

Advisory Opinion #170

Parties: Destination Homes, Inc., Legacy Neighborhoods, LLC
and Golden Land Management, Inc.

Issued: July 19, 2016

TOPIC CATEGORIES: Impact Fees

Kaysville City's requirement that Destination Homes pipe the Joe Hill Ditch is an illegal exaction and a violation of Kaysville City ordinance. Kays Creek Irrigation Company has unequivocally determined that it will not distribute water in the Joe Hill Ditch. Therefore, no water will flow through the Joe Hill Ditch in the future. With no water in the Ditch, requiring that Destination Homes pipe the ditch is an illegal exaction, because the exaction does not solve a problem that the development activity creates. Moreover, a requirement to pipe violates a Kaysville City ordinance, which requires a ditch with no water to be removed.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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ADVISORY OPINION

Advisory Opinion Requested By: Destination Homes, Inc.,
Legacy Neighborhoods, LLC and
Golden Land Management, Inc.

Local Government Entity: City of Kaysville

Applicant for Land Use Approval: Destination Homes, Inc.,
Legacy Neighborhoods, LLC and
Golden Land Management, Inc.

Type of Property: Residential Development

Date of this Advisory Opinion: July 19, 2016

Opinion Authored By: Brent N. Bateman
Office of the Property Rights Ombudsman

ISSUE

Can Kaysville City require Destination Homes to pipe in the Joe Hill Ditch?

SUMMARY OF ADVISORY OPINION

Kaysville City's requirement that Destination Homes pipe the Joe Hill Ditch is an illegal exaction and a violation of Kaysville City ordinance. Kays Creek Irrigation Company has unequivocally determined that it will not distribute water in the Joe Hill Ditch. This is within Kays Creek Irrigation Company's sole discretion, and is a legal and enforceable decision under both the company's Articles of Incorporation and State law. Shareholders will receive their water through the Weaver Lane Pipe. Therefore, no water will flow through the Joe Hill Ditch in the future.

With no water in the Ditch, requiring that Destination Homes pipe the ditch is an illegal exaction under the constitutional *Nollan/Dolan* analysis. The exaction does not solve a problem that the development activity creates. Moreover, a requirement to pipe would violate a Kaysville City ordinance, which requires a ditch with no water to be removed.

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 Stephen F. Noel, Attorney for Destination Homes, Inc., Legacy Neighborhoods, LLC, and Golden Land Management, Inc. on June 17, 2016. A copy of that request was sent via certified mail to Linda Ross, Kaysville City Recorder 23 East Center Street, Kaysville, Utah.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Stephen F. Noel, Attorney for Destination Homes, Inc., Legacy Neighborhoods, LLC, and Golden Land Management, Inc. on June 17, 2016, with attachments:
 - a. Unsigned and notated plats of the Hill Farms Subdivision Phase 2C&3;
 - b. Letter dated March 2, 2016 from David C. Wright, attorney for Kays Creek Irrigation Company, to Andy Thompson, Kaysville City Engineer
 - c. Letter dated May 10, 2016, from Scott Green, President of Kays Creek Irrigation Company, to Andy Thompson, Kaysville City Engineer;
 - d. Minutes of the meeting of the Kays Creek Irrigation Company Board, dated June 6, 2016.
2. Letter submitted by Felshaw King, Attorney for the City of Kaysville, received June 28, 2016.
3. Letter from Mr. Larry R. Williams, Attorney for the five property owners on Angel Street, received July 18, 2016, with attached plats showing current permits showing piped ditch.
4. Amended and Restated Articles of Incorporation for Kays Creek Irrigation Company dated and adopted on April 1, 2006.

BACKGROUND

Destination Homes, Inc., Golden Land Management, Inc., and Legacy Neighborhoods, LLC (collectively, "Destination Homes"), are the owners and developers of certain land located at 200 North Angel Street in Kaysville Utah, upon which they propose to develop the Hill Farms

Subdivision Phase 3. Along the northern boundary of that property sits an open irrigation ditch known as the Joe Hill Ditch (the “Joe Hill Ditch”). The Joe Hill Ditch has historically delivered irrigation water to the property. In addition, the Joe Hill Ditch has for some time delivered water to certain other irrigators (collectively the “Ditch Users”) downstream from the property. The Joe Hill Ditch is the source of all controversy in this matter.

The Kaysville City Council recently approved the plat of the Hill Farms Subdivision Phase 3. But soon after approval the City imposed a requirement that Destination Homes fully pipe the Joe Hill Ditch. Since that time, Kaysville has indicated that no building permits will be issued, and no completion assurance bond will be accepted, until the Joe Hill Ditch is piped. This has effectively stopped all development activity.

Destination Homes disputes that the City has properly imposed this requirement, and has requested this Advisory Opinion. With its request, Destination Homes provided several documents from Kays Creek Irrigation Company (“Kays Creek”).¹ Those documents indicate that the Ditch Users have been taking Kays Creek water through the Joe Hill Ditch for some time. However, Kays Creek states that the Ditch Users have historically taken their water through a different pipe that runs along Weaver Lane. According to Kays Creek, the Joe Hill Ditch was created, owned, and maintained by Joe Hill, the predecessor in interest to Destination Homes, and through it provided Kays Creek water to his property. Kays Creek states that the Ditch Users began using the Joe Hill Ditch with the permission of Mr. Hill because delivery of water through the Joe Hill Ditch was more convenient and did not require the Ditch Users to take irrigation turns.

The Ditch Users claim that the long-term use of the Joe Hill Ditch has given rise to a prescriptive easement for water conveyance across the Destination Homes property, as well as a right to receive their water through the Joe Hill Ditch. The documents from Kays Creek Irrigation Company argue that the Ditch Users do not have a prescriptive easement across the Destination Homes property, due to the use of the Joe Hill Ditch being permissive. Those documents further state that the irrigation company has formally decided to no longer distribute water to the Joe Hill Ditch. Although the Ditch Users are entitled to receive their shares of water, Kays Creek has concluded that the Ditch Users have an adequate means of obtaining water through the Weaver Lane pipe. Thus, from the irrigation company’s standpoint, the Joe Hill Ditch is dry.

Kaysville City believes that it must require Destination Homes to pipe the Joe Hill Ditch because the parties are in a dispute over whether there is a valid easement for the Ditch Users and whether the Ditch Users are entitled to delivery of water from the irrigation company. Therefore, according to the City, it cannot be stated with factual or legal certainty that the Joe Hill Ditch will not carry water in the future. The City finds that until the rights of the Ditch Users to use the Joe Hill Ditch are resolved with some certainty, the City cannot assume that the Joe Hill Ditch will not be used. Thus, the City believes that it cannot allow Destination Homes to fill in the Joe Hill Ditch and must require that it be piped.

¹ Kays Creek is not a participant in this Advisory Opinion. The Ditch Users, through their attorney, have submitted information in order only to assist this office to better understand the situation and render a complete opinion. The Ditch Users have noted that the Advisory Opinion is not a determination of the rights of the Ditch Users.

Destination Homes challenges whether Kaysville City can legally require it to pipe the Joe Hill Ditch. In support of its position, Destination Homes argues that the requirement to pipe (1) is an illegal excessive exaction, (2) is a violation of Kaysville City ordinance, (3) is unauthorized due to the previous final approval of plans, and (4) is arbitrary and capricious. Moreover, Destination Homes argues that Kaysville is illegally prohibiting them from proceeding with the development by refusing to permit them to bond for the improvements to the Joe Hill Ditch.

ANALYSIS

I. The Ditch Users Do Not Have a Legal Right to Receive Water in the Joe Hill Ditch

Some legitimate question and controversy exists regarding whether or not the Ditch Users have a prescriptive ditch easement across the Destination Homes property. Despite the certainty in the letter from Kays Creek that the Ditch Users do not have an easement, the parties simply have not provided sufficient evidence or legal authority to resolve the matter.² Thus, based on the evidence provided, neither this Office, nor Kaysville City, nor Kays Creek, can resolve with certainty whether or not the Ditch Users have a valid prescriptive easement across the Destination Homes property.³

Accordingly, this Advisory Opinion will, as the City must, presume that the Ditch Users do have a prescriptive easement in the Joe Hill Ditch. An easement would give them the right to cross the Destination Homes property with water. However, even if an easement exists, that prescriptive easement would not give the Ditch Users the right to access the water.

In fact, the Ditch Users do not have the right to receive their water through the Joe Hill Ditch. A letter from the attorney for Kays Creek Irrigation, David C. Wright of Mabey, Wright, and James, another letter from Scott Green, the President of Kays Creek Irrigation, and Minutes of the June 6, 2016 Kays Creek Irrigation Company Board of Directors Meeting all show an unequivocal⁴ decision from Kays Creek Irrigation Company not to provide water in the Joe Hill Ditch. Thus, the Joe Hill Ditch, whether a valid easement or not, will remain dry.

This decision not to provide water in the Joe Hill Ditch is legal and within the full discretion of Kays Creek's Board. Kays Creek has the responsibility to reasonably provide the Ditch Users with the water represented by their water shares. *See Swasey v. Rocky Point Ditch Co.*, 617 P.2d 375, 379 (Utah 1980). However, the Ditch Users are not entitled to receive that water in any

² The Kays Creek documents claim that the Ditch was used permissively by the Ditch Users. They conclude, therefore, that the Ditch Users do not have a prescriptive easement to use the Ditch due to failure to show adverse use. However, no evidence better than hearsay has been provided to support the claim of permissive use. To the contrary, the statute imposes a presumption of adverse use. UTAH CODE § 57-13a-102(2). Perhaps the evidence of permissive use exists, but that evidence has not been provided, so adverse use must be presumed.

³ The City has acted with admirable and proper caution in this respect. The City does not have the authority to determine the victor between contesting claimants to interest in land. That authority lies exclusively with the courts.

⁴ The City's submissions indicate a belief that Kays Creek's decision to not provide water into the Ditch is not certain. The reason for this doubt is not explained. To the contrary, the indications from Kays Creek are quite firm and definite. The Minutes of the meeting of the Kays Creek Board of Directors dated June 6, 2016 state that the Board made the unanimous decision that "Kays Creek Irrigation will not provide water down the Joe Hill ditch."

certain way or by any particular path. *See id.* As long as Kays Creek provides that water, Kays Creek has sole discretion to determine how that water is distributed. The Articles of Incorporation of the Kays Creek Irrigation Company state that:

Each share of stock shall have an equal right to all water sources of the Corporation, but the *Directors at their sole discretion shall determine and manage the distribution of water to the members.*

Amended and Restated Articles of Incorporation for Kays Creek Irrigation Company, Article IV (emphasis added). Furthermore, the Utah Supreme Court in *Arnold v. Huntington Canal & Reservoir Assn*, 231 P. 622, 624 (1924), stated that “no one...can legally complain, of the manner in which the [irrigation corporation] conveys its water, or through which ditch it takes and delivers the same to its members and water users, so long as each member or stockholder obtains the amount of water he is entitled to, and obtains it where he can put it to the use contemplated by him.”

Accordingly, the Ditch Users have the right to receive water. But Kays Creek has full discretion to manage and control the distribution of that water. This is true whether or not an easement exists. Therefore, the decision by Kays Creek to not provide water in the Joe Hill Ditch, and instead to provide water to the Ditch Users through the Weaver Lane pipe, is valid and enforceable against the company shareholders. The unequivocal decision by Kays Creek to not permit water in the Joe Hill Ditch is within the Board’s discretion. The Joe Hill Ditch is dry.

II. Kaysville’s requirement that Destination Homes Pipe the Joe Hill Ditch is an Illegal Exaction

The Irrigation Company has unequivocally stated that “Kays Creek Irrigation will not provide water down the Joe Hill Ditch.” *Minutes of the Kays Creek Irrigation Company Board*, June 6, 2016. Accordingly, without water in the Joe Hill Ditch, the requirement that Destination Homes pipe the Joe Hill Ditch is an illegal exaction in violation of the Constitution of the United States.

An exaction is a government-mandated contribution of property imposed as a condition of development approval. *B.A.M. Dev., L.L.C. v. Salt Lake Cnty. (BAM III)*, P.3d 1161, 1168 (Utah 2012). Exactions are valid only if they satisfy the “rough proportionality” analysis adopted by the U.S. Supreme Court and the Utah Supreme Court, and codified in the Utah Code:

A municipality may impose an exaction or exactions on development proposed in a land use application, including... an exaction for a water interest, if:

- (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 § 10-9a-508(1). The purpose of this test is to effectuate the protections guaranteed by the Takings Clause, which is “to bar Government from forcing some people alone to bear

public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).⁵ Thus, Kaysville City may require that Destination Homes pipe the Joe Hill Ditch, “so long as there is a ‘nexus’ [or link] and ‘rough proportionality’ between the property that the government demands and the social costs of the applicant’s proposal.” *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586, 2595 (2013).⁶ The City bears the burden of showing that its proposed exaction satisfies the rough proportionality test.⁷

The language of § 10-9a-508 was borrowed directly from the U.S. Supreme Court decisions in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). See *B.A.M. Dev., L.L.C. v. Salt Lake Cnty. (B.A.M. I)*, 128 P.3d 1161, 1170 (Utah 2006). In those two landmark cases, the U.S. Supreme Court promulgated rules for determining when an exaction may be validly imposed under the federal Constitution’s Takings Clause. This has come to be known as the *Nollan/Dolan* “rough proportionality” test.

Relevant to our discussion here, the rough proportionality analysis was honed by the Utah Supreme Court in *B.A.M. Development, LLC v. Salt Lake County (B.A.M. II)*, 196 P.3d 601 (Utah 2008). In that opinion, the Court 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.” *Id.* at 603. The “nature” aspect focuses on the relationship between the purported impact and proposed exaction. The Court described the approach “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.*, at 603-04.⁸

The City’s requirement that Destination Homes pipe the Joe Hill Ditch fails this portion of the analysis. In terms of a problem and a solution, the requirement to pipe the Joe Hill Ditch does not solve a problem that Destination Homes has created. There will be no water for the pipe to carry. Destination Homes’ activity certainly is having an impact in Kaysville City, and there are certainly legal and proportionate exactions that Kaysville could impose to address those impacts. But an exaction must solve a problem that the development activity creates. If there is to be no water in the Joe Hill Ditch, the requirement to pipe the Joe Hill Ditch does not solve any problem. Therefore, that requirement that the Joe Hill Ditch be piped fails the constitutional exaction analysis and the requirement to do so is therefore invalid.

⁵ The Takings Clause of the Federal Constitution is found in Fifth Amendment, and is made applicable to the states by the Fourteenth Amendment. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). In addition, “[t]he Utah Constitution reinforces the protection of private property against uncompensated governmental takings in article I, section 22, Utah Constitution.” *B.A.M. Dev., L.L.C. v. Salt Lake Cnty. (BAM I)*, P.3d 1161, 1168 (Utah 2006).

⁶ See also *id.*, 128 P.3d at 1170 (Utah 2006).

⁷ See *Dolan v. Tigard*, 512 U.S. 374, 391 (1994).

⁸ The “extent” aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost; 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 land use.

III. The Requirement Violates the Kaysville City Ordinances

Likewise, Kaysville City Ordinance 19-6-3(6)(a) states as follows:

All gravity flow ditches through which water will continue to flow within a subdivision after its completion, whether to serve as irrigation water and/or waste flow to go from any adjacent property, shall remain in use and be piped with a minimum pipe size of at least 15 inches and shall be approved by the city engineer and irrigation provider. *Irrigation ditches which will not carry irrigation water and/or waste flow shall be removed.*

Kaysville City Ordinance 19-6-3(6)(a) (emphasis added). Kays Creek has unequivocally determined that the Joe Hill Ditch will not carry water. Accordingly, by the plain language of this ordinance, the Joe Hill Ditch must be removed. The requirement that Destination Homes pipe the Joe Hill Ditch violates that ordinance.

CONCLUSION

This issue turns on whether there will be water in the Joe Hill Ditch. Insufficient evidence has been provided to determine whether the Ditch Owners have a prescriptive easement in the Joe Hill Ditch. However, even assuming that they do, more than sufficient evidence has been provided to show that the Kays Creek Irrigation Company will not provide water in the Joe Hill Ditch. That decision is within Kay's Creek's discretion under both the Articles of Incorporation and Utah law. Accordingly, this is a fact upon which the City can rely.

Because there will be no water, the requirement that Destination Homes pipe the Joe Hill Ditch is both an illegal excessive constitutional exaction, and a violation of Kaysville City ordinances. The City therefore has an obligation to remove or amend the piping condition.

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 § 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:

Maria Devereux, City Recorder
City of Kaysville
23 East Center Street
Kaysville, Utah 84037

On this _____ Day of July, 2016, 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