Advisory Opinion #96

Parties: Bruce Nilson, Nilson & Company, Inc. and Morgan County

Issued: February 28, 2011

TOPIC CATEGORIES:

D: Exactions on Development
J: Requirements Imposed upon Development

A requirement that a new planned unit development contribute to affordable housing is an exaction, which must satisfy rough proportionality analysis. Since it has not been shown that more housing is needed due to the development, the affordable housing requirement the requirement is not valid. Incorporating an exaction into a development agreement does not change the analysis, particularly where inclusion of the exaction in the development agreement is mandatory. Any benefits conferred by an agreement may offset the developer's compliance costs, which are critical to rough proportionality analysis.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Bruce Nilson Nilson & Company, Inc.
Local Government Entity:	Morgan County
Type of Property:	Residential Planned Unit Development
Date of this Advisory Opinion:	February 28, 2011
Opinion Authored By:	Elliot R. Lawrence, Office of the Property Rights Ombudsman.

Issues

May a local government require a developer to either reserve property to use as affordable housing, or pay a fee for affordable housing programs, in exchange for approval of a development?

Does incorporating the affordable housing requirement in a development agreement exempt it from rough proportionality analysis as a taking?

Summary of Advisory Opinion

A requirement that a new planned unit development contribute to affordable housing either through a fee or by reserving affordable units is an exaction, because it is a condition imposed upon new development. As an exaction, the requirement must satisfy the "rough proportionality" test, using the analytical structure required by the Utah Supreme Court. Under that analysis, a valid exaction must satisfy a need created by the new development, or solve a problem caused by the development. Since it has not been shown that more affordable housing is needed due to the new planned unit development, the affordable housing requirement does not satisfy rough proportionality analysis, and is not a valid exaction.

Incorporating an exaction into a development agreement does not change the analysis. An exaction is a form of a taking, and there is no distinction between a requirement imposed by general legislation, and one imposed through a negotiated agreement, particularly where inclusion of the exaction in the development agreement is mandatory. However, any benefits conferred by an agreement to comply with an exaction may offset the developer's compliance costs, which are critical to rough proportionality analysis.

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 Bruce Nilson on January 10, 2011. A copy of that request was sent via certified mail to Jann L. Ferris Morgan County Attorney. The County received the request on January 19, 2011. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on February 1, 2011.

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 January 10, 2011 with the Office of the Property Rights Ombudsman by Bruce L. Nilson.
2. Response from Morgan County, submitted by Jann L. Farris, County Attorney, received on February 1, 2011.
3. Morgan County Ordinances.

Background

Bruce Nilson, of Nilson and Company, Inc., obtained approval for Aspen Meadows PUD, a planned unit development (PUD) located in Mountain Green, an unincorporated area under the jurisdiction of Morgan County. The plat for Aspen Meadows was approved in December of 2007. In January of 2008, the County and Mr. Nilson signed a development agreement (Agreement) governing the PUD. This Agreement was required by Section 8-5D-18(6) of the Morgan County Code.

Aspen Meadows will consist of 28 town home units on 2.49 acres, for a density of 11.24 units per acre. This fits within the density range established by the Morgan County Code.[1] The town homes will be located in three 6-plex buildings, and two 5-plex buildings. All interior roads in the PUD will owned and maintained by a homeowner's association, as will parks and a trail system.[2] Mr. Nilson also agreed to height restrictions, and architectural guidelines.[3]

The County Code also requires that PUDs with more than five units provide moderate income housing. Section 8-5D-18 mandates that 5% of all residential units be reserved for affordable housing, with deed restrictions to "guarantee continued affordability." MORGAN COUNTY CODE, § 8-5D-18(A)(2).[4] Development agreements for PUDs must contain a provision for "affordable housing implementation," along with other required elements.[5] Instead of reserving any units for affordable housing, the Agreement requires that Mr. Nilson pay a fee of $2,500 per lot to the County.[6] The money generated by this fee is to be used for affordable housing programs in the County.

The County notes that Mr. Nilson was granted a higher, or "bonus" density because he agreed to include certain amenities in Aspen Meadows, and because he complied with other requirements. Presumably, these amenities and requirements include the parks, trails, and architectural guidelines.[7] The County's response, however, indicates that the affordable housing fee was not necessarily agreed to in exchange for concessions on density.[8] The County explains that the affordable housing requirement is part of the County Code, and that two other PUDs are subject to similar fees as Aspen Meadows.[9] However, the County acknowledges that the three PUDs have not yet generated a great deal of revenue for affordable housing programs.

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[1] *See* § 8-5D-18(A)(1). The allowable density ranges from 5.45 units per acre (1 unit per 8,000 square feet), to 16 units per acre (1 unit per 2,700 square feet).

[2] The Agreement requires that "a portion" of the open space in Aspen Meadows be developed as a playground, and that a trail system also be developed. The Agreement refers to a Preliminary Plan Report, which apparently establishes the plan for the entire PUD, including open space. Section 8-5D0-18 requires that 10% of the PUD area be reserved as "permanent open space." There is no dispute concerning the amount or use of open space, and it is presumed that that the Aspen Meadows PUD satisfies the County Code's open space requirement.

[3] The Agreement also requires natural gas fireplaces and guidelines on street lighting (in order to restrict light pollution).

[4] To comply with this requirement, the reserved units would need to include restrictions dictating the future purchase price. Deed restrictions, however, were not required for the Aspen Meadows PUD, because the County agreed to accept a fee in lieu of actually reserving any of the units.

[5] *See* MORGAN COUNTY CODE, § 8-5D-18(6)(i)(5). A total of 37 required items are listed, plus a catch-all "other information, as required" provision.

[6] The fee amount was calculated as 5% of the cost of each lot, which was set at $50,000, for a total of $2,500 per lot. The fee is payable when the units are sold. Since there are 28 units, the fee will generate a total of $70,000.

[7] In its response, the County implied that Mr. Nilson was allowed a greater density due to "amenities and other requirements," but the County did not elaborate on the relationship between the amenities and requirements and the increased density.

[8] The County's response states that the affordable housing fee was negotiated as means of satisfying the requirements of § 8-5D-18(A)(2).

[9] Section 8-5D-18(A) does not include fees as an alternative to reserving units for affordable housing. The County notes, however, that the fees are probably less expensive than reserving units. There was no analysis comparing the fee to the costs of reserving the units.

Mr. Nilson requested this Opinion to evaluate whether the affordable housing fee is an acceptable exaction. The County objects to this Opinion, pointing out that the Aspen Meadows PUD was approved in December of 2007, more than three years before Mr. Nilson requested this Opinon.

Analysis

I. The Affordable Housing Requirement is an Exaction, Which Must Satisfy Rough Proportionality Analysis, Even if it is Expressed in a Development Agreement.

A. The Affordable Housing Requirement is an Exaction, Which Must Satisfy Rough Proportionality Analysis.

The requirement that a PUD provide moderate income housing is an exaction, because it is a condition that must be satisfied in order to obtain approval for land development. "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*").[10] The term "exaction" includes any condition on development, including not only dedication of property, but also payment of money, installation of specific public improvements, or other requirements imposed by a public entity.[11] 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. The Morgan County Code includes a requirement that planned unit developments which have more than five units must reserve at least 5% of those units for moderate income housing. Since this requirement must be satisfied in order to obtain approval for a PUD, the requirement is an exaction. The fee requirement expressed in the Agreement is also an exaction which was specifically negotiated by the parties.

Local governments may impose exactions as conditions on new development, provided the exactions satisfy rough proportionality analysis. The Utah Code authorizes counties to impose exactions, subject to certain limitations:

> A county may impose an exaction or exactions on development proposed in a land use application . . . if:
>
> (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). The Utah Supreme Court observed that the "rough proportionality" test derives from the U.S. Supreme Court analyses in *Nollan v. California*

[10] *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.")

[11] *Id.* "Development exactions may take the form of (1) mandatory dedications of land . . . as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees." (internal quotations omitted).

Coastal Commission, 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 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.[12] This has come to be known as the *Nollan/Dolan* "rough proportionality" test, which has been codified in § 17-27a-507.[13]

The first aspect of the analysis focuses on the connection between the exaction and a legitimate governmental interest. The exaction must have an "essential link" to a legitimate interest. In other words, an exaction must promote or satisfy a legitimate public interest. If it does not, the exaction is not valid.

The Utah Supreme Court further honed the "rough proportionality" analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 ("*B.A.M. II*"), which was a second appeal stemming from the same development project at issue in the earlier decision.[14] 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 74, ¶ 9, 196 P.3d at 603. 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 74, ¶ 10, 196 P.3d at 603-04.

The "extent" aspect 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 74, ¶ 11, 196 P.3d at 604. The court continued by holding that "roughly proportional" means "roughly equivalent." In addition to the other aspects of rough proportionality discussed above, in order for an exaction to be valid the cost of compliance must be roughly equivalent to the cost that a governmental entity would incur to address (or "assuage") the impact attributable to new development.

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[12] *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.").

[13] *See also* UTAH CODE ANN. § 10-9a-508 (applicable to municipalities).

[14] The final "B.A.M." decision was an amendment to an opinion issued a few months earlier. (*See B.A.M. Dev. LLC v. Salt Lake County*, 2008 UT 45).

B. The Affordable Housing Requirement Does Not Appear to Be a Valid Exaction, Because a new PUD Does not Create an Impact on Affordable Housing.

The County's Affordable Housing Requirement does not appear to be a valid exaction, because there has been no showing that the Aspen Meadows PUD causes a need for affordable housing. As has been discussed, an exaction must be roughly proportionate in nature to the impact of the new development. The Utah Supreme Court held that this aspect should be analyzed as a problem and a solution. "[T]he impact is the problem, or the burden which the community will bear *because of the development*." *Id.*, 2008 UT 74, ¶ 10, 196 P.3d at 603-04 (emphasis added).[15] Thus, the exaction must be intertwined with a problem (or impact) attributable to a new land development. Simply promoting a legitimate public interest is not enough to make an exaction valid.[16] The exaction must be a reasonably necessary solution to address a problem caused or worsened by the new development.

There has been no showing that the Aspen Meadows PUD–or any planned unit development, for that matter–creates a need for affordable housing. The County has a legitimate interest in promoting quality housing for all of its residents, not only to provide opportunities for low and middle income families, but also to promote a diverse and sustainable mix of available housing. However, that interest does not warrant an exaction on new housing development, unless it can be shown that the new development somehow causes a need for affordable housing.[17] Without a connection between the exaction and a development's impact, it is not fair to impose a public burden on new development.[18] Since the affordable housing requirement does not "solve" a "problem" created by the Aspen Meadows PUD, it cannot be a valid exaction under the analysis required by both the Utah Code and the Utah Supreme Court.

C. Incorporating an Exaction as Part of a Development Agreement Does not Exempt it From Rough Proportionality Analysis.

An exaction is subject to rough proportionality analysis even if a developer and a local government include it in a development agreement. An exaction is a type of taking regulated by constitutional provisions, and rough proportionality analysis protects private property rights. *See B.A.M. I*, 2006 UT 2, ¶¶ 31-34, 128 P.3d at 1168-69. Incorporating an exaction in an agreement does not change its status as a type of taking, nor does it change the analysis. The *B.A.M I*

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[15] *See also Call v. West Jordan*, 614 P.2d 1257, 1259 (Utah 1980), and *Banberry v. South Jordan*, 631 P.2d 899, 903-04 (Utah 1981). In *B.A.M. II*, the court also cited two decisions from the Washington Supreme Court. *See Sparks v. Douglas County*, 904 P.2d 738, 742 (Wash. 1995) (An exaction must be reasonably calculated to prevent, or compensate for, adverse public impacts of the proposed development.); *Burton v. Clark County*, 958 P.2d 343, 354 (Wash. 1998) (The government must show that the exaction is roughly proportional to a problem that is created or exacerbated by the new development.)

[16] Affordable housing is a legitimate government interest. *See* UTAH CODE ANN. § 17-27a-403(2) (General plans must address affordable housing needs); *see also id.*, § 17-27a-408 (Review of affordable housing elements in general plan). Furthermore, generating funding to be used for affordable housing is a reasonable means of promoting that interest. Thus, the first aspect of exaction analysis is satisfied. *See id.*, § 17-27a-507(1)(a).

[17] It is difficult to imagine a scenario where construction of housing causes a need for *more* housing.

[18] One of the principal purposes of the Taking Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan*, 512 U.S. at 384, (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)).

decision made no distinction between exactions imposed by a legislative act and those imposed through negotiations between a developer and a local government. *See B.A.M. I*, 2006 UT 2, ¶ 46, 128 P.3d at 1170. In other words, an exaction does not cease to be a taking simply because it is included in an agreement between a developer and a local government. As explained by the California Supreme Court:

> In our view, the intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address just indicators in land use "bargains" between property owners and regulatory bodies–those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic permit context–where the individual property owner-developer seeks to negotiate approval of a planned development–that the combined *Nollan* and *Dolan* test quintessentially applies.

Ehrlich v. Culver City, 911 P.2d 429, 438 (Cal. 1996) (emphasis in original).[19]

The County and Mr. Nilson entered a development agreement, which included a calculation of affordable housing fees. This Agreement was required by the County Code as a condition of approval. Although the Agreement granted Mr. Nilson a greater density than was allowed under the County Code, there was no evidence submitted that the density concession was connected to an agreement to pay an affordable housing fee.[20] Regardless, Mr. Nilson agreed to pay the fee. Including the affordable housing requirement in the Agreement, however, does not exempt it from rough proportionality analysis.

Although an exaction expressed in a development agreement is still subject to rough proportionality analysis, an agreement does affect that analysis. As was discussed above, exaction analysis requires a comparison of the developer's compliance costs to the public expense necessary to address the impact of the development. Where a local government confers benefits or concessions in exchange for an exaction (or a modified exaction), the benefits granted to the developer associated with that requirement should offset the compliance costs that are critical to rough proportionality analysis. Offsetting compliance costs by the benefits conferred recognizes the importance of development agreements as a land use tool, balances the rights of developers against the legitimate interests of local governments, and encourages cooperation between developers and local governments. The offset should be limited to the benefits directly associated with the exaction expressed in the agreement, or those which can be allocated to compliance with the exaction requirement.[21] If the developer simply "agrees" to comply with an

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[19] Mr. Ehrlich objected to a $280,000 "public recreation fee" imposed as a condition for his housing development. *See also Parking Ass'n of Georgia, Inc v. City of Atlanta*, 515 U.S. 1116 (1995) (Thomas, J dissenting from denial of certiorari): "The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."

[20] Section 8-5D18 indicates that higher densities may be approved, "through the provision of amenities and conformance with true mixed use residential and commercial development." The ordinance does not appear to allow density concessions in exchange for compliance with the affordable housing requirements.

[21] This limitation recognizes that concessions or benefits may be granted for numerous reasons, not just because of cooperation with an exaction requirement.

exaction which would be required with or without a development agreement, then the benefits should not offset compliance costs, because the benefits were not an incentive to impose or modify the exaction.

II. An Affected Party Has Other Options to Resolve Claims Related to a Land Use Decision Even if There was no Appeal Filed at the Time of the Decision.

An affected party may file a complaint against a local government, to seek relief from claims arising from a land use decision, even if an appeal based on § 17-27a-801 of the Utah Code is not available. The Utah Supreme Court explained that property owners who disagree with a land use decision actually have two options for relief. "They can either file a petition for review pursuant to [§ 801 of LUDMA], or they may file complaint against the land use authority, which may include a variety of claims, including constitutional claims." *Petersen v. Riverton City*, 2010 UT 58, ¶ 29.[22] In other words, a property owner's avenue for relief is not necessarily restricted to the land use appeal process only. A "general" type of complaint (*i.e.*, not an appeal pursuant to § 801 of LUDMA) would not need to be filed in the shortened time frame required for an appeal of a land use decision.[23]

Even though the land use decision approving the Aspen Meadows PUD was made in December 2007, Mr. Nilson may have a potential constitutional claim against the County for a property taking. As explained in *Petersen*, such a claim does not necessarily need to be filed within the 30 day appeal period required by § 801 of LUDMA. This Opinion does not evaluate whether Mr. Nilson actually has such a claim, or any potential liability on the part of the County. Any decision on such a matter would need to be determined by a court.

Conclusion

The affordable housing requirement, whether fulfilled by reservation of units or by payment of a fee, is an exaction that must satisfy rough proportionality analysis. An exaction is a condition imposed on the approval of a land use application, and may include fees as well as dedication of land or public improvements. The affordable housing requirement does not meet the rough proportionality standard, because there is no showing that a housing development causes a need for affordable housing. It is thus not proportional in nature, according to the analysis required by the Utah Supreme Court.

Incorporating an exaction requirement into a development agreement does not exempt the exaction from rough proportionality analysis. There is no distinction between an exaction imposed by general legislation and one negotiated as part of a specific deal. An exaction is a form of a taking, and a development agreement does not alter a land owner's property rights. However, any benefits conferred through an agreement to comply with an exaction (including

[22] "LUDMA" refers to the Land Use Development and Management Acts, found at §§ 10-9a-101–803 (municipalities) and §§ 17-27a-101–803 (counties).
[23] A complaint would need to be filed before being barred by a statute of limitations.

modified requirements of a generally applicable exaction) may offset the developer's compliance costs critical to rough proportionality analysis.

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:

Jann Farris, Morgan County Attorney
48 Young Street
Morgan, Utah 84050

On this _____ Day of February, 2011, 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