Advisory Opinion 253

Parties: Highland City / Steve & Travis Maddox

Issued: April 6, 2022

TOPIC CATEGORIES:

Exactions on Development

A city may only require a property owner to offset impacts of development proposed in a land use application. It may not address impacts of future development a property owner has yet to propose.

In this case, the Maddoxes have applied to Highland City for the creation of two building lots, only one of which will accommodate a new dwelling. Accordingly, the City may only impose a requirement to build road and utility facilities to the extent that such a requirement offsets the impacts of the proposed development. Since the parties agree that the proposed development does not need the road and utility connections the City seeks to require the Maddoxes to construct, the City may not impose the requirement as the exaction would be excessive.

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ADVISORY OPINION

Advisory Opinion Requested By:	Highland City
Local Government Entity:	Highland City
Applicant for Land Use Approval:	Steve & Travis Maddox
Type of Property:	Residential
Date of this Advisory Opinion:	April 6, 2022
Opinion Authored By:	Jordan S. Cullimore Office of the Property Rights Ombudsman

ISSUE

Whether the City's requirement that the developer construct a portion of a half-road and utility facilities is a lawful exaction, where the parties agree that facilities are not needed to serve the applicant's current development proposal, but will be necessary for future development on a remainder parcel of land resulting from the proposed development.

SUMMARY OF ADVISORY OPINION

A city may only require a property owner to offset impacts of development proposed in a land use application. It may not address impacts of future development a property owner has yet to propose.

In this case, the Maddoxes have applied to Highland City for the creation of two building lots, only one of which will accommodate a new dwelling. Accordingly, the City may only impose a requirement to build road and utility facilities to the extent that such a requirement offsets the impacts of the proposed development. Since the parties agree that the proposed development does not need the road and utility connections the City seeks to require the Maddoxes to construct, the City may not impose the requirement as the exaction would be excessive.

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 Title 13, Chapter 43, Section

205 of the Utah Code. 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 Highland City, on September 23, 2020.

EVIDENCE

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

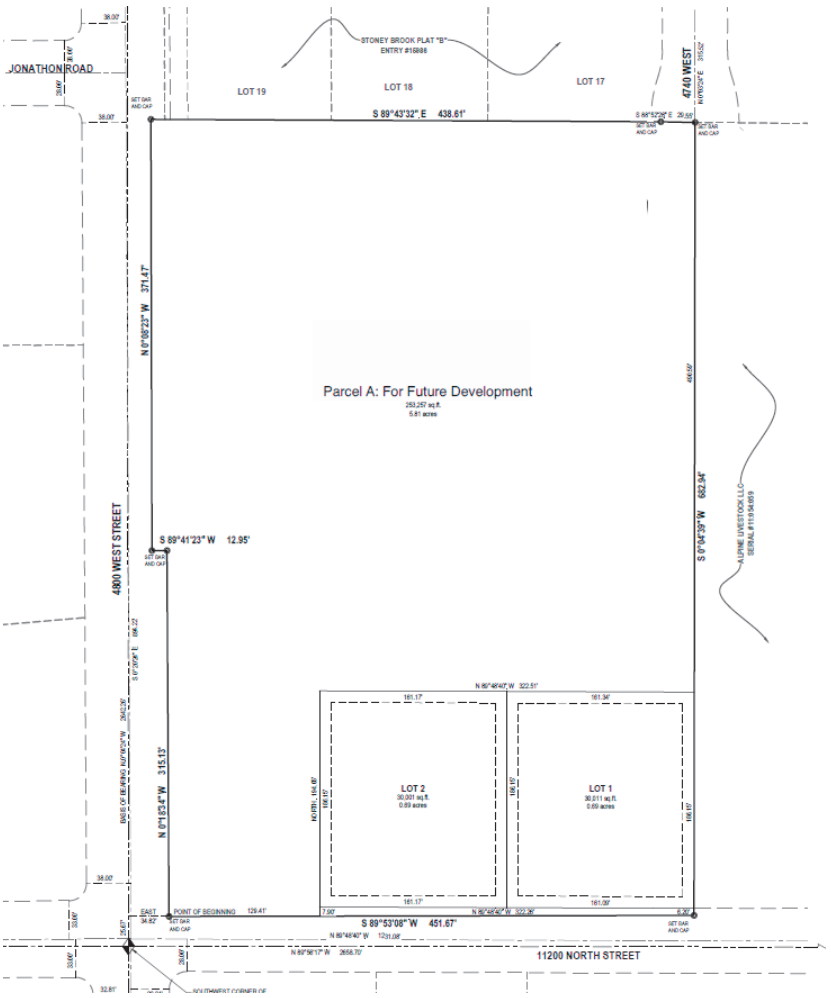
1. Request for an Advisory Opinion submitted by Robert Patterson, Attorney for Highland City, on February 3, 2022.
2. Response submitted by Paxton Guymon, Attorney for Steve Maddox, received on February 10, 2022.

BACKGROUND

Steve and Travis Maddox (the Maddoxes) own an approximately 7.25-acre parcel of land (the Maddox parcel) at 4764 North in Highland City. 4800 West street runs along the west border of the parcel, and 11200 North runs along the southern border of the property. The land is zoned R-1-40 under Highland City ordinances. This zoning designation would allow the Maddoxes to divide the parcel into as many as eight residential building lots. Presently, the entire parcel is occupied by a single residence.

Highland City (the City) points out that there is an existing subdivision, the Stoney Brook subdivision, to the north of the Maddox parcel that was approved sometime in 2018. When the Stoney Brook subdivision was platted, there were concerns about the length of the development's cul-de-sac, so the City required the developer of that project to include a stub road, designated as 4740 West, to provide a future secondary access point to the development, and to provide access to future development on the Maddox parcel and the Christensen property that abutted the east side of the Maddox parcel.

The City's plan, at that time, was to align this stub road with the border between the Maddox parcel—then owned by the Fehrs—and the Christensens' property, so that when the Fehr and Christensen properties eventually developed, the parties would theoretically complete the 4740 West road and connect it to 11200 North, thus sharing equally in the construction of the connection. The extent to which the Fehrs and Christensens agreed with this plan is unclear from the materials submitted to our office, but the City asserts that parties ultimately "acquiesced" to the plan. Neither the City or the Stoney Brook developer acquired any definitive rights from the Fehrs or Christensens for the proposed road alignment, at that time.



Recently, the Maddoxes submitted an application for a minor subdivision[1] to the City proposing to subdivide the Maddox parcel. The Maddoxes' application proposed subdividing the parcel into two residential lots—one of which would include the existing home. The two residential lots will front along 11200 West. The application also proposes leaving a 5.81-acre remainder parcel designated "for future development."

The Maddoxes' application does not follow the City's prior laid plans. The application does not provide for construction of any portion of 4740 West connection, because the connection is not needed for the current proposal. Moreover, the proposed configuration of the lots along 11200 West does not conform with the City's desired alignment for the 4740 connection, as Lot 1 of the subdivision comes all the way to the eastern boundary of the parcel, and leaves no space for the future 4740 West connection. Consequently, in response to the Maddoxes' subdivision application, the City asked the Maddoxes to explain how they intended to provide for future development of the 5.81 acre remainder parcel. The Maddoxes provided a concept plan depicting the ultimate connection to 11200 West as being entirely on the Christensen parcel.

[1] Highland City Code defines a "minor subdivision" as a subdivision that results in no more than three parcels. Highland Development Code § 5-4-205(1).

Owner's Concept Plan for Future Development of Remainder Parcel

The Highland City Planning Commission considered the Maddoxes application on November 16, 2021. Representatives of the Maddoxes and the Christensens participated. The Maddoxes outlined their eventual plan to develop as many as six additional lots on the remainder parcel identified in the current application. The Christensens indicated they were amenable to the City's plan proposing to split the 4740 West Connection between the Maddox parcel and the Christensen parcel, and they asked the City to deny the Maddoxes present application because it does not conform to that plan, and it would theoretically require the Christensens to bear a disproportionate burden if the properties ultimately developed as proposed in the Maddoxes' concept plan.

City staff recommended denial of the application and the Planning Commission unanimously voted to recommend denial of the application because the Maddoxes refused to provide for a portion of the 4740 West connection adjacent to Lot 1 in the proposed subdivision and because the Maddoxes and Christensens were unable to agree on an alternative proposal for road and utility connections from the 4740 West stub to 11200 West.

The Highland City Council, acting as the land use authority for the subdivision application, considered the matter on January 18, 2022. City staff again recommended denial for reasons related to the future 4740 West connection. After discussion, the City Council voted to continue the application and submit an advisory opinion request to this office seeking guidance on the matter.

ANALYSIS

The City, in its submission to this office, frames the dispute between the parties as follows:

The dispute between the Owner and the City is whether the City's proposed condition on the approval of the Application that Owner dedicate and construct the Owner's portion of the 180-foot or so section of the Connecting Road along and adjacent to Lot 1, consisting of a half-road plus additional asphalt to meet minimum standards for two lanes and utility facilities, (the "Condition") is an unlawful exaction. Both sides appear to agree that the first prong of the exaction analysis is satisfied; i.e., there is an "essential nexus" or "essential link" between a legitimate governmental interest and the proposed condition. Utah Code § 10-9a-508(1)(a); *B.A.M. Development, L.L.C. v. Salt Lake County*, 2012 UT 26, ¶ 17, 282 P.3d 41 The interest is in providing for adequate circulation and connectivity of public roads and utilities, and the Connecting Road will directly advance those goals.

The dispute between the parties is whether the extent of the exaction is "roughly proportionate, both in nature and extent, to the impact of the proposed development." Utah Code § 10-9a-508(1)(b); B.A.M., 2012 UT 26, ¶ 19.

To the Owner, the Application only proposes one new home on a residential lot that does not require additional road or utility access other than what currently exists along 11200 North. As such, the Owner believes that providing a stub road and utilities for the future connection to the Stoney Brook Stub is disproportionate to the impact of the Application. To the City, the Application proposes three parcels that effectively stage or phase the overall development of the Property. The City's review of the impact of the Application includes all three parcels—Lots 1 and 2 and the Remainder Parcel—and the City seeks to ensure that all three are adequately served by public infrastructure. The City's Code on minor subdivisions specifically requires the City to ensure that "[l]ots created shall not adversely affect the remainder of the parcel or adjoining property." Highland Development Code § 5-4-205(4).

In the City's view, the creation of the Remainder Parcel, and Owner's stated plans for the future development of the same, must be considered as part of the overall impact of the Application and proposed development. Owner or Owner's representatives have represented to the City throughout this process that they intend to develop the Remainder Parcel in the future. The Remainder Parcel is created by the Application and is specifically marked "For Future Development." No deed restriction, zoning regulation, or other limitation exists that would preclude development of the Remainder Parcel, except for the requirement to provide adequate public infrastructure to serve future lots. While the City would not require completion of the Connecting Road until the subdivision of the Remainder Parcel, the City believes that it is appropriate and necessary to provide for the future development of the Remainder Parcel.

Highland City Letter Supporting Request for Advisory Opinion, received February 3, 2022.

While the questions of nexus and proportionality must eventually be addressed, there is a threshold question that must be first address, and which, in this case, resolves the present dispute. The

threshold question relates to impact and asks about the *scope* of the proposed development—in other words, the first question is, "What development is the present application proposing?" This question defines the scope of the proposal and presents the impact the City must seek to offset through the rough proportionality test.

The city's arguments here illustrate the debate about how to frame the development proposal for determining the impact of the proposal. May the city look at a "larger parcel" or potential future phases of a development when determining the impact of a proposal, or must the city determine only the impact of the *currently proposed* development when determining impact and a proportional exaction?

To resolve this question, we do not need to look any further than the plain language of the state statute governing when and to what extent a municipality may impose an exaction on development.[2] Utah Code § 10-9a-508(1) states that a "municipality may impose an exaction or exactions *on development proposed in a land use application…"* (emphasis added).

Therefore, when determining what the City may consider when determining the impact of the proposed application, the City may only consider development proposed in the *current* land use application. If the law were to allow otherwise, a City may presumably impose disproportionate burdens on developers simply by identifying potential—possibly speculative—development that may occur and that may someday benefit from the imposed requirement, and tie the impact of that future, potential development, to a presently proposed development proposal. This would undoubtably impose an unlawfully disproportionate burden on the proposed development.

Accordingly, where an application substantively conforms to local code requirements, the city may not impose requirements or exactions that consider the anticipated impacts of future development proposals that may or may not materialize in the near term.

Here, the Maddoxes' application proposes the addition of one additional building lot, therefore the City may only consider the impact of that additional building lot when determining the extent to which it may impose conditions on the proposed development.

The City, in its advisory opinion request, acknowledges that the proposed development does not need the road and utility facilities connecting 4740 West to 11200 North. Therefore, it would be unlawful for the City to impose the requirement to construct those facilities on the Maddoxes' current development proposal.

We take a moment to recognize the need for careful and orderly planning within a city, and we acknowledge that the City has done its part to attempt to facilitate such planning. While the city's efforts to plan for the orderly development of its local street system is commendable, the city may not pursue its carefully laid, non-binding plan at the expense of property rights it does not possess and that it has not proposed to pay for. This is the case even where the property owner's development proposal may create added costs for itself down the road, and may not align with what the City considers to be in accordance with best practices. If a property owner ultimately elects to develop in a manner different than the City's preferences, but nonetheless in accordance

[2] *See* Utah Code § 10-9a-306(1) ("A land use authority shall apply the plain language of land use regulations.")

with local ordinances governing the development proposal, then the developer is entitled to approval of his proposal, and the City may not require the developer to address future impacts of future development.[3]

CONCLUSION

A city may only require a property owner to offset impacts of development proposed in a land use application. In this case, the Maddoxes are currently proposing the creation of two building lots, only one of which will accommodate a new dwelling. Accordingly, the City may impose requirements to build road and utility facilities to the extent that such requirements only offset the impacts of the proposed development. Since the parties agree that the proposed development does not need the road and utility connections the City seeks to require the Maddoxes to construct, the City may not impose the requirement, as the exaction would be excessive.

Jordan S. Cullimore

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Office of the Property Rights Ombudsman

[3] Notably, in situations involving development in phases where the developer is not currently seeking approval for all phases of the development, and where the Code doesn't require such a plan, the city may consider proposing a development agreement in which the parties may attempt to negotiate a mutually beneficial solution that would provide the city improvements it seeks for future development and the property owner certain vested rights. Ultimately, however, if the parties cannot reach a voluntary agreement, the property owner's obligation is to comply with code requirements to obtain approval.

NOTE:

This is an advisory opinion as defined in Section 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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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 and civil penalty provisions, found in Section 13-43-206 of the Utah Code, 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.