

Advisory Opinion #187

Parties: Ironwood Development Group, L.C., Smithfield City

Issued: June 15, 2017

TOPIC CATEGORIES: Exactions on Development

A municipality may require a developer to improve a road that will be impacted by its development, but the extent of that requirement must be roughly proportionate to the development's impact. The city's requirement that the developer expand a road and install curbs, gutters, and sidewalks on both sides, is an exaction. This does not appear roughly proportionate to the impact of the development, because it requires Ironwood to provide improvements that should be the responsibility of another developer or the community as a whole.

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ADVISORY OPINION

Advisory Opinion Requested by: Ironwood Development Group, L.C.

Local Government Entity: Smithfield City

Applicant for the Land Use Approval: Ironwood Development Group, L.C.

Type of Property: Residential Subdivision

Date of this Advisory Opinion: June 15, 2017

Opinion Authored By: Pablo Tapia, Legal Intern
Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

Issues

Can Smithfield City require a developer to expand an abutting road and install curbs, gutters, and sidewalks on both sides of that road as a condition to plat approval?

Summary of Advisory Opinion

A municipality may impose an exaction on a developer to make improvements as a condition to approving the land use application. The exaction must satisfy the “rough proportionality test” in order to be valid. The test is a constitutional standard. Whether imposed administratively or by ordinance, a city’s requirement must meet this test.

Smithfield City’s exaction does not appear to satisfy the *extent* portion of the rough proportionality test. Although some exaction would be appropriate and legal, the requirement to improve both sides of Upper Canyon Road abutting Ironwood’s Phase 4 development appears disproportionate to the impacts created by Phase 4 of the development.

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 Mr. Craig L. Winder, on behalf of Ironwood Development Group, L.C. on February 17, 2017. A copy of that request was sent via certified mail to James P. Gass, City Manager, City of Smithfield, 69 North Main, Smithfield, UT 84335.

Evidence

The Office reviewed the following relevant documents and information in preparing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Craig L. Winder, on behalf of Ironwood Development Group, L.C., and received by the Office of the Property Rights Ombudsman on February 17, 2017.
2. Response submitted by Mr. Miles P. Jensen, of Olson & Hoggan, on behalf of Smithfield City submitted and dated March 15, 2017, and all attached documents.
3. Letter dated March 27, 2016 submitted by Mr. Winder on March 31, 2017.

Background

Smithfield Heights is a residential subdivision located on the northeastern limits of Smithfield City. Ironwood Development Group, L.C. (“Ironwood”) is the developer of those residences. Smithfield City approved Ironwood’s development of 27 lots in Phases 1, 2, and 3. Most of those lots have homes on them now. Phase 4 of the project calls for the development of eight lots and is currently under consideration for approval by the city. The land intended for Phase 4 sits between 600 East and 730 East with homes on either side. Phases 1, 2, and 3 are directly to the north and to the west of Phase 4. The Phase 4 site is abutted by Upper Canyon Road on its southern boundary. This 22-foot wide country road leads to a canyon to the east, outside the city. To the west, the road is the main connection to the city for the residents of Smithfield Heights. To the south of the road is an undeveloped parcel of land owned by a different residential homebuilder.

Smithfield City has informed Ironwood that the city will approve the Phase 4 development on the condition that Ironwood improve the abutting portion of Upper Canyon Road. The condition requires Ironwood to widen the road by seven feet on both sides and install curbs, gutters, and sidewalks on both sides. Ironwood objects to improving both sides of the road. Ironwood argues that the city's requirement is not proportionate to the burden that the development imposes on the city, and that Ironwood should only have to improve its own side of the road. Smithfield City explains that the requirement is necessary for the traffic congestion that the development will create.

Analysis

I. Exactions and the “Rough Proportionality” Test

Smithfield City's requirement that Ironwood improve Upper Canyon Road is an exaction. An exaction is a government-mandated contribution of property imposed as a condition of development approval. *B.A.M. Dev., L.L.C. v. Salt Lake County*, (*BAM III*), 2012 UT 26, ¶16. Exactions arise from the principle that development causes impacts to a community. In order to assuage those impacts, the community can exact from the developer property or improvements for dedication to the public.

The Utah Code provides the test to determine whether exactions are legal and appropriate:

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 § 10-9a-508(1). 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 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and has become known as the “rough proportionality test.” See *B.A.M. Dev., L.L.C. v. Salt Lake County*, (*BAM I*), 2006 UT 2, ¶8. If the exaction meets this test, it is valid. If the exaction fails this test, it violates the protections guaranteed by the Takings Clauses of the Utah and U.S. Constitutions. *Call v. West Jordan*, 614 P.2d 1257, 1259 (Utah 1980). Thus this test “bar[s] 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). An exaction helps pay the costs of the development's impact. An excessive exaction requires the developer to pay for impacts beyond its own. *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899, 903 (Utah 1981).

An exaction must satisfy both parts of the rough proportionality test. The first part requires an essential link between the exaction and a legitimate governmental interest. The second part

requires that the exaction be roughly proportionate to the impacts the development creates. The Utah Supreme Court refined the elements of the rough proportionality analysis in *B.A.M. Development, LLC v. Salt Lake County (BAM II)*, 2008 UT 74. The court declared that “the exaction and impact must be related in nature” and that “they must be related in extent.” *Id.* at ¶ 9. The *nature* component takes the form of a problem and a solution. The exaction and the impact are related in nature when the exaction is the solution that “directly addresses the specific problem (the impact).” *Id.* at ¶ 13. If the exaction is a solution to a problem the development creates, the nature element of the rough proportionality test is satisfied.

Finally, the exaction and the impact are related in extent when “the costs to each party are roughly equivalent.” *Id.* at ¶ 11. The court stated that cost is the most appropriate measure in determining whether the exaction and impact relate in extent. *Id.* The cost that the city would incur by dealing with the impact must be roughly equivalent to the developer’s cost in paying the exaction in order for the exaction and the impact to be related in extent. *Id.* at ¶ 13. They do not need to be exactly equal. *Id.* at ¶ 12, n.4. But a city “must make some effort to quantify its findings...beyond a conclusory statement that it could offset some of the traffic demand generated.” *Dolan*, 512 U.S. at 395-96. If they are roughly equivalent, then the extent element of the rough proportionality test has been met.

The exaction imposed on Ironwood as a requirement for site development approval, therefore, must meet the “rough proportionality test.” Smithfield City’s requirement must solve the problem that Ironwood’s development creates. Ironwood’s costs to improve Upper Canyon Road must also be proportionate to the impact that its development imposes on the city’s infrastructure.

II. The Upper Canyon Road Exaction

Ironwood argues that the requirement to expand Upper Canyon Road and add curbs, gutters, and sidewalks to both sides of the road is excessive. It claims that the requirement is not proportionate to the impact of the development and thus does not meet the rough proportionality test.

In response, Smithfield City points out that the requirement is appropriate because the road will almost exclusively be used by the subdivision that Ironwood is developing, and will increase automobile, bicycle, and foot traffic in the area. Additionally, Smithfield City argues that the ordinances are clear in their language and make no exceptions to the requirement to improve both sides of an abutting road. *See* Smithfield Municipal Code §§ 16.20.060 and 16.16.020.

A. An Essential Link Exists Between the Exaction and a Legitimate Government Interest

Smithfield City has a legitimate governmental interest related to the requirement imposed on Ironwood. The city has an interest in maintaining adequate roads for the use and safety of the public within the city’s boundaries. *See* *Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117. Thus, an essential link exists between the city’s interest to provide adequate roads and the requirement for Ironwood to improve Upper Canyon Road.

B. The Exaction Satisfies the Nature Aspect of the Rough Proportionality Test

As part of the rough proportionality analysis, the exaction by Smithfield City and the impact created by Ironwood must first be related in nature. The City's requirement must be a solution that directly addresses a problem created by Phase 4. Smithfield City requires that Ironwood improve the portion of Upper Canyon Road abutting Phase 4 because the development will increase traffic. That is no doubt true. The widening of the road and installation of curb and gutter is a solution to that problem. Therefore, the exaction to expand the road relates in nature to the development's impact, and thus satisfies that aspect of the test.

C. The Exaction Fails the Extent Aspect of the Rough Proportionality Test

The exaction and the impact must also be related in extent. In order to satisfy the extent aspect of the test, Ironwood's cost for improving Upper Canyon Road must be roughly equivalent to the impact of the development on the community. Generally, greater impact justifies a greater exaction. Where the impact is small, the exaction should likewise be small.

Phase 4 will clearly have some impact on Upper Canyon Road. The addition of eight lots will increase traffic on the road. Thus, some exaction is appropriate. The City's exaction requires Ironwood to expand and improve both sides of Upper Canyon Road. Smithfield City argues that this requirement is not excessive because Ironwood need only expand an already-paved road. However, as explained in *Dolan*, the City must show that the exaction is proportionate to the impact by quantifying its findings. *See Dolan*, 512 U.S. at 391. It must go beyond a mere statement that the exaction will offset some of the traffic. The city correctly indicates that traffic in the area will increase, but does not provide further data to show how much the traffic will increase, or how much additional road is needed to absorb that increase. Smithfield City does not provide sufficient evidence to perform a full analysis of the extent of proportionality.

Nevertheless, even without the required findings by the City, the exaction appears excessive. The language of the exaction statute states that the exaction must be roughly proportionate to the impact of the *proposed development*.

- (1) 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 § 10-9a-508(1) (emphasis added). The city argues that the impact arises from the total 34 lots from Phases 1 to 4, and that requires widening and improvement of both sides of the road. However, phases 1-3 received approval long ago. Ironwood's proposed development is Phase 4. Thus, according to the plain language of the statute, Smithfield City can only impose an exaction based on the impact of the proposed development: Phase 4, consisting of eight lots. The

other already-approved 27 lots from the other phases are not *proposed development*. The current exaction should address the Phase 4 impact and require improvements proportionate to the eight lots.

An exaction is disproportionate if it requires a developer to pay for impacts beyond its own. *Banberry*, 631 P.2d at 903. Often, as is the case here, a road will have different landowners on either side. Both landowners will use the road at some point. Requiring one landowner to improve both sides of the road will generally signify that one landowner is providing improvements that another landowner should provide. This is certainly not always the case. Circumstances could exist that would justify one landowner improving both sides of a road. But nothing has been shown here to require Ironwood to expand and improve both sides of the road. Requiring Ironwood to make improvements to its own side of the road may be proportionate. But development of the opposite side of the road appears to involve the impacts of others. Moreover, although it is unknown whether this is the case, the exaction becomes more disproportionate if the city will require Ironwood to dedicate for the expansion land that does not presently belong to Ironwood. Ironwood has no duty to pay for someone else's future impact.

The fact that the local ordinances could be read to require development and improvements of the full road does not justify requiring *Ironwood* to improve the full width. An exaction imposed by ordinance is still an exaction. Exactions must meet the rough proportionality test whether imposed by ordinance or by administrative act. The legislature "intended to apply the rough proportionality test to all exactions, irrespective of their source." *BAM I*, 2006 UT 2, ¶ 46. If the City desires to have both sides of the road improved, they can certainly do so. They will just need to pay for the excessive portion in some other way. The exaction analysis does not dictate how much improvement the City can construct. It limits how much improvement that they can make *this developer* pay for. The City is free to find other funding to pay for the improvements it wants beyond Ironwood's proportionate share.

Conclusion

A municipality may require a developer to improve a road that will be impacted by its development, but the extent of that requirement must be roughly proportionate to the impact. Smithfield City's requirement, that Ironwood expand Upper Canyon Road and install curbs, gutters, and sidewalks on both sides, is an exaction. This does not appear roughly proportionate to the impact of the Phase 4 development, because it requires Ironwood to provide improvements that should be the responsibility of another developer or the community as a whole.

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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 Utah Department of Commerce. This Advisory Opinion's conclusions are based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the conclusions reached in another matter with different facts and circumstances or where the relevant law has changed.

While the author is an attorney and has prepared this opinion after reviewing and analyzing the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues desiring to protect that interest should seek the advice of legal counsel and no party may rely on this document to protect any legal 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 be awarded 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. § 63G-7-401.

These provisions of state code require the delivery of the Advisory Opinion to the agent at the address 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.

The person and address designated in the Governmental Immunity Act database is as follows:

Craig Giles, City Manager
Smithfield City
96 South Main
Smithfield, Utah 84335

On this _____ day of June, 2017, I caused the attached Advisory Opinion to be delivered to the foregoing 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