

Advisory Opinion #247

Parties: Spring Creek Cove Development Corp, Murray City
Issued: December 2, 2021

TOPIC CATEGORIES:

Exactions on Development

Requirements Imposed on Development

Subdivision Plat Approval

The city's requirement that irrigation canals be piped within new residential subdivisions is lawful, even where the developer must enter an agreement it finds "outrageous and illegal" to secure permission to enclose them. Cities may use their police powers to implement generally applicable regulations protecting the health, safety, and welfare of citizens. There are, however, limits to what a government agency may impose via regulations. Generally speaking, regulations that require the conveyance of real or personal property to the government—so called exactions—are subject to constitutional protections.

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ADVISORY OPINION

Advisory Opinion Requested By: Spring Creek Cove Development Corp

Local Government Entity: Murray City

Applicant for Land Use Approval: Spring Creek Cove Development Corp

Type of Property: Residential

Date of this Advisory Opinion: December 2, 2021

Opinion Authored By: Marcie M. Jones, Attorney
Office of the Property Rights Ombudsman

ISSUES

1. May an advisory opinion address a land use decision that was not appealed and therefore final and lacking any further judicial remedy?
2. Is the city's requirement that irrigation canals be piped within a new residential subdivision lawful where the developer must enter an "outrageous and illegal" agreement with the canal owner to secure permission to enclose them?

SUMMARY OF ADVISORY OPINION

Because the request for this Advisory Opinion was filed in accordance with state statute it is considered timely and an Advisory Opinion will be issued. The Advisory Opinion process does not require an open case or controversy, as courts do, only that the request be filed before a land use decision becomes final.

The city's requirement that irrigation canals be piped within new residential subdivisions is lawful, even where the developer must enter an agreement it finds "outrageous and illegal" to secure permission to enclose them. Cities may use their police powers to implement generally applicable regulations protecting the health, safety, and welfare of citizens. There are, however, limits to what a government agency may impose via regulations. Generally speaking, regulations that require the conveyance of real or personal property to the government—so called exactions—are subject to constitutional protections.

In this case, the city is requiring the developer to work with the ditch company to enclose an existing irrigation canal that runs through property proposed to be used as a residential subdivision. Developer claims they are being forced to agree to the ditch company's "outrageous and illegal" agreement proposal in order to proceed with their residential development. The developer further claims that by extension, because the city is requiring the work be done as a condition of development, the city is imposing an outrageous and illegal agreement on them, and requiring them to make payments that address impacts beyond those imposed by the proposed development.

Because the City is not requiring ownership of the canal or other property be transferred to the government, the regulation is not an exaction and not subject to protection under the Takings Clause of the U.S. Constitution. Instead, the regulation is a generally applicable land use law, the validity of which is subject to the "reasonably debatable" legal standard. Because the ordinance was passed to protect citizens from flooding, nuisance, and the hazards of open water, the regulation appears to be reasonably debatably within the interests of the general welfare of the citizens and therefore lawful.

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.

A Request for an Advisory Opinion was received from Jacob Ballstaedt, Spring Creek Cove Development Corp on December 3, 2020. A copy of that request was sent via certified mail to Jennifer Kennedy, City Recorder, Murray City, 5025 South State Street, Room 115, Murray UT 84107 on December 10, 2021.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for Advisory Opinion, Jacob Ballstaedt, Spring Creek Cove Development Corp, December 3, 2020.
2. Reply submitted by Robert C. Keller, Esq., representing Murray City, January 15, 2021.¹

¹ Reply submitted by Robert C. Keller, Esq., representing Murray City, January 15, 2021.

BACKGROUND

Spring Creek Cove Development Corp (the “Developer”) is developing Spring Creek Cove Development, a new residential subdivision consisting of 15 residential units on just over five acres in Murray City (the “City”). As part of the subdivision review and approval process, City is requiring Developer to pipe an existing irrigation canal owned by the Little Cottonwood Tanner Ditch Company (the “Ditch Company”) which crosses the property. Approximately 25% of the irrigation canal is already piped and the existing improvements include a trash rack and racoon guard.

The City has adopted design standards for subdivisions which establish generally applicable minimum requirements for grading, curbs, gutters, drainage, streets, pedestrian ways, sidewalks, connections to sewer facilities, storm drains, fire hydrants, street signs, traffic safety devices, street lighting facilities, etc. (the “Development Code”).² Of relevance, the Development Code states that “[o]pen gravity flow ditches are not permitted within the boundary of a subdivision . . .”³ The City maintains that “open irrigation channels in residential neighborhoods can pose a range of concerns, including flooding of the area, hazards to residents (particularly children), and the potential for nuisance, including contaminants and attraction of wildlife.”⁴ As such, Developer was required to “work with Ditch Company to pipe the existing irrigation canal that runs in an easement on the west side of the property.”⁵

The Developer has reportedly made several attempts to come to a reasonable agreement with the Ditch Company, but ultimately finds they are “being forced to agree to their outrageous and illegal agreement”⁶ in order to proceed with their residential development.

The Developer maintains that the agreement Ditch Company insists on violates UTAH CODE § 73-1-15.5 which governs relocation of water conveyance facilities. In particular, that section limits expenses to the “costs reasonably and necessarily incurred by the facility owner related to the modification of the water conveyance facility” and further limits attorney fees to a maximum of \$5,000.

The Developer maintains that Ditch Company required Developer to pay a non-refundable \$7,000 “good will” fee, which by definition exceeds the costs “reasonably and necessarily incurred.” The Developer further objects to a provision in the agreement which requires payment of attorneys’ fees in connection to reviewing the agreement which exceed the mandated \$5,000 cap. The Developer is also required to take over maintenance of the existing trash rack and raccoon guard on a portion of the ditch which has already been piped and to inspect and clean out all trash racks on a daily basis.

² Murray City Code § 16.16.010 et. seq.

³ Murray City Code § 16.16.300.

⁴ Reply submitted by Robert C. Keller, Esq., representing Murray City, January 15, 2021.

⁵ Planning Commission meeting minutes, March 5, 2020.

⁶ Request for Advisory Opinion, Jacob Ballstaedt, Spring Creek Cove Development Corp, December 3, 2020.

Developer has therefore submitted a Request for Advisory Opinion to determine whether the City’s requirement that the Developer pipe the irrigation canal, and thus be subject to “outrageous and illegal” requests by the Ditch Company is lawful.

In order to move forward with the construction, the Developer has signed an agreement with the Ditch Company and the City has approved the final plat. This approval has not been appealed. The City has requested that our Office decline to issue an Advisory Opinion on this issue because the subdivision plat approval has not been appealed and the decision is therefore final and our response is legally moot.

ANALYSIS

I. Request for Advisory Opinion does not require open case or controversy

As an initial matter, the City requested that our Office decline to issue an Advisory Opinion based on this request because the subdivision application has been approved and the window of time to appeal has passed so there is no live case or controversy. To further this argument, the City quotes the boilerplate “Review” section of advisory opinions and suggests the purpose is “not only to provide advice and guidance, but to aid or incentivize the parties in reaching a practical solution without judicial intervention.”⁷ The “Review” section is included here (*emphasis added*):

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 City argues that the Developer has now received final approval for the subdivision plat, and that the approval had become final on the day the request for Advisory Opinion was submitted because it was not appealed. At the time of writing the Advisory Opinion, the Developer has finalized the disputed agreement with the Ditch Company and construction is likely well under way. Under the circumstances, the City claims that the Developer’s request is untimely and an Advisory Opinion cannot “aid or incentivize the parties in reaching a practical solution without judicial intervention.”⁸

⁷ Reply submitted by Robert C. Keller, Esq., representing Murray City, January 15, 2021.

⁸ Reply submitted by Robert C. Keller, Esq., representing Murray City, January 15, 2021.

The City further argues that the “doctrines of waiver and mootness weigh against issuing an advisory opinion in this matter.”⁹ In entering a contractual agreement with Ditch Company, the issue is resolved, and the case is moot because judicial relief cannot affect the rights of the litigants.¹⁰ In this case, the City maintains that an advisory opinion should be considered moot or no longer necessary.

The City makes legally sound arguments; however, the authority of this Office differs slightly from that established for courts. The authority for Advisory Opinions is outlined in state statute. UTAH CODE § 13-43-205(1)(b) stipulates that “a request for an Advisory Opinion may be filed at any time before a final decision on a land use application” has been made. In this case, the Advisory Opinion Request was filed before the last day to appeal the Planning Commission’s approval of the plat, and is therefore timely. The requirement that our Office issue an Advisory Opinion in response to a timely request does not change, even when the issue would become moot because judicial relief cannot affect the rights of the litigants.

II. Requirement to pipe the canal is lawful

The fundamental dispute in this matter is between the Developer and the Ditch Company. Our Office has not been asked to resolve that aspect of the dispute, nor do we have authority to address in an advisory opinion whether the Ditch Company was acting lawfully in their demands of the Developer.¹¹ Instead, we are asked whether the City can impose the requirement that the canal be enclosed which results in the dispute between the Developer and the Ditch Company over how it should be enclosed.

To determine whether this requirement is lawful, we must apply one of two established legal standards for reviewing land use ordinances:

1. **Reasonably Debatable test.** This is the assumed starting point for determining the validity of generally applicable land use ordinances. This test presumes the ordinance is valid and involves only minimal judicial scrutiny. A court reviewing a land use regulation shall presume that a properly enacted land use regulation is valid and determine only whether “it is reasonably debatable that the land use regulation is consistent with [state law].”¹² The answer to “can the city do this?” is nearly always yes under this test.
2. **Rough Proportionality test.** This test applies to regulations requiring dedication of property to the public, and thus implicating the Takings Clause of the U.S. and Utah Constitutions. This is a higher bar with greater judicial scrutiny. The answer to “can the city do this?” is carefully measured in light of a development proposal’s impact on the city’s ability and capacity to provide services to the development. The courts apply this standard to exactions, which are government-mandated contributions of property as a condition of development approval.

⁹ Reply submitted by Robert C. Keller, Esq., representing Murray City, January 15, 2021.

¹⁰ *See, e.g.* Burkett v. Schwendiman, 773 P.2d 42, 44 (1989).

¹¹ This Office has authority to mediate, and potentially arbitrate, such disputes, but is not authorized to issue an Advisory Opinion addressing dispute between a developer/private property owner and a private ditch company. *See* UTAH CODE § 13-43.

¹² UTAH CODE § 10-9a-801(3)(a).

Therefore, the core dispute at hand is whether the City’s requirement that Developer pipe the canal and secure agreement from the canal owner is a generally applicable land use *regulation*, subject to the “reasonably debatable” test, or an *exaction* which must satisfy the higher “rough proportionality” test constitutional protection provides.

a. **Requiring the piping of the canal, in this case, is a *regulation* not an *exaction***

It is established that an owner of property holds it subject to zoning ordinances enacted pursuant to a state's police power.¹³ Police power is “the capacity of the states to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants.”¹⁴

The U.S. Supreme Court has further held that the valid exercise of police power includes land use regulations.¹⁵ The enactment of a standard land use ordinance is a legislative decision subject to the “reasonably debatable” test whereby a reviewing court must presume that a properly enacted land use regulation is valid and determine only whether “it is reasonably debatable that the land use regulation is consistent with [applicable state law]”¹⁶ and therefore in the interest of the general welfare.

However, there are limits to what a government agency can impose via regulations. Both the U.S. Constitution and the Utah Constitution protect private property from governmental taking without just compensation. The “Takings Clause” in the Fifth Amendment to the U.S. Constitution reads, in relevant part, “nor shall private property be taken for public use, without just compensation.” Likewise, Utah Constitution Article I, Section 22 states “private property shall not be taken or damaged for public use without just compensation.”

Property owners are afforded this constitutional protection against takings even when going through the land use permitting process. Land use applicants are vulnerable to coercion that the constitution protects because the government often has broad discretion to deny land use proposals.¹⁷ Legislative discretion could be used, even unintentionally, to essentially extort property from a developer. For example, by conditioning a building permit on the owner’s deeding over property for a public right-of-way, the owner is often likely to yield to the government’s demand, no matter how unreasonable or illegal, as long as the development is still profitable.¹⁸

At the same time, many proposed developments impose costs on the public that dedications of property may reasonably offset. Where a development proposal would substantially increase traffic congestion, for example, officials might lawfully condition permit approval on the owner’s agreement to deed over the land needed to widen a public road burdened by the development. It is considered fair that developers pay for the impact of their development.

¹³ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114 (1926).

¹⁴ “Police Power”. Encyclopedia Britannica.

¹⁵ *See, e.g. Euclid v. Rambler Realty*, 272 U.S. 365 (1926).

¹⁶ UTAH CODE § 10-9a-801(3)(a).

¹⁷ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697, 2013.

¹⁸ *Id.*

However, local governments may only require a contribution of land or construction of public resources such as roadways, sidewalks, curbs, and gutters as a condition of approval that offset only the impact of the proposed development. To require a contribution beyond this violates the Takings Clause. The protection is designed such that a government may not “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”¹⁹

Note that the Takings Clause protects all forms of real and private property, not only the dedication of land, but also the payment of money and installation of specific improvements for the public benefit required as a condition of development approval.

In the current case, the Developer is alleging that the City’s requirement that they pipe the irrigation canal and secure approval from the Ditch Company as a requirement for subdivision plat approval is an exaction that violates the Takings Clause. They argue that paying the nonrefundable \$7,000 “good faith” fee as well as unlimited attorneys’ fees, and daily maintenance of facilities installed by the canal company by definition requires compensation beyond their impact.

On the other side, the City argues that the requirement that irrigation canals be buried in all residential subdivisions is a standard land use regulation. The City maintains that to be an exaction, and thus afforded constitutional protections, the property interest required as a condition of approval must be dedicated to the public.

The City argues that because any cost, expense, or moneys paid, goes directly to the canal company, and the piped canal will continue to be privately owned, this is not an exaction and not afforded constitutional protection under the Takings Clause. The City maintains that any dispute Developer has with Ditch Company is a contractual issue between the two private parties and does not involve the City.

According to the Utah Supreme Court, “[d]evelopment exactions may be defined as *contributions to a governmental entity* imposed as a condition precedent to approving the developer's project. Usually, exactions are imposed prior to the issuance of a building permit or zoning/subdivision approval.”²⁰ Indeed, in the seminal U.S. Supreme Court cases involving exactions, the defining characteristic is not just that there is a condition of development approval, but also that the condition involve the transfer of a property interest or money to the public.²¹

In the case at hand, the piped canal remains property of the Ditch Company. The City is not demanding the conveyance of property or payment of money to any public entity. Furthermore, any fees or reimbursements paid the Ditch Company do not involve the City. There is nothing to indicate that the city’s requirement, in and of itself, is anything other than a generally applicable

¹⁹ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

²⁰ *Salt Lake County v. Board of Educ. of Granite Sch. Dist.*, 808 P.2d 1056, 1991 Utah LEXIS 20, 157 Utah Adv. Rep. 3 quoting Mazuran, *The Evolution of Real Estate Development Exactions in Utah*, 3 Utah Bar J. Aug./Sept. 1990, at 11 (*emphasis added*).

²¹ *See, e.g., Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Koontz v. St. Johns River Water Mgmt Dist.*, 570 U.S. 595 (2013).

land use regulation.²² The Developer may have a cause of action against the Ditch Company for violating the requirements of UTAH CODE § 73-1-15.5, however, that does not implicate the propriety of the City’s requirement that irrigation canals be enclosed.

Requiring the Developer to pipe an existing irrigation canal does not implicate the Takings Clause because property is not being dedicated to the public. Therefore, the ordinance requiring the piping of all open irrigation canals in residential subdivisions is a generally applicable land use regulation which does not implicate the Takings Clause in this case.

b. City may require that open irrigation canal be enclosed

The Utah Legislature has articulated the standards that a court must apply when reviewing generally applicable land use regulations in UTAH CODE § 10-9a-801(3)(a):

(3)(a) A court shall:

- (i) presume that a land use regulation properly enacted under the authority of this chapter is valid; and
- (ii) determine only whether:
 - (A) the land use regulation is expressly preempted by, or was enacted contrary to, state or federal law; and
 - (B) it is reasonably debatable that the land use regulation is consistent with this chapter.

Utah courts have consistently held “that the enactment and amendment of zoning ordinances is fundamentally a legislative act.”²³ The wisdom behind these holdings is that “[t]he political nature of the decision making process underlying municipal zoning demands that the power to make such decisions be vested in persons who are publicly accountable for their choices.”²⁴ Furthermore, “[i]t is the policy of [the] court as enunciated in its prior decisions that it will avoid substituting its judgment for that of the legislative body of the municipality.”²⁵

A municipal legislative decision will therefore meet this highly deferential “reasonably debatable standard” if “it is reasonably debatable that the [decision to grant or deny the new ordinance] is in the interest of the general welfare.”²⁶

²² As alluded to briefly above, the legislature recently enacted a statutory scheme to guide, and hopefully help resolve, exactly these types of disputes between developers and canal operators when development occurs. The fact the legislature created this scheme is an apparent acknowledgement that a city’s general requirement to improve a privately owned and operated ditch when development occurs is not subject to the constitutional, heightened “rough proportionality” test applied to exactions. The applicable statute, Utah Code § 73-1-15.5, established a separate process for resolving these disputes through negotiation, mediation, and potentially arbitration. The statute outlines a process the parties must follow to allow for beneficial use of the property and relocation of a canal facility, while still preserving the purpose and function of the canal to convey water. It also generally outlines which parties are responsible for what, and limits who must pay certain costs. It appears the parties in this case did not elect to utilize this process prior to entering into an agreement.

²³ *Bradley v. Payson City Corp.*, 2003 UT 16, P 11, 70 P.3d 47 (citing *Sandy City v. Salt Lake Cnty.*, 827 P.2d 212, 221 (Utah 1992)).

²⁴ *Petersen v. Riverton City*, 2010 UT 58, 243 P.3d 1261 quoting *Bradley*, 2003 UT 16, P 11, 70 P.3d 47.

²⁵ *Id.*

²⁶ *Id.*

In this case, there has been no allegation that the ordinance in question was not properly enacted, nor has there been any allegation that the land use regulation is expressly preempted by, or enacted contrary to, state or federal law, so we jump to the last prong of the standard.

We must determine whether “it is reasonably debatable that the land use regulation is consistent with this chapter.” As stated above, the Utah Supreme Court has interpreted this to mean “in the interest of the general welfare.”²⁷ The City has required open irrigation canals be piped within proposed residential subdivisions because “open irrigation channels in residential neighborhoods can pose a range of concerns, including flooding of the area, hazards to residents (particularly children), and the potential for nuisance, including contaminants and attraction of wildlife.”

The regulation appears to be squarely in the interest of the general welfare of the residents of Murray City. Therefore, Murray City’s ordinance requiring the enclosure of open irrigation canals is lawful.

CONCLUSION

Because the Request for Advisory Opinion was filed in accordance with state statute, before a final decision had been made on the subdivision plat, it is considered timely.

Furthermore, the City’s requirement that the Developer enclose the existing irrigation canal in conjunction with development of the proposed residential subdivision is a generally applicable land use law subject to the “reasonably debatable” standard. Because the ordinance was passed to protect citizens from flooding, nuisance, and the hazard of open water, the regulation appears to be squarely in the interests of the general welfare of the citizens and is therefore lawful.



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Office of the Property Rights Ombudsman

²⁷ *Id.*

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.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.