Advisory Opinion #150

Parties: David Davis and Tooele City

Issued: December 19, 2014

TOPIC CATEGORIES:

Exactions on Development

An exaction must be roughly proportional to the impact caused by new development. If a new structure replaces an old one, the impact of the new development should be reduced by the impact attributed to the old, which reduces the level of an acceptable exaction. An exaction may be charged on any "new" impact, over and above the old.

The amount of water exacted for residential development should be determined based on reliable information related to the amount of water required for that development. Basing residential water requirements on the maximum amount of water the state considers "beneficial" for agricultural irrigation is not the type of individualized determination required for valid exactions.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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ADVISORY OPINION

Advisory Opinion Requested by:	David Davis
Local Government Entity:	Tooele City
Property Owner:	We Create LC
Type of Property:	Residential Lot
Date of this Advisory Opinion:	December 18, 2014
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

May a City require new development to dedicate water rights, if the new development replaces an older structure?

How much water may a City require?

Summary of Advisory Opinion

Local governments have a legitimate interest in providing adequate water service. Requiring new development to dedicate enough water rights to meet the increased need for service is a reasonable means to accomplish the important public objective. If new construction replaces an older structure, the impact of the new development should be reduced by the impact related to the old. An exaction on new development may be based on its additional impact over and above the impact of the older structure.

The amount of water that may be required of new construction must be roughly equal to the amount needed to provide service. A local government must make an individualized determination that an exaction is roughly proportional to the impact caused by the new development. Simply citing the maximum amount of water that may be diverted to beneficial use is not the level of individualized determination required to justify the amount of water required.

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 David Davis on October 30, 2014. A copy of that request was sent via certified mail to Michelle Y. Pitt, Tooele City Recorder, at 90 North Main, Tooele, Utah. According to the return receipt, the City received the Request on November 3, 2014.

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, with attachments, submitted by David Davis, received by the Office of the Property Rights Ombudsman on October 30, 2014
2. Response from Tooele City, with attachments, submitted by Roger Baker, Attorney for the City, received November 13, 2014.
3. Reply submitted by Mr. Davis, received November 19, 2014.
4. Reply submitted by the City, received via email on November 25, 2014.

Background

David Davis owns a lot located at 722 West Vine Street in Tooele.[1] The lot is approximately 24,750 square feet, or .57 acres. In September of 2014, he applied for a building permit to construct a home and garage on the lot, and paid $500 as a deposit.[2] Mr. Davis states that he is replacing a home that existed on the property.[3] The City disagrees, however, and maintains that the new home is not a "replacement" structure.

[1] The property owner is listed as "We Create, LC." Mr. Davis applied for a permit to construct a home, so it is presumed that he had authority from the owner to carry out the construction.
[2] The total permit fee was listed as $2,356.12. In June of 2014, Mr. Davis was granted a conditional use permit to construct a 2400 square foot garage on the property. One of the conditions was that a primary residence also be constructed.
[3] Mr. Davis asserted that he spent over $12,000.00 removing an older home from the property.

The City informed Mr. Davis that he would be required to dedicate 2.13 acre-feet (a-f) of water as a condition of permit approval.[4] The amount of water was determined to be what was necessary for both indoor (or culinary) use and outdoor irrigation. The City calculated the needed amount of water based on information provided by the State of Utah's Division of Drinking Water and the Division of Water Rights. The state information adopted by the City indicates that each year, a residential home needs .45 a-f per year for indoor use (146,000 gallons). The state has also established 4.0 a-f per acre (1,300,000 gallons) as the irrigation duty for Tooele County.[5]

Mr. Davis feels that the City is not justified in requiring dedication of the water, because he is replacing an existing home. No new water is needed, because the replacement home does not create a need for additional water.[6] The City allows a property owner to receive credit for any water rights that were already dedicated for development on a property.[7] However, the City maintains that no water rights associated with 722 Vine Street have been dedicated to the City.[8]

On October 20, 2014, Mr. Davis informed the City that he was withdrawing his permit application, evidently because of his disagreement over the water dedication requirement. The City states that it considers his permit application voided. Because the permit application was withdrawn, the City argues that the Request for Advisory Opinion is moot.

Analysis

The Water Dedication Requirement is an Exaction, Which Must Satisfy Rough Proportionality Analysis.

The City correctly notes that Mr. Davis voluntarily withdrew his application for a building permit, and was thus not obligated to dedicate any water rights. However, since it appears that the dedication requirement is imposed by the City's ordinances, it will be required no matter who applies for a building permit.[9] Moreover, Mr. Davis raises an important issue regarding the extent of water rights that may be required. Therefore, this Opinion will evaluate the City's requirements as if they had been imposed.

Because the City's water dedication requirement is a condition of building permit approval, it is an exaction, which must satisfy rough proportionality analysis. "A development exaction is a government-mandated contribution of property imposed as a condition of approving a developer's project." *B.A.M. Development, LLC v. Salt Lake County*, 2012 UT 26, ¶16, 282 P.3d

[4] An acre-foot is a measure of water volume. It is equal to one foot of water over an area of one acre, or 325,851 gallons.
[5] To calculate the water needed for outdoor irrigation, the City excluded the area of the home, garage, and driveway, leaving approximately 18,300 square feet of area to be irrigated (.42 acres). Based on the 4.0 a-f per acre figure, the total determined for annual outdoor use was 1.68 a-f (or approximately 550,000 gallons)
[6] Mr. Davis cited several examples of "replacement homes" that were not required to dedicate water to the City.
[7] Letter from Roger Baker (Received November 12, 2014), at 2.
[8] As has already been discussed, the City does not consider the new home to be replacing an older home.
[9] *See* TOOELE CITY CODE, § 7-26-1 ("all applicants requesting development approval shall provide water rights in an amount sufficient to satisfy the anticipated future water needs of the respective development . . ..")

41, 45 ("*B.A.M. III*"). The City acknowledges that its requirement is an exaction, as well as its responsibility to conduct rough proportionality analysis.[10]

A. Rough Proportionality Analysis

Local governments may require exactions in exchange for development approval, as long as each exaction satisfies rough proportionality analysis. Exactions are a type of property taking, and the rough proportionality test "protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586, 2594 (2013) (citations omitted).[11] The Takings Clause, found in the Fifth Amendment of the U.S. Constitution, "provides that private property shall not 'be taken for public use, without just compensation.'" *Lingle v. Chevron, USA*, 544 U.S. 528, 536 (*quoting* U.S. CONST. amend. V).[12] The Supreme Court has emphasized that the Takings Clause "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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Utah Legislature codified the rough proportionality test in § 10-9a-508 of the Utah Code:

> 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 ANN. § 10-9a-508(1).

That language was borrowed directly from the United States Supreme Court's decisions 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. Development v. Salt Lake County*, 2006 UT 2, ¶ 41, 128 P.3d 1161, 1170 ("*B.A.M. I*")). In those two landmark cases, the Supreme Court promulgated rules for determining when an exaction may be validly imposed under the federal constitution's Takings Clause.[13] This has come to be known as the "rough

[10] *See* Letter from Roger Baker (Received November 12, 2014), at 2. *See also* TOOELE CITY CODE, § 7-26-1 ("Satisfaction of this water rights acquisition policy and the accompanying conveyance requirements shall be considered as a condition to and requirement of approval for all such applications.")

[11] "[A] unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between government's demand and the effects of the proposed land use." *Koontz*, 133 S.Ct. at 2591.

[12] *See* U.S. CONST., amend. V. ("nor shall private property be taken for public use, without just compensation"). The Takings Clause of the Federal Constitution is applicable to state actions (including local subdivisions of states) by the language of the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

[13] 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

proportionality" test. The analysis requires a "nexus," or a link between the exaction and a legitimate government interest, and it also requires that the exaction be roughly proportionate to the impact caused by the new development.

B. An Essential Link Between the Exaction and a Legitimate Public Interest

The City's water dedication requirement meets the first half of the rough proportionality analysis. Ensuring an adequate water supply for a community is a valid governmental objective. *See Summit Water Distribution Co. v. Mountain Regional Water Special Service Dist.*, 2005 UT App 66, ¶¶ 11-14, 108 P.3d 119, 121-22. Requiring developers to provide sufficient water rights for a new development is a reasonable means to accomplish that objective. There is thus no question that there is an essential link between the City's interest in an adequate water supply and its requirement that an applicant provide water to satisfy the needs of new development.

C. Roughly Proportionate to the Impact Caused by New Development.

It appears unlikely, however, that the amount of water required by the City meets the second half of the rough proportionality test. The City has not shown that the amount of water it requires is roughly proportionate, both in nature and extent, to the impact attributed to Mr. Davis's home.

1. The Relationship Between an Exaction and the Impact of Development

This aspect of the analysis stems from the U.S. Supreme Court's decision in *Dolan v. Tigard,* where the rough proportionality test was first established. The Court explained that the analysis required consideration of "whether the degree of the exactions demanded by the city's permit conditions [bore] the required relationship to the projected impact of petitioner's proposed development." *Dolan*, 512 U.S. at 388. The Court concluded that a local government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.*, 512 U.S. at 391. To emphasize, the government bears the burden of proving that each exaction meets the rough proportionality test. *Id.*, 512 U.S. at 391, n.8. The term "rough proportionality" was used to describe the acceptable relationship between the exaction and the development's impact.[14]

The Utah Supreme Court further honed proportionality analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 45, 196 P.3d 601 ("*B.A.M. II*"), the second in the triumvirate of "*B.A.M.*" exaction decisions. In that opinion, the Court explained that rough proportionality

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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").

[14] The Court adopted the "reasonable relationship" approach used by the Utah Supreme Court in *Call v. West Jordan*, 606 P.2d 217 (Utah 1979) (A required dedication "should have some reasonable relationship to the needs created by the subdivision."); *see Dolan*, 512 U.S. at 390-91. However, the U.S. Supreme Court chose the term "rough proportionality" to designate the analysis.

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, 196 P.3d at 603. The "nature" aspect 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.*, 2008 UT 45, ¶ 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 45, ¶ 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 land use.

In the third "*B.A.M.*" decision, Utah's Supreme Court underscored its analysis, firmly tying the exaction to the needs created by the development:

> [N]ot only must the *nature* of an exaction relate to government purpose or need (in that the exaction must alleviate the burdens imposed on infrastructure by the development), but the *extent* of the exaction must also be roughly proportional to the government's need for infrastructure improvements created by the development.

B.A.M. III, 2012 UT 26, ¶26, 282 P.3d at 47.[15]

2. The Nature of the City's Required Exaction

It is not clear whether the required water dedication meets the "nature" aspect of rough proportionality analysis, because the City has not shown that additional water is necessary to "solve" the "problem" caused by construction of the new home. Mr. Davis asserts that he is replacing a home that previously existed on the property, while the City maintains that the Davis home is an entirely new building, not a replacement home. Hence, the City argues that the home imposes a new burden on the City's water resources, and that dedication of water rights is necessary.

[15] Water rights are part of a local government's infrastructure. *See* UTAH CODE ANN. § 11-36a-102(16) (water rights listed as public facilities).

Because a valid exaction may only be required to "alleviate the burdens imposed on infrastructure by development," the City may not require dedication of water rights to the extent that the new home replaces an old one.[16] A new home would have a similar impact on the City's water resources as the old one, so there is no "new" burden on the City's infrastructure. However, if it is shown that the new structure uses more water than the old, the City could require enough water to make up the difference.[17]

Determining whether a home existed on the property should be a fairly straightforward inquiry. A number of public records, beginning with those of the Tooele County Assessor, could confirm whether or not a home previously existed on the parcel. In addition, statements from neighbors or former owners could be obtained, along with records of maintenance or construction, if available.[18] If a home which received water service from the City did exist on the parcel, the overall water needs of the new structure would need to be reduced by the amount of water used by the old home. Any "new" needs, over and above that needed for the old home, could be required by the City as a new exaction.[19]

3. The Extent of the City's Required Exaction

In the material submitted for this Opinion, the City did not adequately prove that the amount of water required was roughly proportionate to the water needs caused by the new home. "[T]he *extent* of the exaction must also be roughly proportional to the government's need for infrastructure improvements created by the development." *B.A.M. III*, 2012 UT 26 ¶26, 282 P.3d at 47. The City determined that the new home on 722 West Vine would require a total of 2.13 a-f of water each year. This was based on the average annual "indoor" water use for residences, or .45 a-f, plus the amount the City stated was needed yearly for outdoor irrigation, based on 4.0 a-f

[16] If a home with water service did exist on the parcel, but the City now requires dedication of water rights because none were dedicated when the previous home was built, that exaction still violates the rough proportionality test. In that case the City would be requiring the developer to solve a problem that his development activity did not cause. An exaction cannot be used to require one party to bear a burden that belongs to another.

[17] *See Cresta Bella, LP v. Poway Unified School District*, 218 Cal. App. 4th 358 (Cal. Ct. App. 2013). In that case, a property developer demolished a 248-unit apartment complex, and built a larger complex with 368 units. The local school district imposed school impact fees based on the total size of the new complex. The California Court of Appeals held that the district should have excluded an area equal to the old complex, unless the district could show that replacing the "old" area would create a greater impact than that attributed to the former complex. The district could have imposed impact fees (a type of exaction) on the "additional" impact attributed to the increased size of the complex. Utah law, as cited above in *B.A.M. III*, requires the same approach (the exaction must be proportionate to the need for infrastructure created by new development).

[18] For example, Mr. Davis claims that he spent several thousand dollars to remove an older home from the parcel. If he hired a contractor to do the work, that contractor could provide reliable evidence of whether a home existed or not.

[19] If the Davis home is not a replacement structure (as the City maintains), then the new home could be required to provide the water needed to offset its impact on the City's resources.

per acre.[20] The figure used for indoor water appears to have been established by the Utah Division of Drinking Water, and is accepted throughout the state.[21] The City states that the 4.0 a-f per acre figure was derived from the irrigation duty established by the Utah Division of Water Rights.[22]

The irrigation duty is the maximum amount of water that may be diverted for crop irrigation. In other words, the duty is the limit of water that can be diverted for a beneficial use (anything greater would not be considered beneficial). The maximum duty is based on the amount of water needed to irrigate alfalfa.[23] The City has not shown that 4.0 a-f per acre is needed for the outdoor watering needs of the proposed Davis home. "[T]he city must make some sort of *individualized determination* that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391 (emphasis added). Simply citing to the State's limit of the maximum amount of water that may be diverted does not provide the type of individualized determination required to calculate the amount of water needed for a single residence.

Information provided by the State indicates that the amount of water needed annually for residential irrigation is significantly less than 4.0 a-f per acre. In 2009, the state's Division of Water Resources published a survey of water use. *See 2009 Residential Water Use: Survey Results and Analysis of Residential Water Use for Seventeen Communities in Utah*, Utah Department of Natural Resources (November 2009).[24] That survey determined that the average outdoor use (for outdoor residential watering) was 729 gallons per day (which translates to .8171 a-f per year). *Id.*, at 18.[25] The survey also concluded that most homes in Utah are using too much water for outdoor irrigation and watering. *Id.*, at 19.[26]

This Opinion does not attempt to calculate the amount of water necessary for Mr. Davis's home. It merely observes that the City has not provided the detailed analysis envisioned by the United States and Utah Supreme Courts, and that the available data seems to indicate that a lesser amount of water may be needed for residential watering. It is not necessary for the City to conduct a detailed analysis for every proposed development, but it should be able to support its decision with data specific to each type of land use. The City did calculate the amount of water needed based on the area of the parcel, but it did not show that 4.0 a-f/acre was a valid basis to

[20] The City excluded the area of structures and driveways, and found that approximately 18,000 square feet would be irrigated. There has been no indication of how extensive the irrigation would need to be. The parcel is only one-half acre, so agricultural production is probably unlikely. There was also no information provided indicating whether water would be needed for livestock.
[21] *See* "Water Use Information for Water Right Applications," Utah Division of Water Rights, available at: http://www.waterrights.utah.gov/wrinfo/policy/wateruse.asp.
[22] Letter from Roger Baker, November 7, 2014, at 2.
[23] Chad R. Reid, *et al.*, "Water Rights in Utah," Utah State University Extension http://extension.usu.edu/files/publications/publication/ENGR_WaterManagement_2008-01pr.pdf (December 2008) at 2.
[24] Available at http://www.water.utah.gov/OtherReports/RWU_Study.pdf
[25] .8171 a-f is approximately 266,300 gallons. Outdoor water is usually used only from April through October. The survey also found that ½ acre lots use an average of 682 gallons per day, or .7645 a-f per year. *2009 Residential Water Use*, at 20.
[26] Homes with automatic sprinklers overwater by as much as 30%. *Id.*, at 19.

determine water needs for residential uses. The City must demonstrate that the amount of water it requires is tied to the amount needed for a home.

Conclusion

The City recognizes that its requirement that Mr. Davis dedicate water rights to the City is an exaction, which must comply with rough proportionality analysis. Ensuring an adequate water supply is a legitimate government objective, and requiring new development to dedicate water rights is a reasonable way to accomplish that goal. Thus, the City's water dedication requirement meets the first half rough proportionality analysis.

It is not clear whether the exaction satisfies the second half of the test. In the first place, Mr. Davis and the City disagree that there was an older home on the parcel. If there was a home that previously received water service from the City, then the impact of the new home should be reduced by the use of the older structure. If that is the case, the City may require additional water rights to meet the water needs of the new home over and above the impact of the old. If there was never a home on the parcel, the City may require dedication of sufficient water to meet the needs of the new home.

The amount of water required to be dedicated must be roughly equal to the amount needed to satisfy the needs of the new home. The City relies upon data from the State Division of Water Rights to determine the water needed for outdoor irrigation. However, it has not shown the level of individualized determination necessary to justify the amount of water required. It is not enough to simply refer to the irrigation duty established as the maximum limit of water use. The City must show that the amount of water it requires is roughly proportionate to the amount of water it would need to provide service to the home.

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.

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:

Michelle Y. Pitt
Tooele City Recorder
90 North Main
Tooele, Utah 84074

On this _____ Day of December, 2014, 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