

Advisory Opinion #79

Parties: Frederico & Loretta Buj and Iron County

Issued: November 30, 2009

TOPIC CATEGORIES:

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

Subdividing property alone does not create the type of impact that requires installation of a fire suppression system. While there is a legitimate interest in fire safety, a local government may not require installation of a fire suppression system until development creates a need. Fire suppression may be required when a parcel is developed, but the County has not shown that it is necessary when property is being divided.

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.



The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov



GARY R. HERBERT
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State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Frederico & Loretta Buj

Local Government Entity: Iron County

Applicant for the Land Use Approval: Frederico & Loretta Buj

Project: Subdivision of Land

Date of this Advisory Opinion: November 30, 2009

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

Issues

May a local government require installation of a fire suppression system as a condition of subdivision approval?

Summary of Advisory Opinion

Subdividing property does not create the type of impact that requires installation of a fire suppression system. Dividing property does not automatically mean that it will be developed. While there is a legitimate interest in fire safety, a local government may not require installation of a fire suppression system until development creates a need. Fire suppression may be required when a parcel is developed, but the County has not shown that it is necessary when property is being divided.

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. 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.

A request for an Advisory Opinion was received from Frederico and Loretta Buj on September 22, 2009. A copy of that request was sent via certified mail to David I. Yardley, Iron County Clerk. The return certificate, indicating that the County received the copy of the Request, was received by the Office of the Property Rights Ombudsman on September 28. On November 16, 2009, a Response from Iron County was received.

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, including attachments, filed September 22, 2009 with the Office of the Property Rights Ombudsman by Frederico and Loretta Buj, including attachments.
2. Response from Iron County, prepared by G. Michael Edwards, Deputy County Attorney, received by the Office of the Property Rights Ombudsman on November 16, 2009.

Background

Federico and Loretta Buj, along with some family members, purchased approximately 137 acres of property located near Beryl, Utah in July of 2005. The Bujs applied to subdivide the property, creating 6 lots, which would then be transferred to a family member. Among other conditions, Iron County required the property owners to install a fire suppression system in order to obtain subdivision approval.¹ The County required that the fire suppression system comply with the International Fire Code, which has been adopted by the State of Utah and Iron County.² The County states that the system only needs to serve the subdivision, and is not expected to provide service to other properties.

¹ There were other conditions required for subdivision approval, but they are not an issue for this Opinion.

² Specifically, the suppression system must be able to provide at least 1500 gallons per minute for a two-hour duration. The County Fire Warden also imposed other conditions which are not at issue for this Opinion.

The Bujs state that they have no current plans to develop the property, but only want to divide the parcel amongst the family members. They do not necessarily question that fire suppression is a valid requirement, only that it is not necessary to install such a system until the property is actually developed. The County states that installing a fire suppression system promotes a legitimate government objective, by providing the means to respond to fires on the property. The County maintains that requiring the Bujs to install the suppression system is a permissible exaction, because the cost to the property owners is roughly equivalent to the costs that would be incurred by the County to fight fires. The County did not provide any analysis comparing the cost to the property owners against the expense incurred by the County.

Analysis

I. The Fire Suppression Requirements of the International Fire Code may be Imposed by State Law and County Ordinance.

Local governments may impose requirements and conditions on development if the requirements are enacted by statute or are clearly expressed as part of the approval process:

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 [Chapter 17-27a of the Utah Code] or the county's ordinances.

UTAH CODE ANN. § 17-27a-508(h).³ A “land use permit” is any permit required by a local government as part of its land use regulations. *See id.* § 17-27a-103(25).⁴ Subdivision approval is required by a local government as part of its land use regulations, and is thus a “land use permit.” The County may impose reasonable conditions and requirements that are found in its ordinances or in State law.

The International Fire Code has been adopted as part of state law and the County's ordinances, and so the County may properly impose those requirements upon new development. The State and the County have both adopted uniform building codes by reference, including the International Fire Code, to protect life and property. All buildings must comply with those codes. The County's Ordinances specifically require new subdivisions to meet fire codes:

Fire Control. A letter, official comments from the Iron County fire chief, or other agency responsible for providing fire protection to the proposed minor subdivision, identifying any items related to provide adequate fire protection and

³ *See also* Utah Code Ann. § 10-9a-509(h) (Applicable to municipalities).

⁴ “‘Land use permit’ means a permit issued by a land use authority.” UTAH CODE ANN. § 17-27a-103(25); “‘Land use application’ means an application required by a county's land use ordinance.” *Id.* § 17-27a-103(22). A building permit is required to construct a new dwelling. A building permit must be approved by the County Fire Department.

suppression services. The proposed minor subdivision shall meet the requirements for fire protection and suppression as adopted by the agency responsible for fire protection, including the provision of fire hydrants, adequate water supply, water storage and other facilities necessary for fire protection and suppression.

IRON COUNTY CODE, § 16.20.070(C).⁵ Local governments may enact ordinances to promote the public's "health, safety, and welfare." UTAH CODE ANN. § 17-27a-103(1). Building and fire codes promote the public's health and safety by requiring compliance with accepted safe building methods. Since the International Fire Code is required by County ordinance and state law, compliance with it is a valid requirement for new development.

II. The Fire Suppression Condition is an Exaction Which Must Comply with Section 17-27a-507 of the Utah Code.

A. The Requirement is an Exaction, which is subject to "Rough Proportionality" Analysis.

The County's requirement that the Bujs install a water system to provide a 1,500 gpm fire flow 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 County requires installation of the fire-suppression system as a condition of approval for a building permit, the County is requiring an exaction, which must satisfy § 17-27a-507(1) of the Utah Code. This statute authorizes counties to impose exactions on new development, within established limits:

- (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).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,

⁵ The Bujs' proposed subdivision qualifies as a minor subdivision.

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 cities found at § 10-9a-508 of the Utah Code.

114 S.Ct. 2309 (1994). (See *B.A.M. I*, 2006 UT 2, ¶ 41, 128 P.3d at 1170) In those two landmark 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 § 17-27a-507.

The Utah Supreme Court further honed the “rough proportionality” analysis in *B.A.M. Development, LLC 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. This opinion 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 land use.

B. The Requirement Satisfies the First Prong of the Rough Proportionality Test

In order to be a valid exaction, the County’s requirement must satisfy all aspects expressed in § 17-27a-507(1). First, there must be an essential link between a legitimate interest and the requirement. The County has a legitimate governmental interest in preventing fires and safeguarding life and property.⁹ Requiring installation of a water system for fire suppression is a

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 UTAH CODE ANN. § 53-7-106; see also § 17-50-302: (Counties may provide services reasonably related to the health, safety, and welfare of residents). Furthermore, building and fire codes promote safety and fire prevention.

reasonable means of accomplishing the County's objectives.¹⁰ Since the County's legitimate interests are promoted by the requirement, the first prong of § 17-27a-507 is satisfied.

C. The Requirement Does not Satisfy the Nature Aspect of the Analysis

The County's requirement, however, fails to meet the "nature" aspect of the analysis. The nature aspect of the rough proportionality analysis requires only a relationship between a need or "problem," and how the exaction "solves" the problem. In this situation, there has been no showing that the subdivision of the land creates a "problem" that justifies installation of a suppression system. Subdivision generally affects only the legal status of the lots,¹¹ but not necessarily the physical characteristics. After subdivision, the fire danger will likely be the same as before subdivision. Installation of a suppression system is a disproportionately excessive "solution" to a "problem" that has not arisen.¹² While fire suppression is certainly a legitimate governmental interest, and installing a suppression system is a reasonable means to promote that interest, creating a subdivision plat simply does not create a need for a suppression system.

Subdivision does not necessarily grant a property owner any special entitlement to develop property. Development would be required to follow statutory standards, including building and fire codes. According to the Bujs, the property will remain unchanged after subdivision, because there are no current plans to develop any of the lots. Therefore, the fire suppression needs will also remain unchanged. In most circumstances, a property owner divides property intending to develop it. However, property may be divided without development. Therefore, a subdivision application does not necessarily create an impact requiring installation of a fire suppression system.¹³ Since the requirement does not satisfy the nature aspect of § 17-27a-507(1)(b), the County may not validly impose the requirement at the subdivision stage.

¹⁰ Note that the first step of the evaluation under § 17-27a-507(1)(a) requires an essential link between the requirement 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.

¹¹ "Subdivision" means any land that is divided, resubdivided or proposed to be divided into two or more lots, parcels, sites, units, plots, or other division of land for the purpose, whether immediate or future, for offer, sale, lease, or development either the installment plan or upon any and all other plans, terms, and conditions." UTAH CODE ANN. § 17-27a-103(44).

¹² Many subdivision applications clearly evidence the intent to immediately develop the property, for example by showing new roads, utility easements, etc., on the face of the application. Where the subdivider clearly expresses the intent to proceed to development of property, the "nature" aspect is satisfied because the "problem" has arisen – the lots will soon be improved and occupied. This Advisory Opinion contemplates only whether the subdivision on land, without more, justifies installation of a fire suppression system.

¹³ An earlier Advisory Opinion issued by the Office of the Property Rights Ombudsman concluded that a local government could require installation of a fire suppression system as a condition of approval for a building permit. *See Opinions of the Office of the Property Rights Ombudsman, # 55, Jim Shea, Jr.* (November 12 2008). In contrast, the Bujs are not applying for a building permit, but a simply dividing their property. If any of the lots were developed, the County could likely require installation of a fire suppression system. The impact arises due to building or development, not division of the parcel.

Conclusion

The County has a legitimate interest in promoting fire and building safety, and may require installation of fire suppression systems when a parcel is developed. However, a subdivision application does not automatically mean that a parcel will be developed. Subdivision approval alone simply does not create the type of impact that requires installation of a fire suppression system. If any of the parcels in the new subdivision are developed, the County may validly require installation of an acceptable fire suppression system.

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:

David I Yardley, County Clerk
Iron County
68 South 100 East
Parowan, Utah 84761

On this _____ day of November, 2009, 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