

# Advisory Opinion #15

Parties: Brian Hofheins and Wasatch County, Wasatch County Special Service District #1  
Issued: April 27, 2007

## TOPIC CATEGORIES

### Exactions on Development

A requirement that a developer dedicate water rights is an exaction. An exaction must satisfy rough proportionality analysis. There was no showing that the amount of water required is roughly proportionate to the impact of the proposed subdivisions.

#### 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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# State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

## ADVISORY OPINION

### Proving Water Rights as a Condition of Property Development

Advisory Opinion Requested by: Bryan Hofheins  
Local Government Entity: Wasatch County  
Wasatch County Special Service District #1  
Applicant for the Land Use Approval: Bryan Hofheins  
Project: Subdivision of Two Parcels in Wallsburg  
Date of this Advisory Opinion: April 27, 2007

#### Issue

Is Wasatch County's requirement that a property owner obtain four acre-feet of water rights per acre for two proposed subdivisions a valid exaction under § 17-27a-507 of the Utah Code?

#### Summary of Advisory Opinion

The county's requirement that the property owner obtain water rights and transfer joint ownership to a special service district is an exaction. In order to be valid, this exaction must meet the two-part standard imposed by § 17-27a-507 of the Utah Code. This statute adopts the constitutional takings analysis of the U.S. Supreme Court in the *Nollan* and *Dolan* cases. The county's exaction meets the first prong of that analysis, because there is an essential link between the county's legitimate objective of ensuring adequate water supplies and requiring property owners to provide water rights for new development.

The exaction, however, does not meet the second prong of the test required by the statute. There has been no showing that the amount of water required is roughly proportionate to the impact of the proposed subdivisions. The county bases the requirement on a finding that the properties had been "historically irrigated," which ignores the intended agricultural use of the new development. The county's water requirement appears to be derived from the irrigation duty for the area, and not on the proposed use of the properties. Furthermore, even if historic use is the basis for the amount of water required, there is evidence that the properties were irrigated with one-half of the water the county now expects the property owner to provide.

## **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 U.C.A. §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 Bryan Hofheins on January 22, 2007. A letter with the request attached was sent via certified mail, return receipt requested, to Thomas Low, Salt Lake City, at 805 W. 100 South, Heber City, Utah 84032. The return receipt was signed and was received on February 23, 2007, indicating that Mr. Low had received it.

## **Evidence**

The following documents and information with relevance to the issue involved in this advisory opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion filed January 22, 2007 with the Office of the Property Rights Ombudsman by Bryan Hofheins
2. Ordinance No. 10.01.01 of the Wasatch County Code, "Adequate Water Rights Required"
3. Ordinance No. 16.07.14 of the Wasatch County Code, "Other Requirements"
4. "Water Development Review Data Sheet — Scarpino Subdivision" (Undated, presumed late 2006)
5. "Water Development Review Data Sheet — Thompson Subdivision" (Undated, presumed late 2006)
6. "Proposed Determination of Water Rights by the State Engineer Provo River Division Round Valley Subdivision Book 1" dated May 1, 1984 (Available via Utah Division of Water Rights Web Site, Code 55, Book 1)
7. Telephone conversations and emails from Bryan Hofheins
8. Telephone conversation with Steve Ferrell, Wasatch County Water Advisory Board

## **Assumed Facts**

1. This Opinion focuses solely on the requirement that the developer obtain water shares in order to gain approval for the subdivisions. It is assumed that the proposed subdivisions would meet other development requirements of the county.
2. This Opinion also assumes that sufficient water shares are available for purchase by the property owners from the water companies, and that purchase of the shares for the

intended use does not violate any of the articles, bylaws, or resolutions of the respective water companies, and is not otherwise illegal or impossible.

### **Background**

Bryan Hofheins has proposed two subdivisions on two separate parcels located in Wallsburg, Utah. The first proposal would subdivide a 15 acre parcel into three lots (the "Scarpino Subdivision"), and the second would subdivide a 30 acre parcel into five lots (the "Thompson Subdivision"). The two parcels are not contiguous, and are owned by two separate entities incorporated by Mr. Hofheins and his business partner. The purpose of the subdivisions is to create large residential lots with animal rights. The properties are both zoned "Residential-Agricultural" (RA-5), which allows residences with agricultural uses on lots no smaller than five acres.

In order to gain approval of the subdivisions, the Wasatch County Water Advisory Board ("Board") required that the property owners acquire the following:

#### **Scarpino Subdivision**

Obtain the following amount of water rights from the Main Creek Irrigation Company:

.45 acre-feet of water per lot (for culinary water), or 1.35 acre-feet total, plus

A total of 58.00 acre-feet (for agricultural irrigation).

#### **Thompson Subdivision**

Obtain the following amount of water rights from the Hobble Creek Irrigation Company:

.45 acre-feet of water per lot (for culinary water), or 2.25 acre-feet total, plus

A total of 111.50 acre-feet (for agricultural irrigation)

Steve Ferrell of the Water Advisory Board confirmed that subdivision approval was conditioned on the property owner obtaining the amount of water described above. Mr. Ferrell also stated that on average, a share in both the Main Creek and Hobble Creek Irrigation Companies equals four acre-feet of water. Assuming those averages are correct, the property owners needed a total of 15 shares of Main Creek Company stock for the Scarpino Subdivision, and 29 shares of Hobble Creek Company stock for the Thompson Subdivision in order to satisfy the Board's requirement. The County further required that ownership of the shares be held jointly by the owner of each lot and the Wasatch County Special Service Area #1. According to the Water Advisory Board, this condition was imposed to discourage sale of the water shares.

Mr. Ferrell is familiar with the area, and in a telephone conversation stated that the Scarpino property had eight shares of Main Creek stock when it was irrigated, but the previous owners sold five shares sometime around 1990, leaving three shares for the parcel. Accordingly, at the time of the subdivision applications the owners of the Scarpino parcel possessed 3 shares of Main Creek stock. The owners of the Thompson parcel had 15 shares of Hobble Creek stock. Mr. Hofheins found that shares in the two companies are available for purchase, with the cost

being in the range of \$9,000 to \$14,000 per share. Mr. Hofheins has not purchased any additional shares for the subdivisions.

The Board imposed the water requirement based on Section 16.07.14(5) of the Wasatch County Code. That subsection applies to properties located in an RA-5 zone and provides the following, under "water requirements:"

(a) Each dwelling shall be considered a fulltime residence and must have sufficient culinary water available as required by the State Water Engineer and/or governing water district for residential use only.

(b) Other Requirements. Each dwelling must have sufficient water for outside irrigation to provide water for a minimum of one-quarter (.25) acres of landscaped area, plus any water required for irrigation of any agricultural use intended. All lots must prove sufficient water to irrigate any land, which has been historically irrigated. An appropriate reduction acreage may be given for: 1) water which is converted to provide culinary water service for the dwelling, and 2) certain surface areas that do not require irrigation and that may be created in association with the development of the land. These areas include, but are not limited to, building pads, sidewalks, roadways, driveways and parking areas. The amount of water required for outside irrigation will be determined by the Water Resources Director, based upon the needs of the property after taking into consideration the existing irrigation patterns and any landscaping or agricultural plans of the owner. The Director will also be guided by the policies of the irrigation company involved as well as the State Engineer.

Wasatch County Code § 16.07.14(5)(a-b). The Water Advisory Board determined the water requirements based on its understanding of the needs for agricultural cultivation and culinary service. According to the Board, the agricultural needs in the area were four acre-feet of water per acre, and the annual culinary requirements are .45 acre-feet per residence. There was no evidence of an individualized analysis of the water needs of the proposed subdivisions.

In 1984, the State Engineer's office prepared a general determination of the water duty in the area including the Main Creek drainage. That determination found the following water duty allowances:

Irrigation: 4.0 acre-feet per acre per calendar year . .

Stockwatering purposes: 25 gallons per day per equivalent livestock unit.

Domestic or household use: .45 acre-feet per year, (401.76 gallons per day), per residential unit.

"Proposed Determination of Water Rights by the State Engineer Provo River Division Round Valley Subdivision Book 1," May 1, 1984, ¶¶ 8-10.<sup>1</sup> The duty amounts are consistent with other determinations made in central Utah.

## Analysis

"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. A requirement that water rights be obtained or established as a condition to obtain approval for a subdivision is thus an exaction, and must be analyzed as a potential constitutional taking according to the relevant law.

Section 17-27a-507 of the Utah Code authorizes counties to impose exactions on new development, but 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
- (2) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

UTAH CODE ANN. § 17-27a-507.<sup>2</sup> 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 *B.A.M.*, 2006 UT 2, ¶ 41, 128 P.2d 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.<sup>3</sup> This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis is reflected in § 17-27a-507. The county's requirement that the developer prove a certain amount of water rights must therefore meet both standards required by § 17-27a-507.

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<sup>1</sup> An "equivalent livestock unit" is 1 horse or cow, 5 sheep, goats, or swine, or 33 chickens, turkeys, other fowl, or small animals. 25 gallons per unit per day equals .028 acre-feet per unit per year.

<sup>2</sup> There is a corresponding statute applicable to municipalities found at § 10-9a-508 of the Utah Code.

<sup>3</sup> See U.S. Const., amend V. The Supreme Court has interpreted the Takings Clause as limiting a government's ability to impose conditions on development. Furthermore, "[t]he Utah Constitution reinforces the protection of private property against uncompensated governmental takings . . ." *B.A.M.*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. See also Utah Const. art. I, § 22.

*I. There is an Essential Link Between the Legitimate Governmental Interest and the Requirement that Sufficient Water Rights be Obtained for the Proposed Subdivisions*

The county's condition that the developer obtain or prove water rights for the subdivided properties meets the first part of the statutory analysis. Ensuring an adequate water supply is an important objective for the county, particularly in Utah, where water is a scarce resource. *See Summit Water Distribution Co. v. Mountain Regional Water Special Serv. Dist*, 2005 UT App. 66, ¶¶ 11-14, 108 P.3d 119, 121-122. Requiring a developer to provide water rights for a proposed subdivision is a reasonable method to meet that objective.<sup>4</sup> Thus, there is an essential link between the county's objective to ensure adequate water supplies, and the requirement that water rights be provided for the proposed subdivisions.

*2. There Have Been no Findings that the Requirement is Roughly Proportionate to the Impact of the Proposed Subdivisions*

The condition proposed by the county does not pass the second part of the analysis required by § 17-27a-507. The county has not adequately shown that the amount of water required by the county is roughly proportionate to the impact caused by the proposed subdivisions. The county chose the amount of water necessary for the proposed subdivisions without any evidence showing how that amount addresses the needs of the proposed new development.

Section 16.07.14 of the Wasatch County Code requires that each dwelling in the RA-5 Zone have sufficient culinary water, sufficient water for outside irrigation of a minimum of .25 acres of landscaping, "plus any water required for irrigation of any agricultural use intended." Wasatch County Code, § 16.07.14(5)(b).

The amount of water was determined not because of the impact of the proposed subdivision, nor on the amount of water necessary for the intended use, but supposedly due to a finding that the parcels had been "historically irrigated." Using Section 16.07.14 of the Wasatch County Code, the Water Advisory Board ascertained that there had been cultivation on the parcels in the past, and that four acre-feet per acre was required to irrigate the land.

Even if historic irrigation is the measure, there is still no specific finding supporting the amount of water required. According to the Water Advisory Board, the Scarpino parcel had eight shares of water (or ½ share per acre) when it was irrigated, and that the Thompson parcel also had only ½ share per acre. The county has presented no evidence showing why the amount of water actually used for irrigation. in the past should now be doubled for the subdivisions, which are proposing a different agricultural use.

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<sup>4</sup> *See, e.g., Acosta v. Big Bear Community Serv. Dist.*, 2004 Cal. App. Unpub. LEXIS 2253, at 23-24, (Cal. App 2004), an unpublished opinion applying the *Nollan/Dolan* test to a requirement that water rights be conveyed to a public entity as a condition of development approval. The California Court of Appeals found that dedication of water rights from a property developer was a reasonable means of furthering the legitimate objective of ensuring adequate water resources.

There is also no showing that the amount of water required is tied to watering livestock, which is the proposed agricultural use of the subdivision. The developer intends to market the lots as large residential lots with animal rights, not for cultivation of crops. The county did not analyze water needs based on that proposed use, even though § 16.07.14 only requires sufficient water for the intended agricultural use.<sup>5</sup>

The amount of water required for culinary use appears to be consistent with established standards in Utah. Other local governments follow the standard established by the Utah Department of Environmental Quality. (See Utah Admin. Code Rule R309-510-7, sources for residential water must provide a yearly average of 146,000 gal/year/residence (or .45 acre-feet per year)).

On the other hand, the amount of water required for agricultural purposes appears to be based solely on the irrigation duty determined by the State Engineer's office. While data from the State Engineer's office may be useful in calculating the amount of water required for a specific development, the irrigation duty is only a measure of the amount of water deemed necessary for beneficial irrigation in a given area, not a recommendation for any specific use.<sup>6</sup> Because the determinations of the State Engineer are not specific to properties or use, they cannot be the sole source to determine amounts of water required for a specific development.

It should also be noted that it is difficult to determine whether the county's measure of water is dictated by the number of shares, or if the number of shares is dictated by the amount of water. The amount of water available per share varies from year to year, depending upon precipitation, and the four acre-feet per share is actually an average of -the water historically provided. Other irrigation companies in Wasatch County have different average amounts.<sup>7</sup>

## Conclusion

Wasatch County's requirement that a certain amount of water rights be proven in order to obtain subdivision approval is an exaction which is subject to § 17- 27a-507 of the Utah Code. There is an essential link between the county's legitimate interest in providing adequate water supplies for future development and the requirement that a landowner provide sufficient water to meet the needs of a proposed subdivision.

However, the county has not demonstrated that the amount of water rights required is roughly proportionate to the impact of the proposed subdivision of the Scarpino and Thompson parcels. There has been no showing that the proposed subdivisions need the amount of water required by the county. Furthermore, the county's bases the water requirement on a conclusion that the

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<sup>5</sup> Crop cultivation is feasible on the smaller lots of the proposed subdivisions, but not likely. The property owner has suggested that a covenant be recorded with each lot in the subdivisions, defining the scope of agricultural activities that can be conducted.

<sup>6</sup> See *In re Green River Canal Co. v. Olds*, 2004 UT 106, ¶ 10, fn. 2, 110 P.3d 666, 670, fn. 2. According to the State Engineer's Office, the irrigation duty is based on the amount of water needed for alfalfa cultivation.

<sup>7</sup> A company in the Midway area reports 3 acre-feet per share, while another company in Wasatch County reports 9 acre-feet per share.



properties had been "historically irrigated," although the historic irrigation on those properties actually used half the water the county now requires for the subdivisions.

In addition, there has been no analysis demonstrating the amount of water required for the intended agricultural use. The landowner proposes to subdivide the parcels, and market them as large residential lots with animal rights. The county made no findings determining the amount of water necessary due to that proposed use. Such findings are required not only by the Utah Code, but also by § 16.07.14 of the Wasatch County Code, which only requires sufficient water for the intended agricultural use.

This conclusion does not mean, however, that the county cannot require the developer to prove sufficient water, nor that the amount of water required by the county will be automatically less than four acre-feet per acre. The county must show that the amount of water rights required is roughly proportionate to the impact of the proposed subdivisions. The required amount may include sufficient rights to provide culinary water, irrigation for landscaping, and water for the proposed agricultural uses.

For these reasons, it is the opinion of the Office of the Property Rights Ombudsman that Wasatch County's requirement that the owners of the Scarpino and Thompson properties prove ownership of four acre-feet of water per acre for their proposed subdivisions does not meet the requirements of Section 17-27a-507 of the Utah Code.

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**

U.C.A. §13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. §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:

Thomas Low  
Wasatch County Attorney  
805 W. 100 South  
Heber City, UT 84032

On this \_\_\_\_ Day of April, 2007, 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

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