

Advisory Opinion #48

Parties: Ensign Development and Tooele City and Tooele County

Issued: July 29, 2008

TOPIC CATEGORIES:

D: Exactions on Development

Requiring construction and dedication of flood control improvements constitutes an exaction, which must satisfy rough proportionality analysis. Flood control is an important public interest, so there is a link between the requirement and a legitimate governmental interest. It remains to be seen, however, if the cost of the improvements is roughly equivalent to costs that could be incurred by the government to address the impacts.

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

Advisory Opinion Requested by: Ensign Development

Local Government Entity: Tooele City
Tooele County

Project: Canyon Gate Subdivision and Middle Canyon Wash

Opinion Authored By: Su J. Chon, Attorney
Office of the Property Rights Ombudsman

Date of this Advisory Opinion: July 29, 2008

Issue

May local government require Developer to dedicate property and provide improvements to a historic flood channel as a condition for approval of a proposed subdivision?

Summary of Advisory Opinion

The City's requirement that the Developer dedicate property and provide improvements to a historic flood channel as a condition for approval of a proposed subdivision is an exaction that must be analyzed using the "Nollan/Dolan" rough proportionality test found in §10-9a-508. 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 equivalent to the cost imposed upon the developer, can the condition be considered valid.

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.

The request for this Advisory Opinion was received from Ensign Development on June 16, 2008. As provided in statute, a letter with the request attached was sent via certified mail, return receipt requested, to Sharon Dawson, City Recorder, at 90 N. Main Street, Tooele, Utah 84074, and to Marilyn K. Gillette, County Clerk, at 47 S. Main, #318, Tooele, Utah 84074. Both of the return receipts were signed and received on June 23, 2008, indicating that it had been received by both the City and the County. Roger Baker, attorney for Tooele City, responded by mail on or about June 25, 2008. Wayne Jones, the Deputy County Attorney for Tooele County, responded by mail on or about June 26, 2008. Both of the attorneys referred to a letter dated February 22, 2008 as being responsive to the request for Advisory Opinion.

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, submitted by Ensign Development, and received by the Office of the Property Rights Ombudsman, June 16, 2008.
2. Letter dated February 22, 2008 from Roger Baker, City Attorney for Tooele City, and Wayne Jones, Deputy County Attorney for Tooele County, with attachments (the "February 22nd Letter").
3. Letter dated June 25, 2008 from Roger Baker, City Attorney for Tooele City, with attachments.
4. Letter dated June 26, 2008 from Wayne Jones, Deputy County Attorney for Tooele County.

Statutes & Ordinances

1. Tooele City Code, §7-19-2(2)(d).
2. Tooele County, Uniform Zoning Ordinance, Chapter 13.
3. Utah Code Ann. §10-9a-508.

Background

Ensign Development ("Developer") and its principal, Elyas Raigne, approached Tooele City ("City") regarding a proposal to develop its property, which constitutes approximately 43 acres ("Property"). The Middle Canyon Wash ("Wash") runs through the approximate middle of the Property. Middle Canyon Creek and the Wash is part of a historic, natural flood channel that traverses through both the City and Tooele County ("County"). The County undertook a flood control study of Middle Canyon Creek. As a result of the study, the Tooele County Commission adopted the Middle Canyon Creek Master Plan ("Master Plan") on January 8, 2008.

The Developer has not yet filed an application with the City for subdivision approval but has met preliminarily with City. In its meetings with the City, the Developer understood that it would be

responsible for making some improvements to the Wash as part of the City's and County's flood control measures for Middle Canyon Creek and the Wash. In its Request for Advisory Opinion, the Developer indicated its belief that it would be responsible for a structure that would cost approximately one million dollars. The City has indicated that there will be a City requirement of "property dedication and channel improvements to the Wash."¹ Both the City and the County have indicated that no final decision has been made as to the nature of the channel improvements. The City and County have asked the Developer to provide some alternative flood control solutions for review and have indicated a willingness to give professional consideration to such proposals. The City and County indicate that they do not have funding to start improvements to Middle Canyon Creek in accordance to the Master Plan. In the Master Plan, the County has proposed some options for funding those improvements.

In their February 22nd letter, both the City and the County have acknowledged that the City's requirement that the Developer dedicate land and improve the Wash constitutes an exaction. The City and County believe that the level of improvements that will be needed will be "directly proportional" to the amount of the land that can be developed.² All of the parties have agreed to have the OPRO issue an Advisory Opinion on this issue.

Analysis

I. The City's Requirement That the Developer Dedicate Property and Provide for Improvements to the Wash Is an Exaction that Must Be Analyzed Under the *Nolan/Dollan* Rough Proportionality Test.

The City's requirement that the Developer dedicate property and provide some improvements to the Wash 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*"). 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. Because the City is asking that the Developer dedicate property and provide improvements to the Wash, this request is an exaction that must satisfy the requirements § 10-9a-508 of the Utah Code.

Section 10-9a-508 of the Utah Code authorizes cities 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

¹ See February 22nd letter. It is presumed that the requirement of property dedication and channel improvements will be a valid condition because it is required by the Tooele City Code, §7-19-2(2)(d), consistent with the requirements expressed in Utah Code Annotated, §10-9a-509(e)

² See February 22nd letter.

(2) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

UTAH CODE ANN. § 10-9a-508(1).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 also*, *B.A.M. I*, 2006 UT at ¶ 41, 128 P.3d 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 § 10-9a-508.

Recently, the Utah Supreme Court clarified the second part of the analysis under § 10-9a-508(2) in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 45 ("*B.A.M. II*").⁵ That decision explained that the second prong of the "rough proportionality" test "has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent." *Id.* 2008 UT 45, ¶ 10. 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.*

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 governmental interest and each exaction. The Tooele City Code requires that a developer who has property within the hundred (100) year flood plain provide solutions for flooding and

³ There is a corresponding statute applicable to counties found at § 17-27a-507 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. I*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. *See also* UTAH CONST. art. I, § 22.

⁵ *B.A.M. II* is a second appeal of a development project that originally promulgated the "rough proportionality" analysis in Utah in the first appeal.

drainage issues before a subdivision can be approved.⁶ The City has a legitimate interest in controlling flooding and drainage issues.⁷ Requiring the Developer to dedicate the land in the Wash and provide for channel improvements are reasonable means of accomplishing the City's objectives.⁸ Since the City's legitimate interests are promoted by the requirement, the first prong of § 10-9a-508 is satisfied.

The City must also show that the second prong of the test has been met.⁹ As stated above, the "nature" aspect of the test is expressed in terms of a problem (the impact) and a solution (the exaction). With regard to the "nature" aspect of the test, the problem is the existence of homes within a flood plain and the potential that those homes could be flooded. Although the precise solution has not been established, it is presumed that the solution would help to prevent flooding of those homes. Therefore, the exaction is related in nature to the impact of the development.

Although the City has indicated that an exaction will be imposed, the specific exaction has not been determined. The City states that it has provided several alternatives for drainage and flood control, and has invited the Developer to do the same. Whenever the precise exaction has been determined, the "extent" aspect of the *Nollan/Dolan* analysis will require a showing by the City that the cost of the impact and the cost of the exaction are roughly equivalent.¹⁰ As has been discussed, the *B.A.M. II* court held that the analysis must include a comparison of the costs to the City resulting from the impact of the development against the cost to the developer to dedicate the land and provide the channel improvements. The City's cost is measured by the cost necessary to meet the increased *needs* for flood control and stormwater drainage due to the new development.¹¹ Absent an analysis of the costs, and a showing that the costs are roughly equivalent, the exaction must be deemed invalid and cannot be imposed by the City.¹²

⁶ Tooele City Code, §7-19-2(2)(d). Also, the Tooele County Code contains a similar provision restricting construction in a floodway or floodplain. See Uniform Zoning Ordinance of Tooele County, §13-4.

⁷ 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.").

⁸ Note that the first step of the evaluation under § 10-9a-508(1)(a) does not consider whether the City's requirement is the only or best means for accomplishing the City's objectives, only that the requirement be a *reasonable means* of accomplishing the those objectives. As long as the "essential link" is shown, the first prong is satisfied. There may be many other reasonable means for accomplishing the City's objectives. Tooele City has indicated a willingness to consider alternative means.

⁹ 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).

¹⁰ 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 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.

¹¹ The cost of the impact can perhaps be calculated as the cost to provide flood control to one home (in much the same way that impact fees are calculated), multiplied by the number of homes in the proposed development. The costs imposed upon the developer should be roughly equivalent to that amount.

¹² The Developer indicates that it anticipates that the cost of the exaction would be approximately one million dollars. Under this analysis, requiring the developer to expend one million dollars to provide flood control to 21 lots (a cost of approximately \$83,000 per lot) may indeed be an excessive exaction for flood control. When the City actually imposes the exaction, it must be shown roughly equivalent as to cost. If the exaction costs more to the Developer than the cost of assuaging the impact, the City must reimburse the difference to the Developer.

Conclusion

The City's condition that the Developer dedicate property in the Wash and provide channel improvement constitutes an "exaction" under state and federal law. A local government may impose an exaction on property development, but the exaction must satisfy the *Nollan/Dolan* "rough proportionality" analysis. The requirement promotes the legitimate governmental objective of control of 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 and channel improvements 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 the development must satisfy this 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.

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

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the governmental 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:

Sharon Dawson, City Recorder
Tooele City
90 North Main Street
Tooele, Utah 84074

Marilyn K. Gillette, County Clerk
Tooele County
47 South Main, #318
Tooele, Utah 84074

On this 29th 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