

Advisory Opinion #49

Parties: Jim Farrell, agent for Howard Kent and Grand County

Issued: August 20, 2008

TOPIC CATEGORIES:

- D: Exactions on Development
- J: Requirements Imposed Upon Development

Requiring construction and dedication of a connector road (and a bond for the improvements) is an exaction, which must satisfy rough proportionality analysis. The condition was properly imposed, because it was proposed, discussed, and approved by the County Council, which approved the recommendations made by the Planning Commission. A local government may impose conditions on new development, provided those conditions are expressed in a statute or ordinance, or expressed in writing as part of the approval process.

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: Jim Farrell, agent for Howard Kent

Local Government Entity: Grand County

Project: Pueblo Verde PUD

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

Date of this Advisory Opinion: August 20, 2008

Issue

May the County require Developer to dedicate property and provide a bond for road improvements as a condition for approval of a proposed subdivision?

Summary of Advisory Opinion

The City's requirement that the Developer dedicate property and provide a bond for road improvements 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 UTAH CODE § 17-27a-507. The requirement promotes legitimate governmental interests, and thus satisfies the first part of the test. The City must also show, however, that the cost of the dedication is roughly equivalent to the amount 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. The County has not made such a showing, and until doing so, cannot impose the exactions.

The Conditions imposed by Ordinance No. 439, Series 2006 are not invalid due solely to the fact that they were not attached to the City Council motion granting approval of the preliminary plat. The conditions appear frequently and patently within the written record evidencing approval of

the subdivision plat, and thereby may be imposed in accordance with UTAH CODE § 17-27a-508(1)(h)(i).

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 Jim Farrell, agent for Howard Kent, on May 16, 2008. As provided in statute, a letter with the request attached was sent via certified mail, return receipt requested, to Commissioner Judy Carmichael at 125 E. Center Street, Moab, Utah 84532. The return receipt was signed and received on May 21, 2008, indicating that it had been received by the County. W. Scott Barrett, deputy attorney for Grand County, responded by mail on or about June 25, 2008. Mr. Farrell sent a letter dated June 23, 2008, responding to the statement by Grand 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, submitted by Jim Farrell, and received by the Office of the Property Rights Ombudsman, May 16, 2008.
2. Letter dated June 25, 2008 from W. Scott Barrett, Deputy County Attorney for Grand County, with attachments.
3. Letter dated June 23, 2008 from Jim Farrell.

Background

Jim Farrell, on behalf of Howard Kent and SLI Real Estate Development (collectively, the “Developer”), filed an application for sketch plan and preliminary plat regarding a proposal for the Pueblo Verde PUD Subdivision (the “PUD”) in 2006. The PUD property is bounded by Spanish Valley Drive on the north and east and by Chapman Lane, a dirt road, on the west. The PUD will have 28 total units: 4 ranchettes on 2.5 acre lots and 24 one-third acre lots, with a primary access from Spanish Valley Drive.

According to the Minutes of the meeting dated August 9, 2006, the Grand County Planning Commission approved the Developer’s sketch plan along with several staff recommendations.

Those recommendations included “3. Extension of a connecting road to Chapman Lane to be shown on the Preliminary Plat.” On September 27, 2006, the Grant County Planning Commission approved the Developer’s preliminary plat application with conditions. Those conditions included: “2. Street Improvements should be made on the extension of Alejandro Drive to the County road standard and dedicated as a right-of-way. 3. The applicant shall bond for Street improvements on Chapman road within the subdivision to the County road standard and dedicate the half street right-of way.”

In the Minutes of the Grand County Council Meeting dated October 17th, 2006, a public hearing was held on the Developer’s preliminary plat application. The minutes reflect the approval and recommendation of the Planning Commission with conditions. The record does not indicate that any public comment was received. Finally, at the Grand County Council Meeting on November 21, 2006, the County Council considered and approved the Developer’s preliminary plat application. The minutes show only that the application was considered and approved. No conditions are listed.

The County Council then issued and recorded Ordinance No. 439, Series 2006, dated November 21, 2006. This Ordinance contains the Approval of the Developer’s preliminary plat. This Ordinance includes the conditions approved by the County Planning Commission verbatim, including the condition requiring improvement of Chapman Lane, and the improvement and extension of Alejandro Drive. The Ordinance is signed by Frank Townsend, County Clerk, and Joette Landianese, Chair of the County Council.

In his request, Mr. Farrell objects to the conditions that he dedicate and improve Alejandro Drive and that he dedicate property and bond for the improvements to Chapman Lane. Mr. Farrell claims that these conditions are illegal exactions. Mr. Farrell also objects to those conditions because they were not included in the motion approved by the County Council, but instead were surreptitiously and wrongfully placed within the ordinance by County staff.

Analysis

I. The County’s Requirement that the Developer Dedicate Property and Provide a Bond for Road Improvements Is an Exaction that Must Be Analyzed Under the *Nolan/Dollan* Rough Proportionality Test.

The County’s requirement that the Developer dedicate property and provide a bond for road improvements 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 County is asking that the Developer dedicate property and provide a bond for road improvements as a

condition of development approval, this request is an exaction that must satisfy the requirements § 17-27a-507 of the Utah Code.

Section 17-27a-507 of the Utah Code authorizes counties to impose exactions on new development, and also 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. § 17-27a-507(1).¹ 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.² This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis is reflected in § 17-27a-507.

Recently, the Utah Supreme Court clarified the second part of the analysis under § 17-27a-507(1)(b) in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 45 ("*B.A.M. II*").³ 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.

¹ There is a corresponding statute applicable to cities found at § 10-9a-508 of the Utah Code.

² 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.

³ *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.

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 County’s dedication requirement must satisfy all aspects expressed in § 17-27a-507. First, there must be an essential link between a legitimate governmental interest and each exaction. The Grand County Land Use Code requires that a developer provide connector roads from a subdivision to “existing principal streets.”⁴ The County is also concerned that the PUD have a secondary access in case of an emergency. The County has a legitimate interest in managing and controlling roads,⁵ traffic and access.⁶ Requiring the Developer to dedicate land for the connector road and the widening of Chapman Lane, and to provide a bond for future road improvements are reasonable means of accomplishing the County’s objectives.⁷ Since the County’s legitimate interests are promoted by the requirement, the first prong of § 17-27a-507 is satisfied.

The County must also show that the second prong of the test has been met.⁸ 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 lies in the addition of twenty-eight new homes to the area -- and the associated increase in traffic, as well as the need to provide a secondary, emergency access for the homes. The proposed solution is to provide a secondary road access to a county road. This solution is to be achieved by having the Developer dedicate land for and construct the improvements to the connector road (the extension of Alejandro Drive); dedicate land to widen that portion of Chapman Lane that lies within the boundaries of the Developer’s property; and provide a bond for the future construction of road improvements to Chapman Lane. The proposed solution would improve traffic management and provide secondary road access. Therefore, the exaction is related in nature to the impact of the development.

However, the County must also establish that the cost of the exaction to the Developer is roughly equivalent in extent to the cost to the County of assuaging the impact of the Development. In order to make such a showing, and satisfy the “extent” aspect of the *Nollan/Dolan* analysis, information must be provided that establishes (a) the cost of the exaction to the Developer, including the cost of dedicating land, the cost of improving the roads to the County standard, and the cost to bond for future road improvements; (b) the cost to the County to assuage the impact of adding twenty-eight new homes, including traffic management costs and costs to provide

⁴ GRAND COUNTY LAND USE CODE, § 5.3.2.

⁵ UTAH CODE ANN. §17-50-505(1)(b).

⁶ See, *Hampton v. State Rd. Comm’n*, 445 P.2d 708, 710 (Utah 1968) where the Supreme Court recognized the government’s police power to protect the public and facilitate traffic and access.

⁷ Note that the first step of the evaluation under § 17-27a-507(1)(a) does not consider whether the County’s requirement is the only or best means for accomplishing the County’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 County’s objectives.

⁸ 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).

emergency access to the development (the increased *needs* for roads due to the new development); and (3) that those costs are roughly equivalent.⁹ 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 County.¹⁰

II. The Conditions Imposed By Ordinance No. 439, Series 2006 Are Not Invalid Due Solely To The Fact That They Were Not Mentioned In The City Council Motion Granting Approval Of The Preliminary Plat.

The Developer also objects to the conditions imposed upon approval of the preliminary plat due to the fact that those conditions were not included in the County Council motion to approve the preliminary plat. Mr. Farrell claims that County staff surreptitiously and wrongfully placed the conditions in the ordinance that were not part of the approval.

While it is true that the Minutes of the County Council meeting make no mention of any conditions placed upon approval of the preliminary plat, the conditions are part of the Council's preliminary plat approval. UTAH CODE § 17-27a-508(1)(h)(i) dictates the circumstances under which conditions may be placed upon subdivision approval:

- (h) A county may not impose on a holder of an issued land use permit or approved subdivision plat a requirement that is not expressed:
 - (i) in the land use permit or subdivision plat documents on which the land use permit or subdivision plat is based, or the written record evidencing approval of the land use permit or subdivision plat; or
 - (ii) in this chapter or the county's ordinances.

This ordinance states that a condition imposed upon a subdivision plat must be expressed. The conditions may be expressed in the *written record* evidencing approval of the subdivision plat. Ordinance No. 439, Series 2006, is part of the written record evidencing preliminary approval of the subdivision plat. Without regard to the identity or motives of the party that prepared the ordinance, the ordinance has been signed by the County Clerk and Chair of the County Council. The Ordinance therefore is part of the written record evidencing approval of the plat. In addition, the conditions objected to by the Developer are clearly expressed throughout the preliminary plat approval process, including in the conditional approval given by the County Planning Commission, and were discussed on the record by the County Council at the public hearing. Accordingly, the conditions imposed by the County on the approval of the preliminary plat are expressed in the *written record* evidencing approval of the subdivision plat. The Developer may not claim ignorance of the conditions or that the inclusion of them was surreptitious. Because they are included in the written record evidencing approval of the subdivision plat, those

⁹ 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.

¹⁰ The *B.A.M. II* analysis applies to the present exaction despite the fact that *B.A.M. II* was recently decided (2008), while the exaction was imposed two years earlier, in 2006. The Utah Supreme Court in *B.A.M. II* did not establish a new exaction standard, but simply clarified the application of well-settled exaction law. See *B.A.M. II* at ¶8.

conditions are not invalid due simply to the fact that they were not directly expressed in the County Council motion for approval.

Conclusion

The County's condition that the Developer dedicate property for the connector road and the expansion of Chapman Lane and provide a bond to pay for the construction of road improvements to Chapman Lane constitute 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 controlling roads, traffic and access. Thus, the first prong of the "rough proportionality" analysis is met. The cost to the Developer of dedicating property and providing a bond for road improvements must also be roughly equal to the cost that would be incurred by the local government to address the impact caused by new development. The County'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.

The Conditions imposed by Ordinance No. 439, Series 2006 are not invalid due solely to the fact that they were not attached to the City Council motion granting approval of the preliminary plat. The conditions appear frequently and patently in the written record evidencing approval of the subdivision plat, and thereby may be imposed in accordance with UTAH CODE § 17-27a-508(1)(h)(i).

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 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:

Commissioner Judy Carmichael
125 E. Center Street
Moab, UT 84531

On this 20th day of August, 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