

Advisory Opinion # 156

Parties: J L.C., Town of Alta, and Salt Lake County Board of Health

Issued: April 15, 2015

Correction & Withdrawal: August 4, 2015

TOPIC CATEGORIES:

Exactions on Development

On April 15, 2015, the Office of the Property Rights Ombudsman issued an Advisory Opinion. Upon receipt and consideration of additional clarifying facts provided by the parties, this Office finds that it lacks authority to issue an Advisory Opinion in this matter. Accordingly, the Advisory Opinion in this matter dated April 15, 2015 is withdrawn in its entirety.

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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CORRECTION AND WITHDRAWAL OF ADVISORY OPINION

Advisory Opinion Requested by: Evan Johnson

Local Entity: Town of Alta
Salt Lake City
Salt Lake County Board of Health

Property Owner: J L.C.

Type of Property: Recreational Cabin Property

Date of this Correction: August 4, 2015

Date of Original Opinion: April 15, 2015

Correction and Withdrawal Authored By: Brent N. Bateman
Office of the Property Rights Ombudsman

Summary

On April 15, 2015, the Office of the Property Rights Ombudsman issued an Advisory Opinion, requested by J L.C., involving the Town of Alta and the Salt Lake County Board of Health. After the Opinion had issued, J L.C. requested reconsideration of the Opinion. The Town of Alta and the Salt Lake County Board of Health each responded and likewise requested reconsideration or correction of the Advisory Opinion.

Upon consideration of the additional clarifying facts and arguments provided by each party in their requests for reconsideration, this Office finds that it lacks authority to issue an Advisory Opinion in this matter. Utah state law authorizes this Office to issue Advisory Opinions only upon certain enumerated subjects. *See* UTAH CODE § 13-43-205. This matter does not give rise to any of those subjects.

Accordingly, the Advisory Opinion in this matter dated April 15, 2015 is hereby withdrawn in its entirety. No Advisory Opinion under UTAH CODE § 13-43-205 shall be considered to exist in this matter, and the previously issued April 15, 2015 Advisory Opinion shall have no legal force nor effect.

Discussion

UTAH CODE § 13-43-205 gives the Office of the Property Rights Ombudsman the responsibility to prepare Advisory Opinions. However, in creating this function, the Legislature set specific subject matter limitations upon which Advisory Opinions may be issued. Advisory Opinions are available only to determine compliance with:

- (i) Section 10-9a-505.5 and Sections 10-9a-507 through 10-9a-511;
- (ii) Section 17-27a-505.5 and Sections 17-27a-506 through 17-27a-510; and
- (iii) Title 11, Chapter 36a, Impact Fees Act.

UTAH CODE § 13-43-205. Where the subject of an Advisory Opinion clearly falls outside of those statutory limitations, this Office lacks authority to issue an Advisory Opinion.

The matter under consideration arises from the Town of Alta's refusal to consider J.L.C.'s applications for lot development in the Albion Basin and Cecret Lake areas. This Office previously understood that the Town's ordinances required each lot owner to dedicate sufficient water rights to provide at least 400 gpd per cabin. The April 15, 2015 Advisory Opinion was issued under the understanding that UTAH CODE § 10-9a-508 ("Exactions") applied. The Town's requirement was analyzed under the exaction rules, and this Office's jurisdiction rested fully on that basis.

However, the Town of Alta and the Salt Lake County Board of Health both point out that this understanding is in error and have requested correction. They point out that *dedication* of those water rights is not required. An individual is only required to *possess or show availability* of that volume of water in order to build in the area. Thus, because dedication is not required, they argue that the matter is not an exaction and that this Office accordingly lacks authority to issue an Advisory Opinion.

Development exactions arise out of the constitutional takings clause. *Koontz v. St. Johns River Water*, 133 S. Ct. 2586 (2013). In Utah, the Supreme Court has instructed that "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 41, 45 ("BAM III") (emphasis added). Further, the Utah Supreme Court has explained that "Development exactions may take the form of (1) mandatory dedications of land . . . , (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees and (4) impact fees." *Salt Lake County v. Board of Education*, 808 P.2d 1056, 1058 (Utah 1991)(citation omitted). Exaction jurisprudence at all levels indicates that exactions arise from the contribution or dedication or property to public purposes.

Exactions are permissible unless excessive. If excessive, they may violate the takings provisions of the constitution. Development requirements that do not involve the transfer or dedication of property to the public use are not exactions.

Alta's water requirements are not dedicatory – they do not require J L.C. to surrender its water. The water requirements relate to minimum volumes a person must possess in order to obtain a building permit. Indeed, the Town of Alta neither exacts water nor owns water. Thus, because neither Alta nor Salt Lake City requires dedication of the water, but only possession by the property owner, the 400 gpd per cabin requirement is not an exaction.

The Town's requirement that a landowner have available a certain minimum amount of water prior to building compares to a requirement that a landowner possess a certain minimum acreage in order to build. Such a requirement does not deprive the owner of its property, and is thus not an exaction. The Town of Alta's requirement is similar. J L.C. may need to own a certain minimum acreage or a certain minimum volume of water to construct a cabin. Both may be far more than he needs for his cabin. But those requirements are nevertheless not exactions because J L.C. is not required to dedicate the property to the public use.

No other basis can be found to give this Office authority to issue an Advisory Opinion. The arguments of J L.C. all relate to the excessiveness of the water requirement. Those arguments may have merit, and other avenues of relief may be available. But whether meritorious or not, those arguments do not establish jurisdiction in this office. Only when the Advisory Opinion concerns one of the subjects listed in UTAH CODE § 13-43-205 is an Advisory Opinion authorized.

Conclusion

Accordingly, the previous Advisory Opinion in this matter, dated April 15, 2015, is hereby withdrawn in its entirety, with no remaining legal force or effect. The Advisory Opinion request does not raise issues within this Office's subject matter jurisdiction, because the requirement in question is not an exaction.

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

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 Tom Pollard
Town of Alta
10201 E. Highway 210
PO Box 8016
Alta, Utah 84092

On this 5th Day of August, 2015, 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