction and a need attributable to new development. As has been discussed, the "nature aspect" expressed in § 10-9a-508(1)(b) concerns the relationship between the exaction and the need created by new development. *B.A.M. II*, 2008 UT 45, ¶ 10.

[12] The City code states that roads in subdivisions must comply with minimum standards, which would require a 56-foot wide right-of-way for 2000 East. The paved portion of 2000 East is about 30 feet wide, which is barely sufficient to accommodate two-way traffic. However, there has been no indication that the entire roadway is to be widened or improved. The drive serves three other homes.

[13] The City has submitted no evidence showing that such a problem/solution relationship exists between the addition of the Kriser's home and the installation of curb, gutter, and sidewalk. Installation of such improvements may satisfy the nature aspect of the test in some circumstances, but it is certainly in doubt when none of the other properties in the immediate area have curbs and gutters.

contrary analysis is provided, the roadway dedication and installation of the required improvements do not satisfy the "extent" aspect of the rough proportionality analysis.[14]

Conclusion

The 2004 subdivision plat approved by Mapleton City is void, because it was not properly recorded within three years, as required by the City's ordinances. The 2004 plat was subject to the recording requirement, which promotes legitimate public purposes. Even though the ordinance in question voids the Kriser's approved subdivision plat, the City was within its authority to impose and enforce the restriction.

The conditions that the Krisers dedicate property to widen and realign the drive, and install curb, gutter, and sidewalks are impermissible exactions, because the City has not shown that the exactions are necessary because of the home that is proposed for the property, nor has it shown that the cost to the developer is roughly equivalent to the cost to the City to assuage the impact of the Kriser's home. The dedication and improvement conditions do not satisfy the "nature and extent" aspect of the rough proportionality analysis required by the Utah Code, and are therefore impermissible exactions.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

[14] There are other proposed conditions that are not discussed in this Opinion, which may be valid if they satisfy the "rough proportionality" analysis of § 10-9a-508.

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.

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:

Camille Brown, City Recorder
Mapleton City
125 W. Community Center Way
Mapleton, UT 84664

On this _____ Day of October, 2008, 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