

Advisory Opinion #207

Parties: A&B Hotel Management; Grand County

Issued: January 9, 2019

TOPIC CATEGORIES:

Exactions on Development

An affordable housing fee is an exaction. To be valid, an exaction must provide a solution to a problem development creates, and must be roughly proportionate to the impact of the development. Thus, Grand County's affordable housing fee must solve a problem created by development on A&B Hotel Management's property, and must be proportional to the impact it addresses.

In this case, the County's proposed affordable housing fee addresses a need for affordable housing supply that lodging-related development creates. The County must ensure it implements the fee in a manner that allows for adjustment of the fee when a developer presents evidence showing the fee does not proportionately address the specific impact of a given development on affordable housing supply.

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ADVISORY OPINION

Advisory Opinion Requested By: Loren Castro, Castro Law, P.C.
Local Government Entity: Grand County
Applicant for Land Use Approval: A&B Hotel Management
Type of Property: Commercial
Date of this Advisory Opinion: January 9, 2019
Opinion Authored By: Jordan S. Cullimore
Office of the Property Rights Ombudsman

ISSUE

May Grand County impose an affordable housing fee on new lodging-related development?

SUMMARY OF ADVISORY OPINION

An affordable housing fee is an exaction. To be valid, an exaction must provide a solution to a problem development creates, and must be roughly proportionate to the impact of the development. Thus, Grand County's affordable housing fee must solve a problem created by development on A&B Hotel Management's property, and must be proportional to the impact it addresses.

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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 Loren Castro, Attorney for A&B Hotel Management on September 21, 2018. A copy of that request was sent via certified mail to Jaylyn Hawkes, Grand County Council Chair, at 125 East Center Street, Moab, UT 84532.

EVIDENCE

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

1. Letter Requesting an Advisory Opinion submitted by Loren Castro, Attorney for A&B Hotel Management, dated August 30, 2018.
2. Formal Request for an Advisory Opinion submitted by Loren Castro, Attorney for A&B Hotel Management, on September 21, 2018.
3. Reply submitted by Robert A. McConnell, Attorney for Grand County, on October 16, 2018.
4. Response submitted by Loren Castro, Attorney for A&B Hotel Management, On October 23, 2018.
5. Response submitted by Zacharia Levine, Grand County Community & Economic Development Director, on November 14, 2018.
6. Email response sent by Dan Duffy, Chief Operations Officer for Castro Law, November 19, 2018.
7. Phase I Assured Housing Feasibility Analysis for the City of Moab and Grand County Utah, prepared by BAE Urban Economics, dated March 2018.
8. Phase II Assured Housing Nexus Fee Analysis for the City of Moab and Grand County, Utah, prepared by BAE Urban Economics, dated May 2018.

BACKGROUND

A&B Hotel Management and A&V Petro (collectively "A&B") own vacant land (the "Property") at 938 and 940 South Main Street in Moab, Utah. A&B has requested an advisory opinion from this Office examining the legality of Grand County Council Resolution No. 3147 (the "Resolution").¹ While the submitted materials do not include the actual text of the Resolution, the parties indicate that it "gives notice that new development in the County may be subject to future ordinances and requirements aimed at mitigating the impact of new lodging-related development," such as hotels and other short-term lodging facilities, "on the demand for and

¹ A&B's request also asked the Ombudsman's Office to address whether the approach proposed by the County's Resolution "is the most sensible approach to solving the affordable housing issue." Such a policy question is outside the scope of this Office's jurisdiction to provide advisory opinions. We therefore decline to address the question.

availability of affordable housing” in the County. *Letter from Grand County*, dated October 16, 2018.

A&B originally purchased the Property intending to entitle it for commercial development and construct lodging for local tourism. A&B’s business plan subsequently changed and it decided to sell the property to another investor. After entering into a Purchase Contract with A&B, the potential purchaser learned about the Resolution through conversations with County staff and decided that the policy would negatively impact the development potential and profitability of the Property. A&B asserts that because of the Resolution, it is now stuck with land that is no longer profitable to develop or sell.

The County asserts that A&B’s challenge to the Resolution “and potential ordinances” is premature because the County has yet to actually pass any ordinances implementing the County’s intentions, as expressed in the Resolution. Nevertheless, the County has indicated it will welcome an opinion from this Office regarding whether the County may implement an Assured Housing fee based on the findings of a study performed by BAE Urban Economics (the “BAE study”) for the County. Thus, it appears that both parties are interested in an opinion about whether the BAE study’s conclusions and recommendations may be lawfully imposed on potential development of a hotel on A&B’s Property.

ANALYSIS

I. The Assured Housing Feasibility and Nexus Studies

Local governments throughout the country have wrestled with issues related to the availability and supply of affordable housing. One commentator has noted that “[w]hile local governments should be congratulated for recognizing and attempting to address what has become a national affordable housing supply crisis, they may only do so by constitutional means.”²

Two common means local governments have used to attempt to address shortages in affordable housing supply in their communities include (1) mandatory set-asides that require developers to actually construct affordable housing as part of their developments, and (2) in-lieu fees that require developers to contribute to an affordable housing trust fund.³ This dispute involves whether the County may enact an ordinance imposing an in-lieu fee on development. Accordingly, this Advisory Opinion will focus on the legality of this approach under Utah law.

Grand County commissioned the BAE study to assist the County in deciding whether and to what extent it should impose in-lieu fee requirements on new development within the County. The findings of the study are presented in two documents: a “Phase I” Feasibility Analysis, and a “Phase II” Nexus Fee Analysis.

The Phase I Analysis attempts to analyze market conditions to determine the maximum fee the County could impose on a developer while still allowing the developer a reasonable return on

² David L. Callies, *Infrastructure and Property Right: Mandatory Set-Asides as Land Development Conditions*, 43 *Urb. Law.* 307, 307 (2011).

³ *See id.* at 308-309.

investment—in other words, it attempts to determine the maximum fee it could impose that would leave a typical development project financially feasible. It appears the purpose of this analysis is to avoid imposing fees in a manner that would discourage or even prevent development of certain real estate product types.

The Phase I Analysis concludes that the County could feasibly impose an Assured Housing fee on the following product types: hotels, overnight rentals, condominiums, and luxury single-family homes. The analysis implicates few legal considerations, and is more focused on market and economic considerations.

The Phase II Analysis takes the real estate product types the Phase I analysis deemed “feasible” and attempts to analyze market conditions to determine a “justifiable” in-lieu fee—in other words, a fee that will accurately offset the impact of new development on the community’s need for affordable housing units. While the study analyzes conditions and proposes fees for multiple product types, this legal analysis will focus on the study’s findings relative to hotel facilities, since this is the type of product A&B is proposing to construct on its property.

The Phase II Analysis looks at the characteristics and impacts of a typical hotel development proposal and, based upon its data, calculates a “maximum justifiable fee” of \$15.57 per square foot. This is well below the Phase I Analysis’s “maximum financially feasible fee” of \$30.86 in a moderate real estate market, and \$54.14 in a strong market.⁴ Consequently, the BAE study concludes that the County could impose an Assured Housing fee on new hotel development of \$15.57 per square foot.

II. The Assured Housing In-Lieu Fee and the Rough Proportionality Analysis

The question presented is whether such a fee, if enacted through an ordinance by the County, would comply with applicable Utah law. To answer this question, we look to the Utah law governing development exactions.

An Assured Housing in-lieu fee is a form of development exaction. Utah law defines development exactions as “conditions imposed by governmental entities on developers for the issuance of [development approval]” that “typically require the permanent surrender of private property for public use.” *B.A.M. Dev., LLC v. Salt Lake County* (BAM I), 2006 UT 2, ¶ 34. A requirement imposed on a developer to pay money that will go toward providing for affordable housing qualifies under this definition. Accordingly, if the County decides to enact an ordinance imposing such a fee on new development, it must ensure the fee complies with the law governing exactions.

A. Development Exactions Must Satisfy “Rough Proportionality” Analysis

Utah law allows a local government to impose an exaction on development to the extent the exaction reasonably and proportionately addresses a proposed development’s impacts on the

⁴ The “maximum justifiable fee” was the same for both moderate and strong market scenarios.

community.⁵ If, however, an exaction requires development to pay for impacts beyond its own, the law will deem the exaction excessive and an unconstitutional taking of private property without compensation. *See Banberry Development Corporation v. South Jordan City*, 631 P.2d 899, 903 (Utah 1981).

The standard for measuring whether an exaction imposed by a county is lawful is found at Utah Code §17-27A-507(1):

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.

This standard establishes a two-part test for determining whether an imposed exaction appropriately offsets the impacts of a proposed development. If an exaction satisfies the legal test it is a proper exercise of the local government’s police power. If however, the exaction lacks an essential link to a legitimate government interest, or is disproportionate to the impact of the proposed development, the exaction is excessive and an unlawful taking of property without compensation.

This test was established in the U.S. Supreme Court decisions of *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The test was further expounded upon in the Utah Supreme Court decision, *B.A.M. Development, LLC v. Salt Lake County* (BAM II), 2008 UT 74. Courts have explained that the first part of the test requires a local government to establish a “nexus” or essential link, between a legitimate government interest and the imposed exaction. UTAH CODE §17-27A-508(1)(a).

B. An Essential Link Exists between the County’s Proposed Exaction and a Legitimate Government Interest

In this case, the County is proposing an exaction in the form of an Assured Housing fee to fund affordable housing projects in the County. Assuring the availability of affordable housing is a legitimate government interest under Utah law.

The County Land Use Development and Management Act (LUDMA) is the state statute governing land use and development in Utah. LUDMA requires counties in Utah to “allow and plan for moderate income housing growth...” UTAH CODE § 17-27A-401(3)(a)(i). Moreover, LUDMA states that its purpose is to “provide for the health, safety, and welfare” of present and future residents, and that to accomplish this goal counties may “enact ordinances...and rules...they consider necessary or appropriate for the use and development of land” within their

⁵ See Shelley Ross Saxer, *Exactions and Impact Fees*, 7 Brigham-Kanner Property Rights Conf. J. 77, 83 (2018) (“Insisting that landowners internalized the negative externalities of their conduct is a hallmark of responsible land-use policy....”).

boundaries. UTAH CODE § 17-27A-102(1)(a)-(b). Under authority of these provisions, the County may enact an Assured Housing fee to plan for and ensure the availability to affordable housing in the County. Consequently, the “essential link” requirement of Utah Code § 17-27A-507(1) is satisfied.

C. *Whether the Assured Housing Fee Will Fully Satisfy Rough Proportionality Analysis Depends upon the Impact of the Individual Development*

Next, we turn to the second requirement under Utah Code § 17-27A-507(1)—that the proposed exaction be “roughly proportionate...to the impact of the proposed development.” UTAH CODE § 17-27A-507(1)(b). More specifically, this part of the test requires the County, on a case-by-case basis, to “make some sort of individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development.” *Dolan*, 512 U.S. at 391.

The Utah Supreme Court has explained that this part of the test has two aspects. *B.A.M. Development, LLC v. Salt Lake County* (BAM II), 2008 UT 74. First, the exaction and impact must be related in *nature*; second, they must be related in *extent*.” *Id.* at ¶ 9 (emphasis added). The *nature* aspect focuses on the relationship between the anticipated 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 ¶10.

The *extent* aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost. *Id.* at ¶11 (“The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively.”). The court explained that “roughly proportional” means “roughly equivalent.” *Id.* at ¶8. Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the cost that a local government would incur to mitigate impacts attributable to development.

1. *The Nature Aspect of Rough Proportionality*

Turning first to the *nature* aspect of the test, the present situation passes muster. Admittedly, there are few situations in which new development would conceivably create an impact necessitating construction of affordable housing. For instance, when a developer proposes a standard single-family residential subdivision, it is hard to imagine a scenario in which the proposal would itself cause a need for affordable housing in the community. Residential development doesn’t typically produce such impacts.

This scenario, however, involves commercial development—specifically hotel development. The County has presented evidence indicating this type of lodging-related development “increases demand for affordable housing in the County.” *Grand County Reply Letter*, dated October 16, 2018. *See also Phase II Assured Housing Nexus Fee Analysis for the City of Moab and Grand County, Utah*, prepared by BAE Urban Economics, dated May 2018.

The BAE study indicates that lodging-related development generates new employment for a class of workers that need local affordable housing options. Consequently, hotel development presents a problem, and an Assured Housing fee presents a potential solution to that problem. Consequently, an Assured Housing fee satisfies the *nature* aspect of the rough proportionality analysis in this case.

2. *The Extent Aspect of Rough Proportionality*

Turning to the *extent* aspect of the test, we are unable to provide a definitive answer involving a development proposal on A&B's property. This is primarily because the parties have not provided any details of a development proposal on the Property, and we are unable to determine relative costs to either the County or A&B.⁶

Generally speaking, however, we caution the County against taking a rigid approach to the BAE study's recommendation of enacting an ordinance imposing a uniform per-square-footage fee on all new hotel development within the County. A categorical approach, in several instances, could easily lead to violations of the *extent* aspect of the rough proportionality analysis.

As indicated above, the *extent* aspect requires the parties to assess costs—the cost of the exaction to the developer on one hand, and the cost to the County of assuaging the development's impact on the other. *See B.A.M Dev. LLC*, 2008 UT 74 at ¶ 11. Here, the BAE study attempts to calculate the cost-per-square-foot to the County of a “typical” hotel development. It does so by making broad and sweeping generalizations regarding features and characteristics of a “prototype” hotel development, then calculates a fee based upon the impact of such a prototype.

This one-size-fits-all approach to charging an Assured Housing fee may or may not properly address the impacts of development proposals that fit within the parameters of the study's assumptions. However, it will not accurately capture the impact of every development proposal presented to the County. Accordingly, this approach may be an appropriate starting point for determining a fee to impose hotel development, but the law may require adjustment in certain circumstances.

While the law governing exactions does not require “precise mathematical calculation” of a development's impact, it does, as stated previously, require the County to “make some sort of individualized determination” showing that the exaction and impact are roughly equivalent. *Dolan*, 512 U.S. at 391. *See also B.A.M Dev. LLC*, 2008 UT 74 at ¶ 8 (equating “rough proportionality” to “rough equivalence”). To account for this principle, the County could look to the model established by the Utah law governing impact fees.⁷ The Utah Impact Fees Act

⁶ A&B in its Request for Advisory Opinion estimated that a fee, presumably based on the BAE study's numbers, would increase the cost to the developer by one million dollars. This is all the information we have to go off of at this point. Neither party has submitted information regarding a site plan, other characteristics of the hotel development, the current available stock of affordable housing within the County, or any other information involving costs to each party.

⁷ The BAE study styles the Assured Housing fee as an impact fee. While the fee is an exaction, it is not an impact fee because the fee is not “a payment of money imposed upon new development...as a condition of development approval to mitigate the impact of the new development *on public infrastructure*.” UTAH CODE § 11-36(a)-102(8)(a) (emphasis added). The identified impact of the development in this case is an impact on the availability of affordable

provides a method for calculating a generally applicable standard fee to address development impacts on public facilities and infrastructure. The Act also requires the local government imposing the fee to provide a means for *adjusting* the fee when a developer presents data or studies showing the standard fee does not correctly and proportionately address a specific development's impact in a given situation. *See generally* UTAH CODE § 11-36a-402(1). This approach provides a means for calibrating the fee in consideration of a specific development proposal, and the characteristics of and circumstances surrounding the proposal.⁸

This model provides the County an established, proven method for lawfully imposing a fee intended to offset development impacts. Following this approach, the County may enact a generally applicable fee for ease of administration in most cases, while also ensuring the County does not violate the *extent* aspect of the rough proportionality test in cases in which the standard fee does not lawfully and proportionately address a specific development's impacts.

CONCLUSION

Utah law allows the County to impose an Assured Housing fee on new lodging-related development insofar as the development has an impact on the supply of affordable housing in the County. For the fee to be valid, the County must ensure it implements the fee in a way that allows for adjustment of the fee when a developer presents evidence showing the fee does not proportionately and equivalently address the specific impact of a given development proposal.

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housing, which is not public infrastructure. Since the fee is not an impact fee, it is not governed by the Impact Fee Act. The fee is nonetheless an exaction subject to heightened "rough proportionality" scrutiny.

⁸ Likewise, impact fees cannot be used to correct existing deficiencies. UTAH CODE § 11-36a-202. If the County has an overall shortage of affordable housing stock, it may not use this generally applicable fee to correct its problem. The County may only use the fee to correct the affordable housing problem directly resulting from the particular development—that is, to avoid making the problem worse.

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.