

Advisory Opinion #21

Parties: Brian Pitts, Bowler Development, LC and Tooele County

Issued: September 7, 2007

TOPIC CATEGORIES:

- E: Entitlement to Application Approval (Vesting)
- H: Compelling, Countervailing Public Interests
- M: Substantive Review of Application

Requiring installation of sewer laterals is probably an unacceptable condition if there is no public sewer line. However, requiring “stub” connections for future use may be acceptable.

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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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Requiring Sewer “Stub” Lines in Unincorporated Area

Advisory Opinion Requested by: Brian Pitts, Bowler Development, LC

Local Government Entity: Tooele County

Applicant for the Land Use Approval: Bowler Development, LC

Project: Subdivision near Tooele, Utah

Opinion Authored By: Elliot R. Lawrence, Attorney
Office of the Property Rights Ombudsman

Date of this Advisory Opinion: September 7, 2007

Issue

Is Tooele County’s requirement that homes in a new subdivision include a “stub” for future connection to a sewer system a valid condition § 17-27a-507 of the Utah Code?

Summary of Advisory Opinion

Under Utah law, the term “exaction” includes any condition imposed to gain approval for a development. All conditions imposed on new development are evaluated under the *Nollan/Dolan* “rough proportionality” test, as codified in § 17-27a-507 of the Utah Code. Tooele County’s requirement that a developer install “stub” sewer lines is a valid condition, provided the extent and cost of the installation is not excessive. Encouraging development of sewer systems is a legitimate governmental interest, and requiring “stub” connections is a reasonable means of carrying out that interest. If the “stub” requirement is met by installing only connections at the foundation of each home, the requirement appears to be acceptably proportionate. Requiring the installation of lateral lines, however, does not appear to be proportionate, and would be unacceptable.

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 U.C.A. §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.

The request for this Advisory Opinion was received from Brian Pitts on July 17, 2007. As provided in statute, a letter with the request attached was sent via certified mail, return receipt requested, to Marilyn Gillette, Tooele County Clerk, at 47 S. Main, #130, Tooele, Utah 84074. The return receipt was signed and was received on August 15, 2007, indicating that it had been received by the County.

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 January 22, 2007 with the Office of the Property Rights Ombudsman by Brian Pitts
2. Letter from Brian Pitts to the Office of the Property Rights Ombudsman, dated July 17, 2007
3. Sections from Title 13 of the Tooele County Code, "Subdivisions"
4. Telephone conversations and emails from Brian Pitts
5. Letter to Lynn Bowler from Jim Lawrence, Director, Tooele County Engineering

Assumed Facts

1. It is assumed that installing a stub line or connection at the foundation of each home would not constitute an excessive cost for the developer.
2. It is assumed that the proposed subdivision would meet other development requirements of the county

Background

Bowler Development, LC proposed a subdivision located in an unincorporated area of Tooele County. The subdivision is near the boundary of Tooele City, but the city will not provide sewer services to the subdivision. The County allows underground septic systems, but County

Ordinances state that a subdivision may be required to install sewer lines and mains if it is determined that a system would be extended to the subdivision “within a reasonable time.” See Tooele County Code, § 13-7-11. At the time that the Developer filed the Request for this Advisory Opinion, the County had indicated that it would require installation of sewer mains and connections, even though there was no system serving the area.

Tooele City indicated that it had no plans to annex the area of the subdivision. In fact, the area is not included in Tooele’s annexation master plan. Because of this, the County later dropped its requirement that sewer lines and mains be installed. However, the County now requires that the homes in the subdivision “include a sewer stub for future connection to a public system.” In a letter from the County Engineer, the County stated that this requirement is due to the growth in the area, and the proximity to the city. The stub requirement is not elaborated in greater detail, but the County will require that the location of the stub be clearly indicated.

Analysis

I. The “Nollan/Dolan” Rough Proportionality Test Applies to All Conditions Imposed on New Development.

“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. Under this definition, the term “exaction” includes any condition on development, including not only dedication of property, but also payment of money, installation of a specific improvement, 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 1170.¹

Jurisdictions across the United States have struggled with the scope of the rough proportionality analysis, and whether it should be applied to conditions which do not require dedication of property. The Texas Court of Appeals discussed the applicability the “Nollan/Dolan” proportionality analysis to conditions that do not require actual dedication of property. The court noted that several jurisdictions had expanded applicability of the “Nollan/Dolan” test to include nondedicatory conditions. The Texas court concluded that federal law requires applying the proportionality test to all development conditions.

It is the imposition of land use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the

¹ There has been a great deal of debate over whether the proportionality test applies to conditions imposed by general enactments (“legislative”) as well as specific development decisions (“adjudicative”). The Utah Supreme Court held that the test should apply to all exactions, and noted that the Legislature also requires analysis for all exactions. *B.A.M.*, 2006 UT 2, ¶ 46, 128 P.3d at 1170 (citing the enactment of § 17-27a-507).

sine qua non for application of the . . . standard of scrutiny formulated by the court in *Nollan* and *Dolan*.

Town of Flower Mound v. Stafford Estates, L.P., 71 S.W.3d 18, 36 (Tex. App. 2002) (quotation omitted). The Utah Supreme Court also held that the proportionality analysis should apply to all exactions and conditions. *B.A.M.*, 2006 UT 2, ¶ 46, 128 P.3d at 1170. Requiring a developer to install sewer “stub” lines in new homes is thus an “exaction,” because it is a condition imposed by the County that must be agreed to by the developer to gain approval of the proposed subdivision.²

In 2005, the Utah Legislature enacted Section 17-27a-507 of the Utah Code, which authorizes counties to impose exactions on new development, and also prescribes limits on that authority:

A county may impose an exaction or exactions on development proposed in a land use application provided that:

- (1) an essential link exists between a legitimate governmental interest and each exaction; and
- (2) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

UTAH CODE ANN. § 17-27a-507.³ The Utah Supreme Court noted 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.*, 2006 UT 2, ¶ 41, 128 P.2d at 1170. In those two cases, the Supreme Court promulgated rules for determining when an exaction is valid under the federal constitution’s Takings Clause.⁴ This has come to be known as the *Nollan/Dolan* “rough proportionality” test, and that two-part analysis is reflected in § 17-27a-507.

² “It is in this paradigmatic permit context—where the individual property owner-developer seeks to negotiate approval of a planned development—that the combined *Nollan* and *Dolan* test quintessentially applies.” *Flower Mound*, 71 S.W.3d at 34.

³ There is a corresponding statute applicable to municipalities found at § 10-9a-508 of the Utah Code.

⁴ See U.S. Const., amend V. 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.*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. See also Utah Const. art. I, § 22.

II. Requiring Installation of “Stub” Sewer Lines Meets the Rough Proportionality Test, Provided the Cost and Extent of the Installation is not Excessive.

In order to be valid, the county’s requirement that the developer install “stub” sewer lines must meet both parts of § 17-27a-507.

A. There is an Essential Link Between a Legitimate Governmental Interest and the Requirement that the Development Install “Stub” Sewer Lines.

There is an essential link between the county’s condition that the developer install “stub” sewer lines and the county’s legitimate interest in the public’s health and welfare. Providing public utilities, such as sewers, enhances the public health, which is a legitimate government interest. *See Rupp v. Grantsville City*, 610 P.2d 338, 339-340 (Utah 1980). Requiring developers to provide sewer connections for new homes is a reasonable means to promote that interest. *See id.* (City ordinance requiring connection to system and payment for service upheld). Thus, there is an essential link between the county’s legitimate interest of encouraging sewer systems and the requirement that the new subdivision install “stub” lines for future sewer connections.

B. The Nature and Extent of the “Stub” Line Requirement Determines Whether the Requirement is Roughly Proportionate to the Impact of the Development

The nature and extent of the “stub” line installation will determine whether the requirement is proportionate to the impact of the development. The “rough proportionality” test requires “some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Dolan*, 512 U.S. at 391. Because there is not yet a sewer system serving the proposed subdivision, requiring installation of lateral lines extending from homes to where a main sewer line would be located is would likely be disproportionate to the impact of the development, both in nature and extent.

A requirement that lateral lines be installed is only slightly different than requiring installation of complete sewer mains and hookups in anticipation of a future system. Requiring installation of lateral lines is not necessary, particularly where there are not even current plans for a sewer system in the area. In addition, there is no guarantee that the lines would be compatible or usable if and when a sewer system is available. If the “stub” line requirement amounts to installing lateral lines from homes to meet non-existent main lines, the nature and extent of the requirement does not appear to be proportionate to the impact caused by the proposed subdivision.

However, a requirement to simply the install a connection in the foundation of each home, to make future hookups to a sewer system easier, would be proportionate. The nature and extent of requiring foundation connections rather than lateral lines is proportionate to the impact of the development and furthers the County’s legitimate interest of encouraging sanitary sewer systems. Moreover, the homeowners would benefit, because homes in the subdivision could connect to a future sewer system at a lower cost than if the connection were not installed. Thus, installing a connection located in the foundation of each home appears to be proportionate in nature and extent to the impact of the development, and would be an acceptable condition.

Conclusion

Under Utah law, the term “exaction” includes any condition imposed on a developer to gain approval for a building permit or subdivision plat. Exactions thus include conditions that do not require dedication of property, such as payment of fees, installation of improvements, or other requirements. All conditions imposed on new development are evaluated under the “rough proportionality” test, as codified in § 17-27a-507 of the Utah Code. Conditions are valid if they are linked to a legitimate governmental interest, and their nature and extent are roughly proportional to the impact caused by the new development.

Tooele County’s requirement that the Developer install “stub” sewer lines is a valid condition, provided the nature and extent of the installation is proportionate to the impact of the development. Encouraging development of sewer systems is a legitimate governmental interest, and requiring “stub” connections is a reasonable means of carrying out that interest. For this subdivision, requiring installation of lateral lines would likely be disproportionate, but requiring connections in the foundations of homes only appears to be acceptably proportionate to the impact of the development.

This Opinion makes no conclusions based on the cost of installing the connections. It has been assumed that the additional costs are reasonable.

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

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, § 13-42-205. 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 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

U.C.A. §13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. §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:

Marilyn Gillette
Tooele County Clerk
47 S. Main, #130
Tooele, UT 84074

On this _____ Day of September, 2007, 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