

Advisory Opinion #173

Parties: Grant Salter, Morgan County

Issued: September 30, 2016

TOPIC CATEGORIES:
Exactions on Development

Morgan County's requirement that Mr. Salter provide improvements along Powderhorn Road as a condition of development approval fails the rough proportionality test, and is thus an illegal exaction. Therefore, Morgan County cannot require that Mr. Salter install the improvements along Powderhorn Road.

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ADVISORY OPINION

Advisory Opinion Requested By: Grant E. Salter

Local Government Entity: Morgan County

Applicant for Land Use Approval: Grant E. Salter and Gloria L. Salter
Revocable Trust

Type of Property: Residential Subdivision

Date of this Advisory Opinion: September 30, 2016

Opinion Authored By: Brent N. Bateman
Office of the Property Rights Ombudsman

ISSUE

Can Morgan County require that the developer install road improvements, curb, gutter, and sidewalk along Powderhorn Road as a condition of subdivision approval?

SUMMARY OF ADVISORY OPINION

The County's requirement that Mr. Salter provide improvements along Powderhorn Road fails the rough proportionality test, and is thus an illegal exaction. Therefore, Morgan County cannot require that Mr. Salter install improvements along Powderhorn Road.

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 Grant E. Salter, on behalf of the Grant E. Salter and Gloria L. Salter Revocable Trust on March 31, 2016. A copy of that request was sent via certified mail to Mr. Jann L. Farris, County Attorney, Summit County, 48 Young Street, Morgan, Utah 84050.

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 Grant E. Salter, on behalf of the Grant E. Salter and Gloria L. Salter Revocable Trust on March 31, 2016, with attachments.
2. Letter submitted by Mr. Bill Cobabe, Planning Director for Morgan County, received April 12, 2016, with attachments.

BACKGROUND

Grant E. Salter owns a 3 acre parcel in Morgan County, Utah. Mr. Salter's parcel fronts along Powderhorn Road to the north, and Mr. Salter's current residence and improvements occupy the northern portion of the parcel. The south side of Mr. Salter's parcel is vacant farmland and fronts along Old Highway Road. Old Highway Road intersects with Powderhorn Road some distance away from Mr. Salter's parcel.

Mr. Salter has received concept approval to subdivide his parcel into three lots. His plan separates his existing home on the north onto an approximately 2 acre lot, and creates two one-half acre lots on the south. The two new lots will front exclusively along Old Highway Road, having no frontage or connection onto Powderhorn Road. Likewise, his existing home would have no remaining access or frontage onto Old Highway Road.

As a condition of subdivision approval, the County has required that Mr. Salter install road improvements, curb, gutter, and sidewalk along Powderhorn Road in front of his current residence. Mr. Salter objects to this requirement as an excessive exaction. Morgan County claims that "there is proportionality" in requiring the improvements along Powderhorn Road because the County required the adjacent subdivision to install all of the required improvements, and those improvements abruptly end at Mr. Salter's property.

Morgan County further states that Morgan County Code § 8-12-44(D)(2), entitled "Improvements Exemption," does not provide an exemption to the improvements in this case. This ordinance reads in relevant part:

The planning commission may provide an improvements exemption for certain street improvement requirements. Residential subdivisions of ten (10) lots or fewer may receive a special exemption from the requirement to improve infrastructure deficiencies along the frontage of existing infrastructure. This exemption shall only be available for those properties abutting existing public streets, as indicated in this subsection and as determined by county staff. Pavement width, curb, gutter, sidewalks, and park strips may be treated as separate components. The requirement to provide for each shall depend on the existence of each component previously improved within three hundred feet (300') of the subdivision boundaries. In all cases where each component of new infrastructure is required, it shall be installed pursuant to adopted standards.

Such an exemption may be granted upon finding that requiring the full street infrastructure improvements is not roughly proportional, in nature or extent, to the impact of the development on the community; is not beneficial to the county; or may be detrimental to the neighboring property abutting the development; and that the waived improvements are not necessary at this time to protect the public's health, safety, and welfare.

Morgan County Code § 8-12-44(D)(2). This ordinance permits the Planning Commission to provide an exception for certain street improvements in small subdivisions, upon a finding that the requiring the improvements are “not roughly proportional, both in nature and extent, to the impact of the development on the community.” Morgan County has applied this ordinance, and concluded that Mr. Salter’s subdivision is not eligible for the exception thereunder.

ANALYSIS

The County’s requirement that Mr. Salter provide improvements along Powderhorn Road fails the rough proportionality test, and is thus an illegal exaction. Therefore, Morgan County cannot require Mr. Salter to install improvements along Powderhorn Road.

An exaction is a government-mandated contribution of property imposed as a condition of development approval. *B.A.M. Dev., L.L.C. v. Salt Lake Cnty. (BAM III)*, P.3d 1161, 1168 (Utah 2012). Exactions can include the donation of property, providing public improvements, cash, or any number of items. *Koontz v. St. Johns River Water*, 133 S. Ct. 2586 (2013). Not all exactions are illegal. A County can validly require exactions if the exactions satisfy the “rough proportionality” analysis adopted by the U.S. Supreme Court and the Utah Supreme Court. The rough proportionality test has been codified in the Utah Code as follows:

A municipality 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 § 17-27a-507(1). The purpose of this test is to effectuate the protections guaranteed by the Takings Clause, which 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.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The language of this statute was borrowed directly from the U.S. Supreme Court decisions in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). See *B.A.M. Dev., L.L.C. v. Salt Lake Cnty. (B.A.M. I)*, 128 P.3d 1161, 1170 (Utah 2006).

Thus, Morgan County may require that Mr. Salter provide the improvements, “so long as there is a ‘nexus’ [or link] and ‘rough proportionality’ between the property that the government demands and the social costs of the applicant’s proposal.” *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586, 2595 (2013). It makes no difference whether the exaction is imposed administratively or whether the exaction was required by ordinance. *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 46, 128 P.3d 1161, 1170. Any exaction, by ordinance or otherwise, must satisfy the rough proportionality test in order to be valid. The County bears the burden of showing that its proposed exaction satisfies the rough proportionality test. See *Dolan v. Tigard*, 512 U.S. 374, 391 (1994).

The rough proportionality analysis was honed by the Utah Supreme Court in *B.A.M. Development, LLC v. Salt Lake County (B.A.M. II)*, 196 P.3d 601 (Utah 2008). In that opinion, the Court 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.” *Id.* at 603. The “nature” aspect is relevant here. This test focuses on the relationship between the purported impact and proposed exaction. The Court described the approach “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.*, at 603-04.

The County’s requirement that Mr. Salter install improvements along Powderhorn Road fails the “nature” portion of the rough proportionality test. Both of the new lots in Mr. Salter’s subdivision have exclusive frontage along Old Highway Road. Neither lot has access to Powderhorn Road. The two new Old Highway Road lots are not creating a problem that will be solved by the installation of curb, gutter and sidewalk along Powderhorn Road. The new lots may indeed create a problem along Old Highway Road, but Mr. Salter has not objected to improvements there. Powderhorn Road may indeed also have an existing problem – the road may badly need curb, gutter, sidewalk and road improvements, especially since the neighboring property has installed those improvements and they abruptly end at Mr. Salter’s parcel. But Mr. Salter’s proposed subdivision did not create those problems. Those problems currently exist, and will exist whether Mr. Salter subdivides or not. It is not legal to use Mr. Salter’s subdivision to solve a problem it did not create. Therefore, the requirement to install improvements along Powderhorn Road is an illegal exaction.

Morgan County Code section 8-12-44(D)(2), “Improvements Exemption,” is certainly well-intended to provide an exception to road improvement requirements that are do not pass the

rough proportionality test. However, that ordinance has no relevance here. The “nature” portion of the rough proportionality test derives from constitutional law, as interpreted by the Utah Supreme Court. The constitutional test must be applied without regard to the existence or the language of the local ordinance. Should the requirement fail the constitutional test the exaction is illegal whether or not the ordinance grants an exemption.

CONCLUSION

The requirement that Mr. Salter provide improvements along Powderhorn Road as a condition of subdivision approval is an illegal exaction. The requirement fails the “nature” portion of the exaction test because the requirement to improve Powderhorn Road does not solve any problem that Mr. Salter’s subdivision creates. Thus, Morgan County cannot impose that condition upon Mr. Salter’s subdivision approval.

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.

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 UTAH CODE § 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.