

Advisory Opinion #51

Parties: Jeff Glines and Cities of Washington and St. George

Issued: September 25, 2008

TOPIC CATEGORIES:

D: Exactions on Development

Requiring construction of a secondary access road is valid, even if the road is located in another jurisdiction. The requirement is an exaction, which much satisfy rough proportionality analysis. The cost of the road must be roughly equal to the expense necessary to address the impact of the development. The cost analysis should include public benefits.

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

Requiring a Secondary Access Road Through Another Jurisdiction

Advisory Opinion Requested by: Jeff Glines

Local Government Entities: Washington City
St. George City

Applicants for the Land Use Approval: Jeff Glines
MIKTRAM, LLC

Project: Residential Subdivision

Date of this Advisory Opinion: September 25, 2008

Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

May a local government require acquisition of secondary access through a neighboring jurisdiction?

Summary of Advisory Opinion

The City's requirement that the Developer construct a secondary access road through St. George City is an exaction, which is subject to the analysis required by § 10-9a-508 of the Utah Code. Public safety access and traffic flow are legitimate government concerns, and requiring a secondary access road is a reasonable means to promote that interest, as well as address the impact caused by the subdivision. The cost of constructing the road must be roughly equivalent to the public expense attributable to the development's impact. However, the cost analysis must also include the public benefits conferred by the 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.

The 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 request for this Advisory Opinion was received from Jeff Glines on June 6, 2008. A letter with the request attached was sent via certified mail, return receipt requested, Danice B. Bulloch, City Recorder, Washington City at 111 North 100 East, Washington, Utah 84790. Ms. Bulloch's name is listed on the State's Governmental Immunity Database as the contact person for the City. On July 8, 2008, a letter was sent to Ms. Bulloch, again requesting a response by July 25, 2008. On August 19, 2008, the Office of the Property Rights Ombudsman received a response from the City.

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 filed June 6, 2008 with the Office of the Property Rights Ombudsman by Jeff Glines with attachments.
2. Response submitted by Jeffrey N. Starkey, Durham Jones & Pinegar, attorneys for Washington City, received by the Office of the Property Rights Ombudsman, August 19, 2008.

Background

Jeff Glines proposed a 39 lot subdivision, entitled "Eagle Summit Estates," on a bluff overlooking the Green Springs area of Washington City.¹ The western boundary of the subdivision is also the boundary between Washington and St. George. When the subdivision was proposed, Washington City changed the zoning designation for the property to allow for 12,000 square foot lots.

Washington City approved the preliminary plat for Eagle Summit Estates on October 10, 2007. As a condition of approval the Washington City Council required a secondary access road into the subdivision. This requirement is consistent with the City's code, which requires secondary access on streets longer than 600 feet.² The topography of the area and the layout of the subdivision dictate that any secondary access road must travel to the west, or through the Middleton area of St. George.

¹ According to the information submitted, the property is owned by MIKTRAM, LLC and Corwin and Allison Keltner.

² See § 3.2.4.5.A of the Washington City Code.

Initially, Mr. Glines was able to obtain a “tentative” agreement with the owners of undeveloped properties next to the Eagle Summit subdivision to allow construction of a road. According to Mr. Glines, St. George officials verbally approved the road design, but later backed down, evidently stating that the road should be built when the properties developed. There do not appear to be current plans to develop the neighboring properties, although the City indicates that a residential subdivision has been proposed.

Mr. Glines is thus at the mercy of circumstances beyond his control. He is unable to construct the road across the undeveloped properties in St. George City, but cannot develop the subdivision within Washington City without the road. In addition, Mr. Glines feels that he should not be required to provide a benefit to the undeveloped properties without compensation.

As of the date of this Opinion, it appears that Washington City will accept a “stub” road from the Eagle Summit subdivision, to be connected to a future road in St. George. There is no further information regarding when that road is to be built, or who is responsible for its construction.³

Analysis

I. The Secondary Access Requirement is a Condition that Must Satisfy the Rough Proportionality Analysis Required by State and Federal Law.

The City’s requirement of a secondary access road constitutes an “exaction” under Utah law. “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*”).⁴ The term “exaction” includes any condition on development, including not only dedication of property, but also payment of money, installation of specific improvements, or other requirements imposed by a public entity. 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. Since the City is asking Mr. Glines to construct a secondary access road as a condition of approval for a subdivision, the County is requiring an exaction, which must satisfy § 10-9a-508(1) of the Utah Code.⁵

In 2005, the Utah Legislature enacted § 10-9a-508 of the Utah Code, which authorizes cities to impose exactions on new development, within established limits:

³ Mr. Glines has requested that the Office of the Property Rights Ombudsman complete this Opinion, despite the fact that the City seems to be working toward a compromise solution.

⁴ 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.”)

⁵ The City notes that in the preliminary approval stages, Mr. Glines proposed the location of the secondary access road, and did not object to the City’s requirement. However, a property owner’s accession to an exaction changes neither its nature as an exaction nor the analysis to determine its validity. The secondary access condition was imposed by the City to fulfill requirements found in the City’s code. Even if the developer originally agreed with the condition, the exaction must still fit within the required legal framework.

- (1) A municipality may impose an exaction or exactions on development proposed in a land use application provided that:
- (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. § 10-9a-508(1).⁶ The Utah Supreme Court observed that the language of this statute was borrowed directly from the U.S. Supreme Court analyses in *Nollan v. California Coastal Comm'n*, 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.⁷ This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis has been codified in § 10-9a-508.

The Utah Supreme Court further honed the "rough proportionality" analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 45 ("*B.A.M. II*"), which was a second appeal stemming from the same development project at issue in the earlier decision. 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 45, ¶ 9. 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 45, ¶ 10.

The "extent" aspect of the rough proportionality analysis 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 45, ¶ 11. The court continued by holding that "roughly proportional" means "roughly equivalent." Thus, in order to be valid, the cost of an exaction must be roughly

⁶ There is a corresponding statute applicable to counties found at § 17-27a-509 of the Utah Code.

⁷ 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").

equivalent to the cost that a local government would incur to address (or “assuage”) the impact attributable to a new development.

II. The Secondary Access Requirement Is a Reasonable Means to Accomplish a Legitimate Government Interest.

In order to be a valid exaction, the City’s dedication requirement must satisfy all aspects expressed in § 10-9a-508(1). First, there must be an essential link between a legitimate interest and the requirement. The City has a legitimate governmental interest in improved access for public safety purposes as well as enhanced traffic flow.⁸ Requiring the Developer to install a secondary access road is a reasonable means of accomplishing the City’s objectives.⁹ Since the City’s legitimate interests are promoted by the dedication, the first prong of § 10-9a-508 is satisfied.

III. The Secondary Access Requirement is Related in Nature to the Impact Caused by the Development.

The City must also show that the second prong of the test has been met.¹⁰ With regard to the “nature” aspect of the test, the secondary road is intended to provide additional public safety access and improved traffic flow.¹¹ The “problem” presented by the development is the need for safety and traffic flow. The “solution” is the secondary access road. The solution is a reasonable and effective means to address the problem. The access and traffic “problems” presented by the subdivision are thus addressed by constructing the secondary road.

The extraordinary conditions that the development faces, the location of the property, the unusual terrain, and the need to bring the secondary road through the neighboring city, do not override the City’s legitimate interest in safety and enhanced traffic flow, nor do they interfere with the legitimacy of a secondary access road as a means to address that interest. The City’s interest in safety and traffic flow must be addressed, and cannot be ignored simply because constructing the road is difficult. The nature aspect of the exaction analysis is therefore satisfied.

⁸ See *Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117 (“In order for a government to be effective, it needs the power to establish or relocate public thoroughways . . . for the convenience and safety of the general public.”) also UTAH CODE ANN. § 10-8-8.

⁹ Note that the first step of the evaluation under § 10-9a-508(1)(a) requires an essential link between the requirement and a legitimate governmental interest. This first prong of the test does not require a connection between the exaction and a need attributable to new development. As has been discussed, the “nature aspect” expressed in § 10-9a-508(1)(b) concerns the relationship between the exaction and the need created by new development. *B.A.M. II*, 2008 UT 45, ¶ 10.

¹⁰ See *B.A.M. I*, 2006 UT 2, ¶ 39, 128 P.2d at 1169-70 (Rough proportionality analysis “include[s] the imposition of a burden on the governmental entity to make ‘some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development’”)(quoting *Dolan*, 512 U.S. at 391).

¹¹ The City asserts that the road promotes “sensible planning of vehicular traffic,” but no formal traffic study was prepared. However, there appears to be no dispute that two access points will lead to better traffic flow within the subdivision.

IV. The Cost of the Secondary Access Requirement Must be Roughly Equivalent to the Cost of Assuaging the Impact of the Development.

Niether the City nor Mr. Glines has provided information about the costs associated with the road requirement nor the impact created by the subdivision. As has been discussed, the *B.A.M. II* court held that the analysis must include a comparison of the burden incurred by the City resulting from the impact of the development against the cost to the developer to acquire the right-of-way and construct the road.¹² The analysis boils down to a comparison of the costs to the developer to acquire and build the road against the costs to the City for providing emergency access and traffic flow to thirty-nine new homes. If the cost of the road construction is roughly equivalent to the amount the City would spend to assuage the impact of the thirty-nine homes in the Eagle Summit Estates subdivision, the condition is a proper exaction. If the costs are not roughly equivalent, the exaction violates § 10-9a-508. Without this information regarding costs, an analysis of the legitimacy of the exaction under *B.A.M. II* cannot be complete.

Nevertheless, some guidance is available. Whether or not the condition to build the secondary access road is a legal exaction depends at least in part upon the road that will be built. If the City requires that the Developer build several miles of road over very rough terrain, then the condition is more likely to be an illegal exaction.¹³ The costs of building such a road will be very high, and may be disproportionate to the impact of thirty-nine new homes. Conversely, where the costs of establishing the access road are reduced, for example by requiring a short stub road rather than a lengthy highway (as has been discussed), the costs of the exaction is more likely to be roughly equivalent to the cost to the City to assuage the impact. The exaction in such a case is more likely to be upheld.

The City may also reduce the cost to the Developer by compensating the developer for costs incurred in building the road. This is especially appropriate in a case where, as here, a lengthy road through neighboring property will benefit and could amount to a windfall to other property owners and the public at large. Compensating the developer in such a case would also make the exaction more likely to meet the rough equivalency test. At their heart, constitutional takings provisions promote fairness and proportionality. *See Monterey v. Del Monte Dunes at Monterey LTD*, 526 U.S. 687, 703 (1999).¹⁴ It is not fair that one developer shoulder a burden which ultimately will provide a public benefit in excess of the developer's proportionate responsibility, even if the condition is justified by public needs. Even though public safety may necessitate the secondary access and cost of construction, proper cost balancing must consider the value of other public benefits that derive from the road, and whether it is fair and just for one developer to fully bear the construction cost.

¹² The "rough equivalency" analysis also applies to the costs to install improvements, in addition to the cost of dedicating the land.

¹³ This is not to say that requiring the developer to build a lengthy road *would* be an illegal exaction. An analysis of the costs under *B.A.M. II* would still be necessary, and could result in a showing of rough equivalency.

¹⁴ "[C]oncerns for proportionality animate the Takings Clause . . ." *See also Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee . . . was designed to bar the 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.")

Conclusion

The City's condition requiring a secondary access is an exaction, which must satisfy § 10-9a-508 of the Utah Code. That requirement must be met even though the developer agreed with the condition. A valid exaction must be linked to a legitimate governmental interest, and must be roughly proportionate, both in nature and extent, to impact of a proposed development. "Roughly proportionate" requires rough equivalence between the cost to the private developer and the public expense arising due to the impact of the development. The fundamental concept of fairness and proportionality, which animate Constitutional protections, dictate that the value of public benefits be included in the rough equivalence analysis.

Access for public safety purposes and improved traffic flow is a legitimate governmental purpose, and requiring a secondary access road is a reasonable means of promoting that interest. Furthermore, the secondary access road is related in nature to the impact of the proposed subdivision, by providing a reasonable "solution" to the "problem" raised by the impact of the subdivision. There has been no information related to the costs of the road or the expense caused by the impact of the subdivision. However, the additional public benefits of the proposed secondary road must be considered in the cost analysis, in order to ensure the fairness and proportionality guaranteed by the state and federal constitutions.

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:

Danice B. Bulloch, City Recorder
Washington City
111 North 100 East
Washington, UT 84790

On this _____ Day of September, 2008, 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