

Advisory Opinion #199

Parties: Shawn Cronquist; Nibley City

Issued: July 17, 2018

TOPIC CATEGORIES:

Exactions on Development

The City's exaction requiring the developer to dedicate and construct a half-width of 450 West where it abuts the proposed development is roughly proportionate to the proposed development's impact on the community. Moreover, the City's requirement to dedicate a trail easement along the Blacksmith Fork Irrigation Ditch where it crosses the property is likewise proportionate and appropriate. Consequently, the City may require the developer to resubmit a preliminary plat reflecting these requirements.

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ADVISORY OPINION

Advisory Opinion Requested By: Shawn Cronquist
Local Government Entity: Nibley City
Type of Property: Residential
Date of this Advisory Opinion: July 17, 2018
Opinion Authored By: Jordan S. Cullimore
Office of the Property Rights Ombudsman

ISSUE

Whether Nibley City's requirements to dedicate and construct a half-width of 450 West Street along the western portion of Mr. Cronquist's proposed development and also dedicate a trail easement through the property constitute lawful exactions.

SUMMARY OF ADVISORY OPINION

The City's exaction requiring Mr. Cronquist to dedicate and construct a half-width of 450 West where it abuts Mr. Cronquist's proposed development is roughly proportionate to the proposed development's impact on the community. Moreover, the City's requirement to dedicate a trail easement along the Blacksmith Fork Irrigation Ditch where it crosses the property is likewise proportionate and appropriate. Consequently, the City may require Mr. Cronquist to resubmit a preliminary plat reflecting these requirements.

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 Shawn Cronquist on September 28, 2017. A copy of that request was sent via certified mail to David Zook, City Manager for Nibley City, at 455 West 3200 South, Nibley, Utah.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for an Advisory Opinion, submitted by Shawn Cronquist on September 28, 2017.
2. Timeline and Summary of Events, submitted by Shawn Cronquist via email, on October 3, 2017.
3. Response Letter submitted by Seth J. Tait, Attorney for Nibley City, on April 9, 2018.

BACKGROUND

In August 2017, Shawn Cronquist submitted an application for preliminary plat approval of Nibley Meadows Subdivision, located at approximately 3400 South 250 West in Nibley City (the City). City staff reviewed the application and determined it did not meet Nibley City Code requirements because it did not propose to construct half of 450 West street, a master-planned road abutting the final lot on the west end of the proposed subdivision. Additionally, staff determined the preliminary plat application was deficient because it did not propose to dedicate to the public a trail easement along the Blacksmith Fork Irrigation Ditch, in accordance with the City's Trail Master Plan.

In light of staff's analysis, the Planning Commission considered the application on August 23, 2017. Mr. Cronquist was not present at the hearing. After considering the application, the Commission made a recommendation of approval to the City Council, subject to the condition that Mr. Cronquist include dedication and half-width construction of 450 West along the west end of the subdivision and dedication of the trail easement on the plat.

On September 7, 2017, the City Council considered the application. A representative for Mr. Cronquist, Dan Larsen, attended the meeting and indicated that while he did not oppose including the 450 West right-of-way on the plat, he nonetheless felt that the requirement to construct half of the road, along with curb, gutter, and sidewalk, was excessive and unlawful, presumably because he did not feel it was necessary for the development. Because of Mr. Cronquist's unwillingness to agree to construct the road improvements, the City Council denied the application.

Mr. Cronquist has requested an Advisory Opinion from this office to determine whether the requirement to construct half of 450 West where it abuts the proposed subdivision constitutes an unlawful exaction. Additionally, in his request for Advisory Opinion to this office, Mr. Cronquist also indicates that he feels the requirement to dedicate the trail easement along Blacksmith Fork Irrigation Ditch where it runs through the proposed subdivision likewise constitutes an unlawful exaction.

ANALYSIS

I. The “Rough Proportionality” Test for Development Exactions

Nibley City’s requirement to construct a half-width of 450 West where it abuts the proposed subdivision is a development exaction. A development 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 address and offset these impacts, the community may require dedication of land, or construction of public improvements such as asphalt, curb, gutter, and sidewalk. Such mandatory dedications implicate the Takings Clause of the U.S. Constitution, “which protects private property from governmental taking without just compensation.” *Id.*

Development exactions are legal and appropriate only if they are “roughly proportionate” to the impact the development creates. This principle governing exactions is derived from the U.S. Supreme Court’s landmark decisions in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Utah Legislature distilled and codified the U.S. Supreme Court’s exaction analysis in Utah Code § 10-9a-508(1). The analysis has been termed the “rough proportionality test,” and provides:

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). If a proposed exaction satisfies this test, it is valid. If the exaction fails the test, it violates protections guaranteed by the Takings Clauses of the Utah and U.S. Constitutions. *Call v. West Jordan*, 614 P.2d 1257, 1259 (Utah 1980). A principal objective of the test is to “bar 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 is valid and proportionate when it offsets the costs of a development’s impact. An excessive exaction requires a property owner to pay for impacts beyond his own. *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899, 903 (Utah 1981).

In light of these principles, the Utah Supreme Court has provided further direction on how to analyze rough proportionality. In *B.A.M. Development, LLC v. Salt Lake County* (BAM II), 2008 UT 74, the court explained that rough proportionality analysis articulated above “has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent.” *Id.* at ¶9. The “nature” aspect focuses on the relationship between the anticipated 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.* at ¶10.

The “extent” aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost. *Id.* at ¶11 (“The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively.”). The court explained that “roughly proportional” means “roughly equivalent.” *Id.* at ¶8. 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 mitigate impacts attributable to development.

In the third “B.A.M.” decision, the Utah Supreme Court summarized this analysis, firmly tying the exaction to the infrastructure 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.

BAM III, 2012 UT at ¶ 26. Accordingly, the City’s requirement that Mr. Cronquist construct the half-width improvements within the 450 West right-of-way and dedicate the trail easement must satisfy the rough proportionality test. The proposed exactions must solve problems the proposed subdivision creates. Moreover, the costs to Mr. Cronquist to improve the subject portion of 450 West and dedicate the trail easement must be proportionate to the impacts the development imposes on the City’s ability to provide services.

The City possesses the burden to show the proposed exactions are proportionate, or equivalent, to the development’s impacts and therefore valid. *See Dolan*, 512 U.S. at 391-92. “*No precise mathematical calculation is required*, but the 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.” *Id.* at 391 (emphasis added).

Accordingly, we analyze the City’s reasons for imposing the exaction to determine “whether [their] findings are constitutionally sufficient to justify the conditions imposed” on Mr. Cronquist’s development proposal. *Id.* at 389.

II. The 450 West Exaction

A. The Exaction Advances a Legitimate Government Interest

The first part of Utah Code section 10-9a-508(1) requires an essential link between a legitimate governmental interest and the exaction imposed. The City’s legitimate government interest in this case is safe and efficient traffic flow for vehicles and pedestrians. Constructing new roadways is vital component in accomplishing this objective. *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 § 10-8-8.

Moreover, state law authorizes local governments to establish official maps that plan the location of transportation corridors. *See* UTAH CODE § 72-5-403(2); *see also* UTAH CODE § 10-9a-401 (allowing a city to plan for transportation needs in its general plan). Accordingly, the *essential link* portion of the rough proportionality test is satisfied. UTAH CODE § 10-9a-508(1)(a).

B. The Requirement to Construct a Half-width of 450 West Satisfies the Nature Aspect of the Rough Proportionality Analysis

As indicated above, the *nature* aspect of the rough proportionality test requires an exaction to provide a solution to a problem the proposed development presents. The proposed subdivision will add residents to the community, and those residents will have transportation and access needs. A requirement to construct and provide street access to the subdivided lots addresses these issues.

One of Mr. Cronquist’s principal objections has been that the lots in his proposed subdivision will not front along, nor have direct access to, the planned 450 West street. He believes that if the homes will not directly access the street, he does not need the street. Thus he feels that the city may not require him to construct any portion of it. While he may argue that the 450 West connection is not *necessary* to serve the development, the operative question is not one of wholly of necessity, but also of impact. The City possesses a reasonable degree of discretion to design transportation networks and provide adequate services in a manner it believes will best serves the public interest. *See generally Banberry v. South Jordan City*, 631 P.2d 899, 904 (Utah 1981).

Street connections are important in providing adequate access and circulation, and the City, through thoughtful and careful planning, may identify where to locate and require such connections. The proposed subdivision will add vehicles to the City’s transportation network and will create new traffic impacts. Traffic from this development will inevitably use the 450 West connection to access other parts of the community, as well as regional transportation corridors. Adequate connectivity and multiple circulation options also decrease congestion caused by increased traffic. Since the new lots created by this proposed subdivision present a problem that may be solved by dedication and improvement of new streets, the *nature* aspect of the test is satisfied.

C. The City’s Exaction Satisfies the Extent Aspect of the Analysis

The City may only exact an amount that proportionately offsets its cost to provide adequate transportation facilities to the proposed development. The *extent* aspect of the test compares the City’s cost to address the development’s impact with the property owner’s cost to dedicate and/or construct the proposed exaction—in this case the cost to construct a half-width of the segment of 450 West abutting the development.

The City rightly points out that while the cost to a property owner of an imposed exaction is typically easy to measure in terms of a dollar amount, the cost to the local government of

mitigating impacts attributable to the development is often more difficult to conceptualize in terms of monetary cost. In many cases such an analysis is impractical if not impossible with mathematical precision. Moreover, as stated previously, *mathematical precision* is not required. The standard is *rough proportionality*. In light of this reality, the City has sought to achieve rough proportionality by “requiring dedication or construction of that portion only of the needed improvements that abut or cross the subdivision.” The City further justifies its approach as follows:

[I]f every land owner along a master-planned road dedicated and constructed just the one-half of the property and road that abuts that owner’s property only, then by the time the road is completed, each owner will have contributed only its proportionate share of the road. This approach is both reasonable to understand and administer in practice, especially in the application of residential development or rural areas which are usually subject to similar density throughout the City.

Conceptually, the City’s approach appears to be equitable, but the analysis must go further to pass constitutional muster. The question isn’t simply whether the road abuts the proposed the development, but whether the proposed development will actually have an impact proportionate to the amount exacted by the City.

The proposed development does abut the master-planned 450 West street, and the additional lots created by the development will also have a direct traffic impact on the road. It does not appear that access by the adjacent lot to the road will be restricted, and it is reasonably conceivable that the lots in the proposed subdivision will use the road. Since the road interfaces directly with the proposed subdivision and will be used by its residents, some form of exaction will be appropriate.

Though the City’s extent analysis of the rough proportionality test appears to be over-generalized, it satisfies the analysis in this case. This office has observed that a typical, generally accepted baseline exaction in the context of local roads for residential development is a half-width street along lot frontages. The City may need to adjust this baseline half-width exaction in any given case in light of evidence that the specific development’s impact does not represent a typical impact.

The present scenario, however, does not appear to present any evidence that such adjustment is necessary. The development will use the 450 West connection, and the street is designed as a local street, as opposed to a collector or arterial road.¹ Since the development will interface fully with 450 West, it appears that the typical, half-width exaction requirement is appropriate.

Accordingly, the City’s approach in this case satisfies the *extent* aspect of the rough proportionality analysis. The approach does not require Mr. Cronquist to dedicate or construct improvements that another party should arguably provide. In other words, it only seeks to offset the City’s cost to address the impacts of the proposed development. Consequently, the City’s

¹ If the road was designed to be a collector or arterial road, the City would need to justify why the developer should bear the added burden of such a road that will also offset the burden created by neighboring development. That is not the case here.

requirement to construct a half-width of 450 West where it abuts the development is valid and appropriate in this case.²

III. The Trail Easement Exaction

The City's proposed requirement to dedicate a trail easement along Blacksmith Fork Irrigation Ditch is likewise valid.

A. *The Exaction Advances a Legitimate Government Interest*

First, the City is pursuing the legitimate governmental interest of providing pedestrian and recreational facilities, as defined by the City's Trail Master Plan. *See* UTAH CODE § 10-8-8 (A city may lay out parks and public grounds); *see also* UTAH CODE § 10-9a-401(2)(a) (A city's general plan may provide for recreational opportunities). Consequently, the trail easement exaction satisfies the *essential link* portion of the rough proportionality test

B. *The Requirement to Dedicate a Trail Easement across the Proposed Development Satisfies the Nature and Extent Aspects of the Rough Proportionality Analysis*

Moreover, a requirement to dedicate a trail easement within the subdivision is an appropriate solution to the City's problem of providing park, recreation, open space, and pedestrian facilities. Additional development creates a need for added recreational and pedestrian facilities, and dedication of a trail network addresses this need. Consequently, the *nature* aspect of the analysis is satisfied.

While the City doesn't provide a detailed analysis of the *extent* aspect of the analysis related to cost, it provides the following rationale:

While the City recognizes that the portion of the trail crossing the Subdivision will likely be used at some point by citizens of the City that may live in areas other than in the Subdivision, the City also feels the bulk of the use and impact on the trail section in question will be from those who live the closest to that section of the trail. Thus, the City again approaches "rough proportionality" by requesting that each developer dedicate only that portion of the trail which crosses or abuts the new development with the understanding that if each land owner does so, then by the time the trail is fully constructed, each land owner will have contributed towards the roughly proportionate share of each development's impact on the trail system.

City Response Letter dated April 6, 2018.

² The City acknowledges that the proposed centerline alignment of 450 West does not perfectly follow the proposed development's western boundary line. As a result, land dedication of more than a half-width of the right-of-way may be required. The City is willing to purchase any needed land in excess of the half-width requirement, and it is confident it will be able to reach an acceptable solution with the property owner in this regard.

Here again, the City may be overgeneralizing by attempting to apply a categorical requirement to a question of individual impacts. That said, in the present case, it appears the City's requirement to dedicate an unimproved easement across the land involving only the proposed subdivision proportionately offsets the City's burden to provide pedestrian and recreational services to the development. The residents in the subdivision will certainly use the proposed trail system, and requiring the developer to only dedicate, but not improve, the trail easement within the proposed development is a reasonable and proportionate means of offsetting the proposed development's impact on the City pedestrian and recreational facilities.³

In other words, the exaction only requires the property owner to address its own impacts and not impacts that others should address. Consequently, the City may lawfully require dedication of a trail easement along the irrigation ditch where it traverses the proposed development.

CONCLUSION

The City's exaction requiring Mr. Cronquist to dedicate and construct a half-width of 450 West where it abuts Mr. Cronquist's proposed development is roughly proportionate to the proposed development's impact on the community. Moreover, the City's requirement to dedicate a trail easement along the Blacksmith Fork Irrigation Ditch where it crosses the property is likewise proportionate and appropriate. Consequently, the City may require Mr. Cronquist to resubmit a preliminary plat reflecting these requirements.

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

³ Neither party has explicitly indicated the width of the proposed easement. We assume that the required width will only be that which is reasonably necessary for safe travel and maintenance. This factor plays into the rough proportionality analysis, and cannot be excessive or disproportionate to development impact.

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:

David Zook, City Manager
Nibley City
455 West 3200 South
Nibley, UT 84321

On this _____ Day of _____, 2018, 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