Advisory Opinion #47

Parties: David Grotegut and City of Spanish Fork

Issued: July 29, 2008

TOPIC CATEGORIES:

D: Exactions on Development
E: Entitlement to Application Approval (Vesting)

The expense of complying with exaction must be roughly equal to the costs the City would incur to address the impact. It also must be remembered that the trail requirement was imposed in exchange for concessions on density. Development must proceed within the bounds set by statute and ordinances, as well as specific plans.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Validity of Development Agreement for Construction of Public Improvements as Condition of Development

Advisory Opinion Requested by:	David Grotegut
Local Government Entity:	Spanish Fork City
Applicant for the Land Use Approval:	David Grotegut
Project:	Residential Subdivision
Date of this Advisory Opinion:	July 29, 2008
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

I. May a local government require dedication of a twenty-eight foot strip of land for a trail, landscaping, and storm-water management from an individual property owner who is part of a larger development project?

II. Is the City obligated to approve an additional lot proposed by the developer?

Summary of Advisory Opinion

The required dedication constitutes an exaction, which must satisfy the "rough proportionality" analysis required by state and federal law. The requirement promotes legitimate governmental interests, and thus satisfies the first part of the test. The City must also show, however, that the dedication is roughly equivalent to the costs associated with assuaging the impact attributable to the new development. Only if the cost of addressing the impact can be shown to be roughly equal to the cost of the property to be dedicated, can the condition be considered valid.

The City is not obligated to approve an additional lot on a major collector if the lot violates prohibitions found in the City's code. The property is subject to zoning regulation by the City,

and the subdivision must comply with the restrictions found in the City's code. Even if an additional lot is allowed by the applicable density, the restrictions prohibit the layout proposed by the developer.

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. 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 David Grotegut on March 26, 2008. A letter with the request attached was sent via certified mail, return receipt requested, to Kimberly Robinson, City Recorder, Spanish Fork City, at 40 S. Main Street, Spanish Fork, Utah 84660. Ms. Robinson's name was listed on the State's Governmental Immunity Database as the contact person for the City. The City submitted a response, which was received by the Office of the Property Rights Ombudsman on April 8, 2008. Mr. Grotegut submitted additional information on April 14, 2008 and on April 29, 2008. On April 14, copies of all correspondence that had been received were sent to Brent Bowers of Salisbury Development, which is a potentially interested party. Neither Mr. Bowers nor Salisbury Development submitted any response.

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 March 26, 2008 with the Office of the Property Rights Ombudsman by David Grotegut, with attachments.
2. Response from Spanish Fork City, submitted by S. Junior Baker, City Attorney.
3. Additional information from David Grotegut, received on April 14 and 29, 2008.

Background

In June of 2006, Spanish Fork City annexed about 127 acres, including a parcel owned by Mr. Grotegut. The parcel was located along the City's eastern boundary, near 400 North. Mr. Grotegut agreed to this annexation.[1] By the end of 2006, Salisbury Homes had submitted an

[1] According to Mr. Grotegut, the annexation was proposed by KDNJ Development, LLC. Mr. Grotegut signed an agreement with KDNJ, along with another property owner. It appears that Salisbury Homes acquired the KDNJ property, and has pursued development.

application for a proposed planned unit development ("PUD") encompassing all or most of the parcel. The PUD included single family homes, condominiums, and multi-family residences, along with some parks. The City allowed the PUD to have a higher density, or number of units, than would have been allowed under the zoning designation for the property. This "bonus density" of 79 units was approved, at least in part, because the PUD's developers promised to develop a trail along 400 North to be incorporated into the City's trail system.[2]

Mr. Grotegut's property is included in the northwest corner of the PUD, although he states that he is free to develop his property independently of the PUD's developer, and that his property is not bound by the requirements imposed on the remainder of the PUD. The property will be linked to the remainder of the annexed parcel by roads. Mr. Grotegut lives in an existing home on the property, located on 400 North, but no other lot will be accessible directly from that road. By agreement, Mr. Grotegut transferred the "bonus" density on his property to KDNJ, in exchange for payment of initial fees and engineering costs.

The overall development was approved in phases. Salisbury began by developing the first two phases on the southern portion of the parcel, away from Mr. Grotegut's property, and has proceeded northward. Mr. Grotegut's property is designated as "Neighborhood #2" and it appears that it will not be developed by Salisbury, although it will still be part of the same PUD.

As a condition of approval, the City required the developers of the PUD to dedicate a 28 foot strip of property along 400 North for a trail and landscaping. The landscaping would include a curb and gutter, storm drain, and a wall separating the trail from the adjoining homes.[3] Mr. Grotegut objects to this condition, stating that the burden of the total required exaction is disproportionately high compared to the impact caused by the development on his property. As of this writing, Mr. Grotegut has not formally dedicated the property to the City.

The City approved a preliminary plat for the PUD in early 2007. Mr. Grotegut's property included 22 new lots, plus the existing lot. None of the new lots had frontage on 400 North, but all were accessed by internal streets. The City indicated that it preferred to restrict access onto 400 North, in order to minimize traffic disruption on that collector route.[4] In November of 2007, Mr. Grotegut applied to modify the plat layout on his property. He hoped to add an additional lot on 400 North to the west of his home. He maintained that this proposed lot could share the existing access with his home, or, in the alternative, be accessed by a lane from an internal street. The City rejected both the "shared access" proposal and the alternative "lane access," on the basis that City ordinances prohibited "flag" lots.[5] The City also maintains that the maximum

[2] The City ordinance annexing the parcel designated the zoning as "R-1-12" (12,000 square foot lots, or a density of about 3.5 units per acre), and imposed two conditions: (1) Completion of 130 West before July 2008; and (2) construction of a trail in conjunction with development of the parcel. The City states that 17.38 additional lots are attributable to the trail construction.

[3] Mr. Grotegut's home would still have access from 400 North, although it is not clear whether the wall would be required. Dedication of land for the trail was also a condition of annexation. *See* note 2.

[4] The City's Ordinances prohibit new lots with frontage on arterial or major collector streets. Spanish Fork City Code, § 39.20.030(G).

[5] A "flag" lot does not have full frontage directly on a public street, but is accessed by a driveway or lane.

allowable density, or number of lots, has been reached, and so an additional lot could not be added.

The City did allow Mr. Grotegut access to his existing home from the east, via a 12 foot lane from a cul-de-sac. The City felt that this access would be beneficial, because it would help alleviate possible traffic problems on 400 North. Mr. Grotegut disagrees with this proposal.

Analysis

I. In Order to be a Valid Exaction, the Cost of the Trail Must be Roughly Equal to the Cost Necessary to Address the Increased Needs Caused by the Development.

The City's requirement that property be dedicated for a trail 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. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 34, 128 P.3d 1161, 1169 ("*B.A.M. I*").[6] 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 Mr. Grotegut dedicate a portion of his property and develop it into a trail and landscaping 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.

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

> (1) A municipality 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).[7] 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 I,* 2006 UT 2, ¶ 41, 128 P.3d at 1170.) In those two landmark

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

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

cases, the U.S. Supreme Court promulgated rules for determining when an exaction may be validly imposed under the federal constitution's Takings Clause.[8] 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.

The Utah Supreme Court further honed the "rough proportionality" analysis in *B.A.M. v. Salt Lake County*, 2008 UT 45 ("*B.A.M. II*"), which was a second appeal stemming from the same development project at issue in the earlier decision. The decision 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." *B.A.M. II*, 2008 UT 45, ¶ 9. The "nature" aspect focuses on the relationship between the purported impact and proposed exaction. The court agreed that the approach should be expressed "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.*, 2008 UT 45, ¶ 10.

The "extent" aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost:

> The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively. The impact of the development can be measured as the cost to the municipality of assuaging the impact. Likewise, the exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction.

Id., 2008 UT 45, ¶ 11. The court continued by holding that "roughly proportional" means "roughly equivalent." 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 address (or "assuage") the impact attributable to a new development.

In order to be a valid exaction, the City's dedication requirement must satisfy all aspects expressed in § 10-9a-508. First, there must be an essential link between a legitimate interest and each exaction. The City's legitimate governmental interests are promoted because the dedication provides drainage control,[9] a pedestrian trail,[10] street improvements, and landscaping.[11] Requiring the developers to dedicate the land for these improvements is a reasonable means of

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[8] *See* U.S. CONST., amend. V. ("nor shall private property be taken for public use, without just compensation.")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 I.*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. *See also* UTAH CONST. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation.")

[9] *See, e.g., Call v. West Jordan*, 606 P.2d 217, 219 (Utah 1980). ("As undeveloped land is improved, it is also important that some provision for flood control be made.").

[10] *Call*, 606 P.2d at 219 (Court endorsed the desirability of public recreational facilities, such as parks and trails); *see also* UTAH CODE ANN. § 10-8-8 (Cities may establish pedestrian walkways).

[11] *See Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117 (Cities authorized to establish and improve roads); *see also* UTAH CODE ANN. § 10-8-8. The dedication includes curb and gutter along 400 North.

accomplishing the City's objectives.[12] Since the City's legitimate interests are promoted by the dedication, the first prong of § 10-9a-508 is satisfied.

The City must also show that the second prong of the test has been met.[13] With regard to the "nature" aspect of the test, the problem stemming from the proposed development seems to be the increased concentration of population from approximately 350 new homes, along with some increase in traffic on local streets. The solution proposed by the City is a trail along 400 North, plus drainage control, street improvements, and landscaping. The need for drainage control, street improvements, a trail system, and landscaping, can be attributed, at least in part, to the impact of the new development on the PUD. Therefore, the exaction is related in nature to the impact of the development.

However, the City has provided no information about the costs associated with the dedication requirement. As has been discussed, the *B.A.M. II* court held that the analysis must include a comparison of the cost to the City resulting from the impact of the development against the cost to the developer to dedicate the land. The "needs" caused by the development includes the impact on the City's trail system, along with the need for increased stormwater drainage. These costs are measured by the "impact" of the new development, and may be different than the cost of the land to be dedicated.[14] Instead, the City's cost is measured by the cost necessary to meet the increased needs due to the new development, which may be not be the same as the cost to acquire the land directly. Absent an analysis of the costs, and a showing that the costs are roughly equivalent, the excaction must be deemed invalid and cannot be imposed by the City.

Mr. Grotegut's parcel is part of the entire PUD area. The City has granted additional density in the PUD in exchange for dedication of the trail. Mr. Grotegut has benefited from the additional density by receiving value in exchange for transferring his portion density to KDNJ. It is therefore appropriate that the entire PUD be used to determine the level of impact and allocation of costs, rather than Mr. Grotegut's smaller parcel alone. If the cost of assuaging the need is approximately equal to the value of the land and improvements to be dedicated, the exaction satisfies the "rough proportionality" (or "rough equivalency") test. If the City's cost to address the impacts is less than the value of the land and improvements, the City will either have to

[12] Note that the first step of the evaluation under § 10-9a-508(1)(a) requires an essential link between the exaction and a legitimate governmental interest. This first prong of the test does not require a connection between the exaction and a need attributable to new development. As has been discussed, the "nature aspect" expressed in § 10-9a-508(1)(b) concerns the relationship between the exaction and the need created by new development. *B.A.M. II*, 2008 UT 45, ¶ 10.

[13] *See B.A.M. I*, 2006 UT 2, ¶ 39, 128 P.2d at 1169-70 (Rough proportionality analysis "include[s] the imposition of a burden on the governmental entity to make 'some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development'")(quoting *Dolan*, 512 U.S. at 391).

[14]The decision in *B.A.M. II* emphasized that the cost would be determined at the time of the exaction. Therefore, the cost of acquiring the land would be the fair market value, which is exactly the value of the land to the developer. However, the cost of assuaging the impact may be different than merely the cost of the land to be dedicated.

modify its condition, or compensate the land owners for amounts that exceed the cost of the impact.[15]

II. The City is not Obligated to Approve an Additional Lot on 400 North.

Because of restrictions in the Spanish Fork City Code, the City could deny Mr. Grotegut's request for an additional lot on 400 North. The City's standards for street improvements prohibit new lots with direct access from arterial or major collector streets. *See* Spanish Fork City Code, § 39.20.030(G). In addition, § 15.3.24.090(F) of the City Code prohibits flag lots in new subdivisions. These two provisions preclude the alternative proposed by Mr. Grotegut for a new lot to the west of his existing home. Access from 400 North is precluded, if the street is an arterial or major collector road.[16] Furthermore, the alternative access, via a driveway or lane from an interior cul-de-sac, is also prohibited, as that would result in the creation of a "flag" lot.

Mr. Grotegut maintains that the density approved for his parcel allows at least one additional lot, so he should permitted to develop a lot on the west of his home. However, the number of allowable lots is not the determining factor. Based on the plat maps, Mr. Grotegut could develop 3-4 lots along 400 North.[17] The City Code, however, prohibits new lots with access from a major street, and also prevents flag lots.[18] Mr. Grotegut's property is subject to the zoning regulations of the City Code.[19] In this case, those regulations prevent development of the lot in the manner he has proposed. If Mr. Grotegut would like to take advantage of the additional lots, he would need to reconfigure his design in a manner permitted by City Ordinances.

Conclusion

The City's condition that Mr. Grotegut dedicate a 28-foot strip of his property for a trail, curb and gutter, and storm drainage constitutes an "exaction" under state and federal law. A local government may impose an exaction on property development, but the exaction must satisfy the *Nolan/Dolan* "rough proportionality" analysis. The requirement promotes the legitimate governmental objectives of street improvement, development of recreational facilities, and

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[15] The "rough equivalency" analysis also applies to the costs to install improvements, in addition to the cost of dedicating the land. Because no information concerning impacts or costs have been submitted, it is not possible for this Opinion to determine whether the exaction is valid.

[16] The materials submitted for this Opinion do not conclusively identify 400 North as either an arterial or major collector street, but there are references in Planning Commission and City Council minutes that strongly imply such a status.

[17] The extra lot apparently fits within the allowable density for the property. The City's objections stemmed from the access issues.

[18] It appears that a plat was proposed which included 24 lots with no new lots on 400 North. It is not clear why this proposal is undesirable.

[19] "[A]n owner of property holds it subject to zoning ordinances enacted pursuant to a [city's] police power." *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 252 (Ct. App. Utah 1998) (*quoting Western Land Equities v. City of Logan*, 617 P.2d 388, 390 (Utah 1980)). The access restrictions were in place before Mr. Grotegut applied for development, so he does not have the right to develop a new lot that would violate the City's ordinances. He does, however, have the right to maintain the access that already exists to his home.

control of storm and flood waters. Thus, the first prong of the "rough proportionality" analysis is met.

A recent decision from the Utah Supreme Court held that "roughly proportional" means the same as "roughly equivalent" in nature and extent. This means that the cost to the developer of dedicating property must be roughly equal to the cost that would be incurred by the local government to address the impact caused by new development. The City's condition on Mr. Grotegut's development must satisfy this analysis. Since no information concerning the respective costs has been submitted, this Opinion cannot determine if the City's condition satisfies this aspect of the analysis. Absent this analysis, with a showing that the cost of the impact is roughly equal to the cost of the exaction, the exaction cannot be imposed.

The City was not obligated to approve an additional lot on 400 North, because to do so violated the City's ordinances. The City's Code prohibits new lots with access from major collector or arterial streets, and it also prohibits "flag" lots. The proposed lot would either be a flag lot, or would require access from 400 North. Since this is prohibited by the City Code, the lot should not be approved. Even though the additional lot may be permissible under the density applicable to the parcel, the restrictions of the City's Code prohibit the proposed lot.

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:

Kimberly Robinson, City Recorder
Spanish Fork City
40 S. Main St.
Spanish Fork, UT 84660

On this _____ Day of July, 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