

Advisory Opinion #42

Parties: Equidigm Holding, LLC and North Ogden City

Issued: May 29, 2008

TOPIC CATEGORIES:

D: Exactions on Development

A City's requirement that a Developer purchase an undeveloped public right-of-way from the City, build a road, and then dedicate it back to the City adds unnecessary costs that are not proportional to the impact of the development. There is no reason why the City cannot retain ownership of the roadway strip, and allow the Developer to construct the road. Payment of an exaction "under protest" in order to preserve a right to a challenge may be permissible, although it is by no means clear.

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

Purchase and Improvement of Publicly-Owned Property as Condition of Development

Advisory Opinion Requested by: Equidigm Holding, LLC

Local Government Entity: North Ogden City

Applicant for the Land Use Approval: Ryan Johnson, Managing Member

Project: Residential Subdivision

Date of this Advisory Opinion: May 29, 2008

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

Issues

May the City of North Ogden require that a developer purchase publicly-owned land, construct a street on it, and then dedicate the same property back to the City?

Summary of Advisory Opinion

The City's requirement that Equidigm purchase a publicly-owned roadway, construct a road, and then dedicate the improved property back to the City is an invalid condition on Equidigm's proposed land development. As a condition imposed on subdivision approval, the City's "Purchase/Improve/Rededicate Requirement" is an exaction, which must satisfy the "rough proportionality" analysis of § 10-9a-508 of the Utah Code. The City has not shown that the burden and costs of purchasing the City-owned property, building the road, and then dedicating the property back to the City is roughly proportional to the impact caused by the proposed subdivision. Without an individualized determination that the exaction is roughly proportionate to the impact created by the subdivision, the exaction exceeds the City's authority.

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.

The request for this Advisory Opinion was received from Equidigm Holding, LLC on April 7, 2008. A letter with the request attached was sent via certified mail, return receipt requested, to Mayor Gary A. Harrop, North Ogden City, at 505 East 2600 North, Ogden, Utah 84414. Mayor Harrop's name was listed on the State's Governmental Immunity Database as the contact person for the City. The return receipt was signed and was received by the Office of the Property Rights Ombudsman (OPRO) on April 10, 2008, indicating that the City had received it.

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 April 7, 2008 with the Office of the Property Rights Ombudsman by Equidigm Holding, LLC, with attachments.
2. Email response from Bruce Evans, Attorney for North Ogden City, dated May 6, 2008.

Background

Equidigm Holding, LLC ("Equidigm") purchased a parcel of land in North Ogden City, and proposed developing a residential subdivision. The parcel was "landlocked," and did not have access to any improved public streets. However, the City owned an adjoining parcel that had evidently been acquired many years ago to be a public road or right of way. According to the information available for this Opinion, the City possessed fee simple title to the adjoining parcel (not merely an easement or defeasible title). The parcel was a narrow strip, suitable for use as a public road, although the road was never built, and the parcel was never used for public travel.

Equidigm approached the City and explained its proposal to develop the subdivision, and construct a road on the City's parcel. The road would not only provide access for Equidigm's proposed subdivision, but also access for other nearby properties. Equidigm was willing to build

the road at its expense.¹ The City, however, rejected this proposal, and required Equidigm to purchase the parcel from them, build the road, and then dedicate the newly-constructed road back to the City when construction was completed. The City offered to sell the parcel to Equidigm for \$18,000.00. According to the City, this was nearly \$2,000 below the appraised value. Although Equidigm objected to the sale, it nevertheless accepted the City's offer, and purchased the parcel in April of 2008. Ryan Johnson, the managing member of Equidigm, reports that he purchased the parcel under protest, and informed the City that he reserved the right to challenge the City's requirement. The City acknowledged Mr. Johnson's objections in its response.

Analysis

I. Requiring Equidigm to Purchase the Road Parcel and Dedicate it Back to the City Constitutes an Improper Exaction.

The City's requirement that Equidigm purchase the road parcel and dedicate back to the City after the road is improved (the "Purchase/Improve/Rededicate Requirement") constitutes an improper exaction under the laws of the State of Utah. Local governments are restricted from imposing unfair exactions on new development. As is discussed herein, the City's requirement is an improper exaction because the cost and burden imposed on Equidigm are not roughly proportional to the impact caused by the proposed subdivision. Disproportionate exactions are prohibited by § 10-9a-508 of the Utah Code, and by decisions of the Utah Supreme Court.

A. *The Utah Code Establishes Parameters for Local Governments that Impose Development Exactions*

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

(1) A county 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).² 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. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 41,

¹ From the information available for this Opinion, it appears that the road in question is not particularly long, and would end shortly past the boundary of Equidigm's property.

² There is a corresponding statute applicable to counties found at § 17-27a-507 of the Utah Code.

128 P.3d 1161, 1170.) In those two landmark cases, the U.S. Supreme Court promulgated rules for determining when an exaction is valid under the federal constitution's Takings Clause.³ 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.

B. The City's Requirement is an Exaction.

The City's requirement that the Developers purchase a roadway parcel from the City, improve it, and then dedicate the parcel back to the City 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.*, 2006 UT 2, ¶ 34, 128 P.3d at 1169.⁴ 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 Equidigm to purchase, improve, and then rededicate the roadway parcel in order to obtain approval for a subdivision, the City is requiring an exaction, which must satisfy the requirements of § 10-9a-508(1) of the Utah Code.⁵

C. There is an Essential Link Between the Exaction and the City's Legitimate Governmental Interest.

Because improvement and maintenance of roadways and management of traffic is a legitimate governmental interest, there is an essential link to the City's requirement that Equidigm provide a public road. The City's requirement that Equidigm acquire, improve, and dedicate property for a roadway meets the first test of § 10-9a-508, which requires an essential link, or "nexus" between the governmental interest and the proposed exaction. *See Nollan*, 483 U.S. at 837; *see also B.A.M.*, 2006 UT 2, ¶ 36, 128 P.3d at 1169. Building and maintaining adequate roadways is a legitimate government interest. UTAH CODE ANN. § 10-8-8; *see also Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117.⁶ Requiring Equidigm to acquire, improve, and dedicate

³ *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.

⁴ *See also Salt Lake County v. Board of Education, Granite School District*, 808 P.2d 1056, 1058 (Utah 1991) (Development exactions are "contributions to a governmental entity imposed as a condition precedent to approving the developer's project.")

⁵ The City's Purchase/Rededication Requirement falls squarely within the U.S. Supreme Court's *Nollan/Dolan* analysis, which specifically includes dedication of land as a condition of approval. *See Monterey v. Del Monte Dunes at Monterey, LTD.*, 526 U.S. 687, 703 (1999); *see also Dolan*, 512 U.S. at 385.

⁶ "In order for a government to be effective, it needs the power to establish or relocate public thoroughways, even at the expense of some individual citizens, for the convenience and safety of the general public. . . . In fact, cities are vested with the statutory power to 'lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, . . . and may vacate the same . . . by ordinance'. Utah Code Ann. 10-8-8." *Carrier*, 2001 UT 105, ¶ 18, 37 P.2d at 1117.

property to use as a roadway promotes the City's legitimate objectives, and thus the Purchase/Improve/Rededicate Requirement meets the first prong of § 10-9a-508.⁷

D. The City has not Shown that the Purchase/Improve/Rededicate Requirement is Roughly Proportional to the Impact of the Proposed Subdivision.

The required exaction exceeds the City's authority because there has been no showing that the Purchase/Improve/Rededicate Requirement is roughly proportional to the impact of the proposed subdivision. Both the Federal and Utah Constitutions "bar the 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).⁸ Fairness and justice dictate that a local government cannot force a single developer to construct and dedicate a public improvement over and above what is needed for a specific development. That is the underlying philosophy of the *Nollan/Dolan* rough proportionality analysis, codified at § 10-9a-508.

In order to satisfy § 10-9a-508(1)(b), the City is required to undertake "some sort of individualized determination" that its exaction is roughly proportional to the impact of the subdivision. *See B.A.M.*, 2006 UT 2, ¶ 39, 128 P.3d at 1170; *see also Dolan*, 512 U.S. at 391. The City has not shown the sort of individualized determination necessary to justify the Purchase/Improve/Rededicate Requirement. Without this determination, the City cannot meet its burden of establishing that the exaction is proper.

The City points out that requiring developers to deed roadways in new subdivisions to local governments is a "well established and lawful practice." In general, that is correct, as many residential subdivisions include internal and access roads built by private developers, which have been turned over to local authorities. Such road dedications are exactions, however, and are subject to the individualized rough proportionality analysis required by § 10-9a-508. Simply because the practice is well-established does not mean that it is exempt from the *Nollan/Dolan* rough proportionality analysis.

Even without an individualized study of the exaction's burden on the developer, there are serious questions that the Purchase/Improve/Rededicate Requirement is disproportional to the impact of Equidigm's subdivision. In the first place, the road that is being constructed appears to benefit other properties. If that is the case, it is unfair and unjust that Equidigm bear the full burden of constructing the road. State and Federal law prohibits the City from requiring Equidigm to bear more than its proportional share for the road.

⁷ Note that the first prong of the exaction test in § 10-9a-508 requires an essential link between the exaction (dedication of the road) and a legitimate government interest (providing adequate roadways). This first prong does not, however, require an essential link between the exaction (widening the road) and the approval sought (a subdivision). *See Nollan*, 483 U.S. at 837. The "rough proportionality" prong of the test weighs the impact of project for which approval has been sought against the nature and extent of the proposed exaction. *See B.A.M.*, 2006 UT 2, ¶¶ 39-40, 128 P.3d at 1169-70.

⁸ *See also Monterey*, 526 U.S. at 703 ("[I]n a general sense, concerns for proportionality animate the Takings Clause" (*i.e.*, the Fifth Amendment to the U.S. Constitution.)). As has already been discussed, Article 1, § 22 of the Utah Constitution also prohibits uncompensated public takings. *See* footnote 3, *supra*.

Secondly, the City's requirement that Equidigm purchase the property for the road from the City adds unnecessary cost to the project. Requiring purchase of the property amounts to a windfall for the City, because it gets the improved property back, but keeps the purchase price. There has been no individualized determination that the impact of the Equidigm subdivision is roughly proportional to the cost of acquiring the property, plus the cost of building the road and dedicating the property back to the City. Unless the City can show that the overall cost (including the purchase price as well as construction costs) is roughly proportional to the impact caused by the proposed subdivision, the requirement is an improper exaction under § 10-9a-508.

The City states that conditioning approval of the subdivision on Equidigm's purchase of the roadway parcel was "entirely appropriate," and necessary to prevent the City's property from becoming part "of one or more building lots." This argument is specious, because the City's property could not become part of a private building lot or a subdivision without the City's approval. Along the same lines, since it is impossible to obtain title to public property through adverse possession, there is no danger that City property will revert to private ownership.⁹

In further defense of the condition, the City claims that there was no other way to ensure that the development would proceed. "If the City were to 'gift' the property to a developer in this circumstance, the City cannot easily guarantee that the proposed development will proceed, be approved or sold to another owner." This argument also has little merit, because once the City has sold its property, nothing prevents a purchaser from reselling it. In fact, the City would exert more control over the development if it retained title to the roadway parcel and simply required Equidigm to construct the road

The City's position apparently stems from a belief that Equidigm must own the property in order that it may construct improvements upon it. It is true, as the City states, that a government entity must receive fair value when it disposes of public property. *Price Development Co. v. Orem City*, 2000 UT 26, ¶ 27, 995 P.2d 1237, 1247. However, that principle does not mean that the City is obligated to sell the roadway parcel to Equidigm so that the road could be built. It also does not follow, as the City seems to contend, that the City must sell its property to a developer in order force that developer to dedicate the improved property back.¹⁰ There is no law preventing the City from requiring a developer to improve any property already owned by the City, subject to rough proportionality analysis. In other words, the City may retain title to the

⁹ UTAH CODE ANN. § 78B-2-216 (formerly § 78-12-13); see also *Cassity v. Castagno*, 10 Utah 2d 16, 18, 347 P.2d 834, 835 (Utah 1959) ("One may not adverse the sovereign"); *Fries v. Martin*, 2006 UT App. 514, ¶ 7, 154 P.3d 184, 186-87 (Claimaint "cannot adversely possess land 'designated for public use'").

¹⁰ The City states that: "The practice Equidigm espouses (*i.e.*, not being required to purchase the roadway parcel) could directly threaten future developments within the City or statewide if it resulted in an expectation that the City shouldn't seek or require compensation for its property wherever it lies. Taken to an extreme, this would threaten deeding aprons, sidewalks, and other land when the City will ultimately receive title." E-mail Response, City of North Ogden, May 6, 2008.

land, but require construction and dedication of any improvements. The City could have simply entered an agreement with Equidigm to construct the road on the property it already owns.¹¹

In sum, the Purchase/Improve/Rededicate Requirement is an exaction that is subject to § 10-9a-508. In order for the exaction to be valid, the City must show that the total burden on Equidigm is roughly proportional, both in nature and extent, to the impact caused by the proposed subdivision. The City has not undertaken the sort of individualized determination which satisfied the rough proportionality test. The exaction is therefore invalid. Even without an individualized analysis, it appears that the added cost of purchasing the property from the City, only to dedicate it back after constructing a road, exceeds the proportional impact attributable to the subdivision.

II. Equidigm May Preserve the Right to Challenge the Exaction, by Protesting the Purchase of the Roadway Parcel.

Equidigm purchased the roadway parcel under protest. The City acknowledged that Equidigm disputed the sale.¹² While a full analysis of Equidigm's legal rights is beyond the scope of this Opinion, it is possible that an action challenging the exaction could be maintained. In *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979), one of the property owners paid the disputed exaction "under protest," so that his development could proceed. The Utah Supreme Court did not question his ability to pursue a challenge to the required exaction.¹³

Conclusion

The requirement that Equidigm purchase the roadway parcel from the City, construct a road, and then dedicate the same property back to the City is invalid. This Purchase//Improve/Rededicate Requirement is an exaction, because the City has imposed the requirement as a condition on Equidigm's subdivision application. As an exaction, the condition must satisfy the two-part test expressed in § 10-9a-508 of the Utah Code.

Requiring the purchase of City property for a road satisfies the first part of the test: There is an essential link between the construction and dedication of the road, and the City's legitimate interest in providing adequate public roadways. However, the requirement is an invalid exaction, because there has been no showing that it is roughly proportional to the impact caused by Equidigm's proposed subdivision. The burden of constructing the road alone may be

¹¹ As a condition of approval, such an agreement would be an exaction subject to the "rough proportionality" analysis of § 10-9a-508.

¹² See E-mail Response, North Ogden City, May 6, 2008. The City stated that it rejected Equidigm's request that the purchase money be held in escrow pending this Opinion.

¹³ *Call v. City of West Jordan*, 606 P.2d 217, 218 (Utah 1979). Plaintiff Clark Jenkins paid \$16,576.00 "under protest." The Court did not directly address his standing to challenge the exaction.

disproportionate to the impact of the subdivision, plus the unnecessary cost of purchasing the property from the City further exceeds the needs caused by the proposed development. For these reasons, the Purchase/Improve/Rededicate Requirement is an invalid exaction, unless the City can show, through an individualized determination, that the total cost and burden is roughly proportional to the impact of Equidigm's proposed subdivision.

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.

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:

Mayor Gary A. Harrop
505 E. 2600 North
North Ogden, UT 84414

On this _____ Day of May, 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