

Advisory Opinion #77

Parties: Corry and Kristen Craig and City of Hyde Park

Issued: November 9, 2009

TOPIC CATEGORIES:

- D: Exactions on Development
- J: Requirements Imposed Upon Development

Requiring a property owner to purchase property, construct a road, and dedicate that road to the public in order to obtain a building permit is an exaction, which must satisfy rough proportionality analysis. A property owner may only be required to build and dedicate as much road as justified by the impact of the development.

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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: Corry and Kristen Craig
Local Government Entity: Hyde Park City
Applicant for the Land Use Approval: Corry and Kristen Craig
Project: Single Family Dwelling
Date of this Advisory Opinion: November 9, 2009
Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issue

May a local government require a property owner without frontage on a public road to purchase property, construct a road, and dedicate that road to the public in order to obtain a building permit?

Summary of Advisory Opinion

Requiring a property owner to purchase property, construct a road, and dedicate that road to the public in order to obtain a building permit is an exaction, which must satisfy rough proportionality analysis. There is a link between the City's legitimate interest in traffic flow and requiring construction and dedication of a road. However, the City did not show that the expense of constructing the road is roughly equivalent to the cost to address the impact of the proposed home. The City may only require the property owner to build and dedicate as much road as justified by the impact of one home.

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 Corry and Kristen Craig on July 30, 2009. A copy of that request was sent via certified mail to Mayor David Kooyman, Hyde Park City. The return certificate, indicating that the City received the copy of the request, was received by the Office of the Property Rights Ombudsman on August 4, 2009. The County submitted a response to the OPRO, which was received on August 31, 2009. The Craigs submitted a reply via email, which was received on September 9, 2009.

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 July 30, 2009 with the Office of the Property Rights Ombudsman by Corry and Kristen Craig, including attachments.
2. Response from Hyde Park City, including attachments, submitted by Reed Elder Hyde Park Planning Commission, received August 31, 2009.
3. Reply submitted by Corry and Kristen Craig, received September 9, 2009.

Background

Corry and Kristen Craig own a 3.5 acre lot located at 875 East 100 North in Hyde Park. The surrounding area has been undeveloped agricultural land, and the lot does not have frontage on a city street. Access to the parcel is by an unpaved lane on an easement that burdens two other parcels.¹ The lot was evidently created in 1989, when two siblings divided a larger parcel. The Craigs purchased the property intending to construct a home and barn. Beginning in the summer of 2008, the Craigs approached the City to discuss their proposed buildings. The City informed them that before a building permit could be approved, the Craigs would need to construct and dedicate a roadway from 200 North to their property.² This roadway would be approximately 1000 feet long, with about 700 feet crossing the neighboring parcels. The road would need to be built to the City's standards, including curb and gutter, and drains to carry storm water.

The City maintains that the Craig's parcel is not a "legal" lot, because it does not comply with a City ordinance requiring frontage on a public road. Section 2-56 of the Hyde Park City Code defines "lot" as

¹ The easement runs along the boundary between two parcels which adjoin the Craigs' parcel. According to a plat map, the easement appears to be 40 to 50 feet wide.

² There were also concerns with whether the water supply was adequate for fire suppression. Those concerns are not part of this analysis, however.

[a] parcel of land occupied or to be occupied by a main building or group of buildings (main or accessory), together with such yards, open spaces, lot width and lot area as are required by [the City's] Ordinance, and having frontage upon a dedicated, City-maintained and approved street shown on the Master Street Plan. A lot must be within 325 feet of a City fire hydrant or be conformance with the duly adopted Uniform Fire Code and be accessible to City culinary water lines and public utilities.

HYDE PARK CITY CODE, § 2-56. Since the lot does not have frontage on a street, the City maintains that it is not “legal,” and so a building permit cannot be approved.³ According to the City, that ordinance was enacted in 1991, although it could be older.⁴

The Craigs do not necessarily disagree with the need for the road, but object to the cost of building the entire road, particularly because it will also serve the other properties.⁵ The adjoining property owners may eventually develop the properties, but one of the owners has indicated that he prefers access using a different road plan, which would come from the opposite direction, and not follow the strict “grid” system of roads. The Craigs argue that they should be able to continue using the existing easement until the adjoining properties are developed, and the cost of a road could be shared amongst all property owners. The Craigs have indicated that they are willing to pave a portion of their easement to use as a private driveway.

Analysis

I. The Frontage Requirement is a Reasonable Exercise of the City's Authority.

The requirement that each building lot have frontage on a dedicated street serves a legitimate public purpose, and is a valid exercise of the City's authority. Requiring frontage on public roads ensures adequate access to properties by property owners and public safety. The requirement also encourages responsible growth and development. *See Johnson v. Hermes Associates*, 2005 UT 82, 128 P.3d 1151 (access to public streets important factor in development). The City may “enact all ordinances, resolutions, and rules . . . necessary or appropriate for the use and development of land” UTAH CODE ANN. § 10-9a-102(2).⁶ Thus, the City is within its authority to impose a “frontage requirement” on building lots.

While the City's frontage requirement is reasonable, however, the Craigs' rights in their property must also be recognized. *See id.* (Municipalities must balance land use regulations with private property interests). For whatever reason, the parcel was created in the late 1980s without frontage on a public street.⁷ The Craigs acquired that parcel in good faith, hoping to construct a

³ The City's code only requires some frontage on a public street. It does not say how much frontage.

⁴ In an email response submitted at the request of the OPRO, the City indicated that the ordinance dates to at least March of 1991, but it may be older.

⁵ The City noted that the Craigs could enter a development agreement which would provide reimbursement if the other property were developed.

⁶ The City's authority includes regulation of transportation, infrastructure, streets, and property uses. *See* UTAH CODE ANN. § 10-9a-102(2).

⁷ The information is not available, but the parcel may have been created by deeding a portion of a larger parcel.

home and barn. They have the right to a reasonable expectation that they can put their property to some economically beneficial use. If the City fails to balance those interests, an unconstitutional taking of property without just compensation may result.⁸

II. The Dedication Required by the City is an Exaction, Which Must Comply with Section 10-9a-508 of the Utah Code.

A. The Dedication is an Exaction, which is subject to “Rough Proportionality” Analysis.

The City’s requirement that the Craigs purchase land and construct a roadway 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*”).⁹ 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 the Craigs to acquire property, construct a road, and then dedicate it to the public in order to get a building permit, the City is requiring an exaction, which must satisfy § 10-9a-508(1) of the Utah Code.

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:

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).¹⁰ 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,

⁸ A balance between the City’s interests and the Craigs’ property rights could possibly be met through a variance of the frontage requirement. Cities are authorized to approve variances when enforcement of a zoning ordinance causes an unreasonable hardship. UTAH CODE ANN. § 10-9a-702. If approved by the City’s appeal authority, the frontage requirement could be adjusted for the Craigs’ property, allowing their easement to satisfy the requirement. Moreover, conditions may be imposed on variance approvals. See UTAH CODE ANN. § 10-9a-702(6). The City could propose a condition that the Craigs agree to participate in the construction of a public road when the surrounding properties are developed. This Opinion only suggests that a variance may be possible means to resolve this situation, and does not imply that a variance must be granted. A variance can only be approved by the City’s appeal authority, if all statutory requirements are met.

⁹ 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.”)

¹⁰ There is a corresponding statute applicable to counties found at § 17-27a-509 of the Utah Code.

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.¹¹ 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 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.¹² 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 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 74, ¶ 11, 196 P.3d at 604. 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 equivalent to the cost that a local government would incur to address (or “assuage”) the impact attributable to a new development.

B. The Road Requirement Satisfies the First Prong of the Rough Proportionality Test

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 safe and efficient traffic

¹¹ 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”).

¹² The Court’s original decision in *B.A.M. II* was amended. The original opinion is found at 2008 UT 45. The amended opinion is cited herein.

flow.¹³ Ensuring access to public roads is also a legitimate public interest. Requiring construction and dedication of a public roadway providing access to the Craig's property is a reasonable means of accomplishing the City's objectives.¹⁴ In addition, installation of curbs, gutters, and sidewalks improves aesthetics and helps control stormwater. Since the City's legitimate interests are promoted by the dedication, the first prong of § 10-9a-508 is satisfied.

C. The Road Requirement Satisfies the Nature Aspect of the Analysis

The proposed road dedication also meets the "nature" aspect of the analysis. Constructing a public road "solves" the problem caused by the impact of the home proposed for the Craig property. Presently, there is no access to the property from a public road. Constructing a home on the parcel causes an "impact," by increasing the need for access by public safety vehicles, as well as the general public. Requiring construction and dedication of a public road for access addresses that impact.

D. The Road Requirement does not Satisfy the Extent Aspect of the Analysis

Requiring the complete full-width construction to city standards with curb and gutter of a 1000' road, along with acquisition and dedication to the public, solely to access the Craig's property does not satisfy the extent aspect of the rough proportionality analysis. As has been discussed, the *B.A.M. II* court held that the extent 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 provide the improvements. If the cost of the right-of-way and construction of the road is roughly equivalent to the cost the City would spend to assuage the impact from one home, the condition is a proper exaction. If the costs are not roughly equivalent, the exaction violates § 10-9a-508.

An analysis of the impact to the City of one home has not been provided, nor of the cost to the property owners to construct and dedicate the road, but it appears that requiring the construction and dedication of a 1000-foot road to the Craig's parcel would exceed the cost to the city to assuage the impact from one home. As long as City services can legally and safely access the home, a fully constructed and developed roadway may not be necessary, at least until the neighboring parcels are developed. Unless a contrary analysis is provided, the roadway dedication and installation of the required improvements do not satisfy the "extent" aspect of the rough proportionality analysis.

Entering an agreement whereby the neighboring property owners would contribute a share of the road construction cost does not necessarily satisfy the rough proportionality analysis. The Craigs would still be required to pay the full cost of the road in order to build their home. Their only

¹³ 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."); see also UTAH CODE ANN. § 10-8-8.

¹⁴ 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.

hope of receiving any kind of compensation for the construction is if the neighboring properties are developed. Since there are no current plans for development, it may take several years for the Craigs to receive any kind of payment, if they receive any at all.¹⁵ A development agreement, however, could provide that a road would be completed in the future if the neighboring properties were developed. The Craigs could agree to contribute a fair share of the construction costs, when a road becomes necessary.¹⁶

Conclusion

The City has a legitimate interest in ensuring that developed properties have frontage on public roads. However, that requirement must be balanced against the property owners' rights, and also must satisfy rough proportionality analysis. The City may be able to require the property owners to provide access to their property, but the real question is *how much* road the City can require the property owners to build.

The City's requirement that the Craigs purchase property, construct a 1000-foot road, and dedicate that road to the public in order to obtain a building permit is an exaction. In order to be valid, the exaction must satisfy rough proportionality analysis. The City has not shown that the cost to address the impact caused by the home is roughly equivalent to the expense of the road. Unless the cost of the impact is roughly equivalent to the expense of compliance, the exaction is invalid.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

¹⁵ The Craigs indicated that one of their neighbors envisions a development with access from a different point. Placing a road as required by the City may discourage development of the neighboring parcel, or compromise the property owner's plans.

¹⁶ If a road in that location is not desired due to future development, the Craigs could still relinquish all or part of their easement, and agree to different access on a future public road which follows a different route.

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:

Mayor David Kooyman
Hyde Park City
113 E. Center Street
PO Box 489
Hyde Park, Utah 84318

On this _____ Day of November, 2009, 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