

Advisory Opinion 190

Parties: Todd Jackson, Moab City

Issued: September 8, 2017

TOPIC CATEGORIES:

Exactions on Development

An ordinance mandating that a property owner abut a public road in order to obtain a building permit serves a legitimate public purpose, and is enforceable. Nevertheless, requiring a property owner to purchase property, construct a road, and dedicate that road to the public in order to obtain a building permit is an exaction, which must satisfy the rough proportionality analysis. The City may require the property owner to build and dedicate only as much road as is justified by the impact of his development.

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ADVISORY OPINION

Advisory Opinion Requested By: Todd Jackson
Local Government Entity: City of Moab
Applicant for Land Use Approval: Todd Jackson
Type of Property: Residential
Date of this Advisory Opinion: September 8, 2017
Opinion Authored By: Brent N. Bateman
Office of the Property Rights Ombudsman

ISSUE

Is a property owner obligated to show that his parcel abuts a public road, in compliance with local ordinance, in order to obtain a building permit? And must that property owner obtain, improve, install utilities, and dedicate that road to the public at his sole expense when other property owners will use the road and improvements?

SUMMARY OF ADVISORY OPINION

An ordinance mandating that a property owner abut a public road in order to obtain a building permit serves a legitimate public purpose, and is enforceable. No unconstitutional taking arises from this requirement in this matter. Nevertheless, requiring a property owner to purchase property, construct a road, and dedicate that road to the public in order to obtain a building permit is an exaction, which must satisfy the rough proportionality analysis. The City may require the property owner to build and dedicate only as much road as is justified by the impact of his development.

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 Mr. Todd Jackson on March 27, 2017. A copy of that request was sent via certified mail to Rachel Stenta, City Recorder, City of Moab, 217 East Center Street, Moab, Utah 84532.

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 Mr. Todd Jackson on March 27, 2017.
2. Response submitted by Mr. Christopher G. McAnany, Attorney for the City of Moab, on April 5, 2017.
3. Reply submitted by Mr. Jackson, on April 13, 2017.
4. Additional information, including aerial photographs of the property, submitted by Mr. Jackson on April 19, 2017.

BACKGROUND

In September 2015, Todd Jackson purchased a one-half acre parcel located at 549 E Center Street in Moab, Utah. Sometime prior to 2015, the property contained a manufactured home with utility hook-ups upon a cement pad. The property is currently vacant and unimproved, although it is surrounded by properties developed with single family homes.

According to the City, Moab Center Street terminates at 501 East. Access to properties beyond that point, including to Mr. Jackson's parcel, is via individual private easements along a private dirt lane. Multiple residences use this private lane as access. These properties lack frontage upon a public street.

Prior to purchasing the property Mr. Jackson contacted the City regarding the parcel and any issues related to potential development. The City responded with a "summary of issues" containing 6 points that would need to be addressed. Items included sewer and water service, storm water conveyance, street improvements, and the lack of a legal right-of-way. After receiving this summary, Mr. Jackson proceeded with his purchase.

Now, Mr. Jackson would like to build a residence and an accessory dwelling on his parcel. He has not yet applied for a building permit, but has entered discussions with the City. In those discussions, the City has pointed out that the Moab Municipal Code requires that all new dwellings in town abut a public street:

Except as otherwise provided in this title, at least one side of each lot used as a dwelling site shall abut upon a street which has been designated or dedicated to the public for street purposes.

Moab Municipal Code § 17.09.035. Mr. Jackson's parcel does not abut a public street. It abuts the private easement only. The "summary of issues" provided prior to Mr. Jackson's purchase did not mention this ordinance, although it did mention the lack of a legal right-of-way and need for street improvements. Moab City has indicated its intention to enforce this ordinance as a condition to issuing a building permit.

Moreover, Moab City design standards require that every public street be a minimum of 50 feet wide. According to the City, the existing private drive is no wider than 16 feet, and thus does not comply with the City's minimum design standards for a public street. The City also indicates that in order to qualify for a building permit, utility service upgrades within the right of way will also be needed. Although some utility infrastructure is present and serving other properties, the City indicates that it is insufficient to serve Mr. Jackson's development.

Mr. Jackson objects to these requirements. He feels that if the City had properly informed him of the street frontage problem, he would not have purchased the property. He argues that the City should excuse him from the street frontage requirement either by fairness or to avoid a constitutional taking. Moreover, he objects to the other building permit requirements as excessive exactions, including obtaining and dedicating a 50 foot right of way, construction of the public improvements in the right of way, and the utility upgrades.

The City argues that it has full authority to enact and enforce its abutment ordinance against Mr. Jackson's parcel, and may deny a building permit until Mr. Jackson dedicates or provides evidence of a public right of way. In addition, the City argues that no extra utility capacity currently exists, so the parcel must bring additional utility capacity. Moreover, since no actual building permit application has been made, the City points out that the proportionality of the City's requirements is at this stage hypothetical.

ANALYSIS

I. The Street Abutment Requirement

Mr. Jackson argues that the City never informed him of the street abutment requirement. Therefore, the requirement should not apply to his parcel because (1) had the City informed him, he would not have purchased the property, and (2) the City's requirement renders his property useless, and thus the abutment requirement is an unconstitutional taking.

Moab City's requirement that each building lot abut a public street serves a legitimate public purpose. Requiring frontage on public roads ensures adequate access to property owners and their guests, as well as to public safety vehicles. The requirement also encourages responsible growth and development. *See Johnson v. Hermes Associates*, 2005 UT 82, 128 P.3d 1151 (access to public streets important factor in development). Accordingly, it is a valid exercise of the City's authority to require that building lots abut a public street.

Although the City did provide Mr. Jackson with a "summary of issues," the City's failure to cite the abutment requirement does not prohibit the City from enforcing this ordinance upon Mr. Jackson's parcel. The "summary of issues" provided by the City cannot be read as a final and comprehensive checklist of issues, and a waiver or all unlisted issues. Certainly a plethora of listed and unlisted City ordinances apply to development of this parcel in Moab. One of the oldest established legal maxims is "ignorance of the law is no excuse." Mr. Jackson cannot be excused from the City's ordinance requirement due to the fact that the City never specifically told him about the requirement prior to his purchase of the property. A property owner has his own duty to inquire into the requirements of the City. *See Utah County v. Young*, 615 P.2d 1265, 1268 (Utah 1980). And individuals are deemed to have constructive notice of the applicable law. *In re Adoption of B.Y.*, 2015 UT 67 ¶19. It appears that the abutment requirement has been in place for years. It applied to the property and to other similarly situated properties, prior to the time when Mr. Jackson purchased the parcel. Moreover, abutment and frontage requirements are common in communities throughout Utah. The City did not need to inform him of this specific ordinance in order to enforce it. Accordingly, Mr. Jackson cannot be excused from the ordinance requirement simply because the City did not specifically inform him of it.

Mr. Jackson argues that requiring him to comply with the frontage requirement causes a taking of his property without just compensation, because the requirement renders his property useless. This claim for a taking arises out of a paragraph in *Advisory Opinion #77*, (AO#77) issued by this Office. The facts in that Advisory Opinion are very similar to the present matter. The property owners' lot lacked frontage on a city street, and access to their parcel was by an unpaved private easement. The property owners wanted to develop, and the city informed them that before a building permit could be approved, they would need to comply with the city ordinance requiring frontage on a public road. In order to comply, the owners would need to obtain property from private owners. The roadway would also need to be built to the city's standards. The owners objected to the requirement to create a road, and felt that the burden upon them to build the road was disproportionate.

The paragraph in AO#77 that Mr. Jackson relies upon reads:

While the City's frontage requirement is reasonable, however, the Craigs' rights in their property must also be recognized. For whatever reason, the parcel was created in the late 1980s without frontage on a public street. The Craigs acquired that parcel in good faith, hoping to construct a home and barn. They have the right to a reasonable expectation that they can put their property to some economically beneficial use. If the City fails to balance those interests, an unconstitutional taking of property without just compensation may result.

This paragraph does not excuse Mr. Jackson from complying with the frontage requirement. This statement merely reminds the City that it should work with a property owner to avoid a taking, both in terms of permitting some economically viable use, and in terms of the rough proportionality discussion that follows that passage in AO#77. The City must allow some economically viable use on the property. However, that use need not be any use desired by Mr. Jackson, especially when such use does not comply with legitimate requirements. This paragraph did not excuse the AO#77 property owners from their frontage requirement. It does not excuse Mr. Jackson's parcel now. AO#77 later reads:

The City may be able to require the property owners to provide access to their property, but the real question is how much road the City can require the property owners to build.

This statement applies equally to Mr. Jackson's matter.

Enforcing a legitimate requirement against the parcel does not mean that the City has committed a regulatory taking. In order to do that, the City would need to have taken something from Mr. Jackson. The threshold inquiry to any takings claim is whether an individual has a protected property interest, and whether that interest was taken or damaged by government action: "[T]o succeed in its takings claim, [a property owner] must establish: (1) that it has a protectable interest in the property in question, and (2) that the interest has been taken or damaged by government action." *L.C. Canyon Partners, L.L.C. v. Salt Lake County*, 2011 UT 63 ¶25. Setting aside whether Mr. Jackson has a protectable property interest in receiving a building permit, the City has not taken anything from Mr. Jackson. Nothing has changed with Mr. Jackson's parcel since he purchased it. The parcel can still be accessed through its easement upon the private dirt lane. The parcel may still be used in any way that complies with Moab City ordinances, just as before. The parcel can be developed if it abuts a public road. No government action has taken a protected property interest from Mr. Jackson, since nothing has changed with regard to the parcel from the time Mr. Jackson purchased it. Accordingly, no taking has occurred.

Zoning estoppel likewise does not excuse Mr. Jackson from the abutment requirement. Zoning estoppel requires that the owner expend significant funds in development and improvements on the property. It is not enough that the owner expended funds in purchasing the property. *See Stucker v. Summit County*, 870 P.2d 283, 290 (Utah Ct. App. 1994) (purchase or ownership of property, by itself, is not a sufficient expense to justify a vested right by estoppel).

Accordingly, as with the property owners in AO#77, Mr. Jackson will need to show that his property abuts a public street in order to qualify for a building permit on his property.

II. The Improvement and Utility Requirements

The City may be able to require Mr. Jackson to provide a public street to his property, but the real question is how much road the City can require Mr. Jackson to build. The City's ability to impose public dedication requirements on Mr. Jackson is limited by the constitutional exaction law. 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 can include the donation of property, providing public improvements, cash, or any number of items dedicated to the public. *Koontz v. St. Johns River Water*, 133 S. Ct. 2586 (2013).

Exactions are legal if they satisfy the “rough proportionality” analysis adopted by the U.S. Supreme Court and the Utah Supreme Court. The rough proportionality test has been codified in the Utah Code as follows:

A municipality may impose an exaction or exactions on development proposed in a land use application, . . . 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 language of this statute 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). 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).

Each of the City’s requirements, that Mr. Jackson purchase land for public use, construct improvements, dedicate a public street, and provide utility improvements, constitute an “exaction.” Thus, in order to be valid, each of the City’s requirements must satisfy the rough proportionality analysis. According to the Utah Supreme Court, the 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 74 ¶ 9, 196 P.3d at 603. The “nature” aspect focuses on the relationship between the purported impact and proposed exaction. The “extent” aspect measures the impact of the proposed development against the proposed exaction. 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 assuage the impact attributable to a new development.

Requiring Mr. Jackson to provide the road and improvements complies with the nature aspect of the exaction analysis because constructing a public road and adding utilities “solves” the problem caused by Mr. Jackson’s proposed development. However, requiring that Mr. Jackson purchase sufficient property and construct and dedicate a full 50 foot width road to city standards, solely to access the one or two homes on his parcel, likely will not satisfy the extent aspect of the rough proportionality analysis. Mr. Jackson’s impact, as proposed, arises out of one home and one accessory dwelling unit. The City may certainly ask him to participate in the construction and dedication of improvements, but only in proportion to those impacts. Other properties will use the public road, the improvements upon the road, and the utilities within the road. When one person is required to provide public improvements that will absorb the impact of other properties, not just his own, the exaction is disproportionate.

As the City points out, Mr. Jackson has not made his building permit application, and thus the City has not formalized its exactions. Accordingly, this discussion is indeed hypothetical. Suffice to say, however, that were the City to place the full burden upon Mr. Jackson for the road, improvements, utilities, etc., the exaction would certainly be excessive. The City has indicated a willingness to explore options regarding the exactions, as has Mr. Jackson. This is encouraged.

Finally, note that the exaction analysis concerns the expense Mr. Jackson must incur in order to provide public improvements. It does not shift the burden of providing a road that abuts Mr. Jackson's parcel to the City or to any other party. Mr. Jackson must still show that his property abuts a public street, even if it means acquiring permission or property to obtain the public road from neighbors. However, the abutment ordinance does not require Mr. Jackson to provide a 50 foot fully improved road in order to get a building permit. Requiring that is likely an excessive exaction. The ordinance simply requires that Mr. Jackson's property abut a public street. Once done, the exaction analysis will govern the extent of Mr. Jackson's responsibility for the road and improvements.

CONCLUSION

The City has a legitimate interest in ensuring that developed properties abut public roads. Mr. Jackson is not excused from that requirement because the City did not inform him of it, nor because the requirement constitutes an unconstitutional taking. However, that and all of the City's exactions must satisfy the rough proportionality analysis. The City may require that Mr. Jackson's property abut a public road. When Mr. Jackson applies for his building permit, the City must formulate its exactions to comply with the constitutional exaction laws.

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:

Rachel Stenta, City Recorder
City of Moab
217 East Center Street
Moab, UT 84532

On this _____ Day of September, 2017, 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