Advisory Opinion #205

Parties: Devin & Kayley McCabe; Paradise City
Issued: December 12, 2018

TOPIC CATEGORIES:

Compliance with Land Use Ordinances
Exactions on Development

The Town waived requirements it would normally impose at the time of subdivision, expressly agreeing with the developer instead to impose them at the issuance of building permits. Thus, the Town may withhold building permits until those requirements have been met. Moreover, construction of the road is not an excessive exaction, provided the Town is requiring only that portion of the road that is justified by the impact that one building permit would create.

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

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI
Executive Director

BRENT N. BATEMAN
Lead Attorney, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested By:	Devin & Kayley McCabe
Local Government Entity:	Paradise Town
Type of Property:	Residential
Date of this Advisory Opinion:	December 12, 2018
Opinion Authored By:	Brent N. Bateman Office of the Property Rights Ombudsman

ISSUE

Is Paradise Town imposing an illegal condition or excessive exaction in requiring that a road be built before it will grant a building permit for a single-family dwelling on a lot?

SUMMARY OF ADVISORY OPINION

The Town waived requirements it would normally impose at the time of subdivision, expressly agreeing instead to impose them at the issuance of building permits. Thus, the Town may withhold building permits until those requirements have been met. Moreover, construction of the road is not an excessive exaction, provided the Town is requiring only that portion of the road that is justified by the impact that one building permit would create.

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 Devin and Kayley McCabe on September 14, 2018. A copy of that request was sent via certified mail to Mayor Lee Atwood, Paradise Town, 9035 South 100 West, Paradise, 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 Devin and Kayley McCabe on September 14, 2018.
2. Response from Mayor Lee Atwood on behalf of Paradise Town on September 27, 2018.

BACKGROUND

Devin & Kayley McCabe plan to purchase Lot #3 in the Summers Minor Subdivision, located at approximately 300 West and 3900 South in Paradise Town, Utah. The sellers, Richard and Brenda Medsker, are the original owners and subdividers of the land. The subdivision occurred in 2006.

At the time of the subdivision, Lot 3 was bisected by the boundary between Paradise Town and Cache County. The Town, County, and owners worked together to resolve the subdivision issues, and it was agreed that bisected Lot 3 would only become a buildable lot once it was completely annexed into Paradise Town and met Paradise Town requirements.

In order to memorialize these and other requirements, the Town adopted stipulations on approval of the subdivision. The approval stipulations concerning Lot 3, as written, were:

> 3) Lot 3 shall be considered a restricted lot by both Cache County and Paradise Town until it is fully annexed into Paradise.
> 4) Lots 3 and 4 are not approved building lots in Paradise City and shall be required to complete the Paradise City Subdivision Process prior to becoming legal building lots. Paradise City shall maintain full jurisdiction on Lots 3 and 4, with all the rights, duties, and authority to impose conditions and require Lots 3 and 4 to meet the code requirements of Paradise City.

Moreover, the final recorded subdivision plat contained several general notes concerning the subdivision. The general plat notes concerning Lot 3, as written, were:

> 5. Lots 3 is to be annexed into Paradise City.
> 6. Lots 3 and 4 shall meet the requirements of Paradise City prior to be determined as buildable lots.

In April, 2016, the remainder of Lot 3 was annexed into Paradise Town. The McCabes now desire to purchase and build a home on Lot 3. The Town, however, states that it will issue a building permit on Lot 3 "only when the required infrastructure has been completed." According to the McCabes, this means that they will be required to "T up 300 West and 9300 South, and pave 165' of frontage road into the field." The McCabes object to these requirements, arguing that the requirements are excessive. They also object because they feel that the Paradise Town Code does not obligate them to build this road. They argue that since the Town Code defines "developer" as "subdivider," they should not have to meet these requirements because they did not subdivide the land.

The Town does not address the "subdivider" argument, but simply states that no building permit can be issued until the required infrastructure is completed, in accordance with the stipulations and general plat notes.

ANALYSIS

I. Paradise Town Is Entitled to Ensure that Their Requirements Are Met

The stipulations, adopted on approval of the subdivision, as well as the notes on the final plat unequivocally state that in order to get a building permit on Lot 3, the Paradise Town subdivision requirements must be met. Although very little information has been provided regarding this history, these stipulations were likely included (and we assume that this is true) because Paradise Town has certain requirements for subdivisions that were waived at the time in order to allow that subdivision to go forward. The notes and stipulations were the Town's effort to ensure that those requirements were eventually met. In other words, the Town agreed to require the improvements at building permit, rather than at subdivision as they normally would.

Paradise Town is entitled to have these stipulations and plat notes fulfilled. Thus, Lot 3 is not buildable until it complies with Paradise Town's requirements that they would normally require at the time of subdivision. It is unknown what exactly those requirements would be, and whether they are otherwise legal. However, assuming that the requirements are legally imposed by the Town, the Town can withhold building permits until the requirements are complete.

The McCabes argue that the requirements cannot be imposed against them. According to the McCabes, and not contradicted by the Town, the Paradise Town Subdivision Code page #4 defines "Developer" as "See Subdivider." On page #10, the ordinances define "Subdivider" as "an individual, corporation, or registered partnership owning or controlling any tract, lot, or parcel of land to be subdivided." The McCabes reason that they do not meet the definition of Subdivider, so they cannot be defined as Developers. Thus, they cannot be required to conform to these requirements imposed by the Town.

Contrary to the McCabe's assertions, however, they are the developers of their lot, even though they are not the subdividers. That is because through the plat notes and stipulations, it was agreed that the Town's requirements would need to be met before it would issue a *building permit*. In other words, the Town and original subdividers agreed to substitute the builders for the subdividers in this instance. Thus, the builders take on some of the subdivider's responsibilities. Moreover, for the McCabes to build upon a vacant lot but not be considered developers would

lead to an absurd result – development activity occurring without a developer. Thus their argument that they are not developers falls short. They are the developers here.

Nevertheless, finding that the McCabes are "developers" is not a necessity. The question is not whether the *McCabes* can be required to build the road. Rather, the question turns on whether the Town can require that the road be built before issuing a building permit. In other words, it should not matter to the town who builds the road. What matters is whether the Town can require that *someone* build the road before issuing a building permit.

The documentation provided indicates without doubt that the Town can withhold the building permit on Lot 3 until the requirements are met. Thus the McCabes are looking to purchase a piece of land that carries a unique circumstance. Unlike other lots in town, this lot requires a road to be built before a building permit is issued. This may mean that the McCabes will build road, since they want the building permit. However, the real responsibility to build the road may remain with the subdividers, Mr. & Mrs. Medsker. The McCabes and the Medskers or any other interested parties remain free to determine between them who will fulfill the Town's requirements. The purchase price of the lot may reflect this unique circumstance. Nevertheless, the Town is entitled to withhold the building permit until the requirements are met.

II. The Requirement to Build the Road Does Not Appear to be Excessive

Although we sorely lack details about the nature and extent of the requirement, Paradise Town's requirement that the McCabes "T up 300 West and 9300 South, and pave 165' of frontage road into the field" does not appear on its face to be an excessive exaction (even though it may be prohibitively expensive for the McCabes if they also pay full price for the lot).

An exaction is a government-mandated contribution of property or improvements imposed as a condition of development approval. *B.A.M. Dev., L.L.C. v. Salt Lake County, (BAM III)*, 2012 UT 26, ¶16. Exactions arise from the principle that development, even of a single additional home, causes impacts to a community. In order to assuage those impacts, the community can exact property or improvements for dedication to the public.

Exactions are legal and appropriate if they are roughly proportionate to the impact that the development creates. The Utah Code provides:

> 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 analyses in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S 374 (1994), and has become known as the "rough proportionality test." *See B.A.M. Dev., L.L.C. v. Salt Lake County, (BAM I)*, 2006 UT 2, ¶8. If

the exaction meets this test, it is valid. If the exaction fails this test, it violates the protections guaranteed by the Takings Clauses of the Utah and U.S. Constitutions. *Call v. West Jordan*, 614 P.2d 1257, 1259 (Utah 1980). Thus this test "bar[s] 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). An exaction helps pay the costs of the development's impact. An excessive exaction requires the developer to pay for impacts beyond its own. *Banberry Development Corporation v. South Jordan City*, 631 P..2d 899, 903 (Utah 1981).

In question here is whether the "extent" aspect of the exaction test has been satisfied; that is, whether the Town's requirement is excessive, requiring more improvements than one new home makes necessary.

It appears by the description "T up 300 West and 9300 South, and pave 165' of frontage road into the field" that the road requirement exclusively goes along the frontage of the Lot 3. According to the plat map, Lot 3 actually has 384.65' of frontage along 9300 South, and the "T" with 300 West occurs directly across from Lot 3. Building 165' feet of frontage does not even encompass the full frontage. It appears therefore that the Town is requiring that a road be built only along a portion of the frontage of Lot 3, perhaps extending along the frontage from the intersection westward.

A new home will generate some traffic. Thus it brings an impact. It is appropriate for the City to exact some road improvements. It is common for a City to exact the dedication and construction of a half-width of a road, curb, gutter, etc., along the entire frontage of the property. This half-width frontage dedication and construction is common practice and generally accepted as roughly proportionate to a typical road impact. An abutting half-width generally does not require one developer to provide improvements that others should provide — i.e., the opposite abutting landowner typically provides the other half-width.

If these assumptions about what is being exacted are accurate, the exaction to build road along the frontage of the lot is not excessive. It is not known whether the owners will need to construct the full width of the road or a half-width here, but if they are required to build a half width, the exaction appears to be proportionate. Dedication is part of this exaction, and previously occurred at the recording of the plat. Building a half road only along the frontage is normal and proportionate. However, if the developer is required to build any portion of the road that should be built by others, including the full width, or any road the does not front the lot, the exaction is very likely excessive, and the Town must make adjustments to its requirements.

CONCLUSION

Paradise Town is entitled to require that its requirements are met before it issues a building permit. If the road is one of the requirements, then the road must be built. Who builds the road is not important to the Town, and must be sorted out between the original subdividers and the builders before anyone can expect a building permit to be issued.

Moreover, if the Town is requiring that the builders construct a half-width road along the frontage of the lot, the exaction does not appear to be excessive, according to the information that we have received. Details have been scanty. If further information contradicting these conclusions is provided, this Advisory Opinion may be amended.

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.