Advisory Opinion #200

Parties: Mitchell Development, Inc.; Provo City
Issued: August 27, 2018

TOPIC CATEGORIES:

Impact Fees
Exactions on Development

The overlay fee charged to the developer by the City is not an impact fee, because it is a fee for project improvements, which is plainly excepted from the definition of an impact fee under State law. Consequently, the City does not have to follow procedures in the Impact Fees Act relative to calculating and assessing the fee.

The overlay fee is nonetheless an exaction that must satisfy a rough proportionality analysis. In this case, the overlay fee does not satisfy the extent aspect of this test. The test requires an individualized determination that the fee is proportionate, considering the circumstances of the development, including the developer's claim that the overlay can be done at a much lower price. Moreover, in order to ensure proportionality, any leftover funds should be refunded to the developer when the City actually finishes the one-inch overlay on the local streets within the Subdivision.

The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI
Executive Director

BRENT N. BATEMAN
Lead Attorney, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested By:	Mitchell Development, Inc.
Local Government Entity:	Provo City
Type of Property:	Residential
Date of this Advisory Opinion:	August 27, 2018
Opinion Authored By:	Jordan S. Cullimore Office of the Property Rights Ombudsman

ISSUE

Do asphalt overlay fees charged by Provo City violate applicable law?

SUMMARY OF ADVISORY OPINION

The overlay fee charged to Mitchell by the City is not an impact fee, because it is a fee for project improvements, which is plainly excepted from the definition of an impact fee under State law. Consequently, the City does not have to follow procedures in the Impact Fees Act relative to calculating and assessing the fee.

The overlay fee is nonetheless an exaction that must satisfy a rough proportionality analysis. In this case, the overlay fee does not satisfy the extent aspect of this test. The test requires an individualized determination that the fee is proportionate, considering the circumstances of the development, including Mitchell's claim that the overlay can be done at a much lower price. Moreover, in order to ensure proportionality, any leftover funds should be refunded to Mitchell when the City actually finishes the one-inch overlay on the local streets within the Subdivision.

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 Paxton Guymon, Attorney for Mitchell Development, Inc., on February 8, 2018. A copy of that request was sent via certified mail to Janene Weiss, Recorder for Provo City, at 351 West Center Street, Provo, 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 Paxton Guymon, Attorney for Mitchell Development, Inc., on February 8, 2018.
2. Reply submitted by David Graves, Public Works Director/City Engineer for Provo City, on February 27, 2018.
3. Response submitted by Paxton Guymon, Attorney for Mitchell Development, Inc. on March 12, 2018.
4. Response submitted by Robert Trombly, Attorney for Provo City, on March 28, 2018.

BACKGROUND

Mitchell Development, Inc. (Mitchell) recently began developing Osprey Point Subdivision, a multi-phase residential subdivision development located at approximately 1560 South 570 West in Provo City (City). The City's approval of the project required Mitchell to construct the subdivision's internal streets with a three-inch asphalt depth on the surface of the streets. In addition to this requirement, the City required compliance with the following Provo City Code (City Code) provision:

> A one (1) inch surface course of all streets shall be provided within three (3) years after a development has been completed or longer if the majority of the buildings within the development have not been constructed or as approved by the City Engineer…. The developer shall provide the City with a fee, as shown in the Consolidated Fee Schedule as adopted by the Municipal Council, in the appropriate amount to pay for the one (1) inch surface course which will follow for each development. This fee shall be placed into a fund and installation of the surface course shall be coordinated through the Provo City Engineering Division in conjunction with its yearly maintenance program. Fees for the surface course shall be determined by the Engineering Division based on its estimated cost for such work to be completed at a future date.

PROVO CITY CODE § 15.03.230.

In accordance with this provision, the City charged Mitchell a $401,322.20 Asphalt Overlay Fee (overlay fee). According to the City, this fee will cover the City's cost to place an additional one

inch of asphalt on the streets within the subdivision after construction of the homes in the subdivision is complete. The fee also covers the cost of raising manholes and water valves within the street to the level of the one-inch overlay, and tying in the new layer of asphalt to existing improvements.

The City explains that it implemented this fee, and assesses it on all new development, because "with new developments like [this one, the City was] seeing significant damage and wear to the streets through the construction of the homes within [the] developments and the city received a large number of complaints about the streets in these new developments when the homes were completed."

The City also states that it "takes on the responsibility of completing [the] overlay at a future date, usually within three to five years of the start of a project, to install the one inch asphalt surface." To calculate the fee, the City estimates the cost of the work using bid prices obtained from its annual asphalt paving project, "plus a small contingency for inflation." The City feels that the fees charged to Mitchell in this case were reasonable and appropriate because they were correctly calculated in accordance with the City's legislatively enacted fee schedule, and the fees were calculated "in exactly the same way, following exactly the same procedures that [the City follows] in every similar case."

Mitchell disagrees with the City's assessment. Mitchell foremost contends that the overlay fee assessed by the City qualifies as an impact fee, and that the fee must be refunded or adjusted because the fee was not lawfully established, calculated, and assessed as required by the Utah Impact Fees Act (the Act). *See* UTAH CODE CHAPTER 11-36a. Because the Act requires a City to establish an impact fee facilities plan (IFFP) and conduct an impact fee analysis (IFA) to calculate a reasonable and realistic fee, Mitchell argues that the overlay fee was assessed illegally because this City didn't follow the procedures outlined in the Act.

Mitchell points out that in calculating an impact fee, the City must base the amount of the fee "on realistic estimates." UTAH CODE §11-36a-305(2). Mitchell asserts that the rates the City used to calculate the fees are objectively *unrealistic*. To support this argument, Mitchell presents contractor estimates indicating the work could be done for $275,322.20 less than the amount charged by the City. Mitchell contends that the City's charge "is more than *three times* the amount for which Mitchell could have performed the work." (Emphasis added).

In light of this, Mitchell has requested an Advisory Opinion to determine whether the City lawfully charged Mitchell the $401,322.20 overlay fee.

ANALYSIS

I. The Asphalt Overlay Fee is Not an Impact Fee

Mitchell and the City disagree over whether the overlay fee is an impact fee, the calculation and assessment of which must comply with the Utah Impact Fees Act. The Act defines an impact fee as "a payment of money imposed upon new development activity as a condition of development

approval to mitigate the impact of the new development on public infrastructure." UTAH CODE 11-36a-102(8)(a).

Mitchell argues that the Asphalt Overlay Fee unambiguously meets the definition of an impact fee because the City imposed the fee "as a condition of granting approvals for Mitchell Development to proceed with the project." Further, Mitchell asserts that "[t]he roadway has been dedicated, and the future application of [one inch] of asphalt will occur on public infrastructure…. [T]he asphalt overlay fee is a fee imposed by the City to offset the impacts of new development on a public improvement…."

There is, however, a caveat in the Act's impact fee definition that applies to the present case. State Code specifically provides that an impact fee does not include "a tax, a special assessment, a building permit fee, a hookup fee, *a fee for project improvements*, or other reasonable permit or application fee. UTAH CODE § 11-36a-102(8)(b) (emphasis added).

The Act draws a distinction between "system improvements" and "project improvements." The Code defines project improvements as follows:

> "Project improvements" means site improvements and facilities that are:
> (i) planned and designed to provide service for development resulting from a development activity;
> (ii) necessary for the use and convenience of the occupants or users of development resulting from a development activity; and
> (iii) not identified or reimbursed as a system improvement.

UTAH CODE § 11-36a-102(14)(a).

"System improvements" are defined as:

> (i) existing public facilities that are:
> (A) identified in the impact fee analysis [required by the Act]; and
> (B) designed to provide services to service areas within the community at large; and
> (ii) future public facilities identified in the impact fee analysis [required by the Act] that are intended to provide services to service areas within the community at large.

UTAH CODE § 11-36a-102(21)(a)

In this case, the plans in the submitted materials depicting the subdivision indicate that the roads for which the fee will be used to overlay and finish the asphalt surface are on-site, local roads intended to serve building lots within the subdivision. Such roads are properly categorized as project improvements because they are "planned and designed to provide service for the development" and appear to be "necessary for the use and convenience of the occupants or users of" the development.

The submitted materials give no indication that the roads within the subdivision are capital improvements, such as arterial or even collector streets, with a primarily system-wide function. Moreover, nothing in the submitted materials indicates the streets in question have been "identified or reimbursed" as public facilities designed or intended to "provide services to service areas within the community at large." *See* UTAH CODE § 11-36a-102(14)(a), (21)(a).

Since the roads within the Osprey Point Subdivision are project improvements, any improvement fee associated with their completion is not an impact fee and the Impact Fees Act is inapplicable.

II. The Asphalt Overlay Fee is an Exaction

While the overlay fee in this case is not an impact fee, it is nonetheless a development exaction and must comply with the law governing exactions. An exaction is a contribution to a government entity "imposed as a condition precedent to approving the developer's project." *Salt Lake County v. Board of Education of Granite School District*, 808 P.2d 1056, 1058 (Utah 1991). Often, exactions come in the form of mandatory dedication of land and infrastructure improvements, but an exaction may also take the form of a fee-in-lieu of mandatory dedication, as in this case. *See id.*

Provo City's exaction scheme, as applied to Mitchell, includes requiring the developer to construct and dedicate land and most of the street improvements, as well as a fee the City will use to complete the road surface once construction of the dwellings within the subdivision is completed. Nothing in State law prohibits this approach, but it nevertheless must comply with what is known as the "rough proportionality" test applicable to all government-imposed exactions. *See* UTAH CODE § 10-9a-508.

The city may only exact land, improvements, and fees from a property owner to the extent the exactions proportionately offset burdens the development proposal places on the city's ability to provide services[1] to the development. If an exaction satisfies the rough proportionality analysis, it will be deemed reasonable.

The test, which is articulated in State Code, provides:

A municipality may impose an exaction…on development proposed in a land use application…if:

> (a) an essential link exists between a legitimate governmental interest and [the] exaction; and
>
> (b) [the] exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

UTAH CODE § 10-9a-508(1).

[1] Such as access and transportation.

A. Essential Link

The first part of Utah Code § 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 providing serviceable access and transportation to lots within the subdivision. Exacting street improvements and fees to complete street improvements accomplishes 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 throughways . . . for the convenience and safety of the general public.") *See also* UTAH CODE § 10-8-8.

Accordingly, in this case there is a connection between the imposed exaction and a legitimate government interest, so the *essential link* portion of the rough proportionality test is satisfied. UTAH CODE § 10-9a-508(1)(a).

B. Rough Proportionality

The Utah Supreme Court has provided direction on how to analyze the second part of Utah Code § 10-9a-508(1) requiring rough proportionality between the exaction and the development's impact. In *B.A.M. Development, LLC v. Salt Lake* County (BAM II), 2008 UT 74, the court explained that the rough proportionality analysis "has two aspects: first, the exaction and impact must be related in *nature*; second, they must be related in *extent*." *Id.* at ¶ 9 (emphasis added). 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.

Because constitutional protections are involved, the City, as the government entity imposing the dedication requirement, possesses the burden of showing that the proposed requirement is proportionate, or equivalent, to the development's impacts and therefore valid. *See Dolan v. City of Tigard*, 512 U.S. 374, 391-92 (1994). "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).

1. The Nature Aspect

The overlay fee satisfies the *nature* aspect of the analysis. The City has indicated that the problem involves not only providing access and transportation, but ensuring streets are not

prematurely damaged and over worn prior to use by subdivision residents as a result of construction activities related home building. The construction and improvement of the local streets in the manner proposed by the City addresses these problems.

Mitchell may understandably contend that the City's proposed solution to the problem of providing serviceable streets is excessive due to the fact that it requires the developer to pay for an improvement that will be installed years down the road. It could be argued that the City is requiring the developer to not only initially construct the internal local streets, but to also cover the cost of maintaining and upgrading the streets for a period of time, which should be the ongoing responsibility of the City and its residents, not the developer.

While this argument has merit from a cost and a policy standpoint, we find nothing in the law that prohibits the approach in light of our full analysis. In total, the City is requiring the developer to construct a road with a four inch road base, albeit in two phases. Utah Courts have been clear that, as it relates to legislative policy decisions, "[t]he selection of one method of solving [a] problem in preference to another is entirely within the discretion of the city." The City in this case, by legislative enactment, has decided to address the identified problem in this manner. *See* PROVO CITY CODE § 15.03.230. While this approach certainly increases the developer's costs, there is no evidence to suggest that the method itself inherently offends any constitutional standard of reasonableness. *See Banberry Development Corporation v. South Jordan City*, 631 P.2d 899, 902 (Utah 1981) (suggesting that all development fees are governed by some constitutional standard of reasonableness).

By requiring most of the improvements upfront, the City ensures the development has sufficient access from the outset. By requiring a fee to allow the city to complete the road after a significant portion of home construction has been completed, the City addresses the issue of ensuring the roads are not prematurely worn or damaged prior to significant use. Accordingly, the *nature* aspect of the rough proportionality analysis is satisfied.

2. The Extent Aspect

In many cases, it is difficult for a local government to provide the cost analysis necessary for the *extent* aspect of the rough proportionality analysis. That is not the case here as far as the fee is concerned. A fee-in-lieu intrinsically conveys cost in monetary value. The question thus simply becomes whether the fee charged to the developer is roughly proportionate to the City's actual cost of assuaging the burden it would otherwise bear to address the problem if the developer did not pay the fee.[2]

The City in this case has estimated it will need $401,322.20 to finish the one-inch overlay, including the raising of water valves and sewer covers. The City based its calculations on bid prices it had received previously. This is the amount the City has charged Mitchell in overlay fees.

[2] As a threshold matter, it is well-accepted that requiring a developer to install reasonably-sized internal local streets within a subdivision satisfies the rough proportionality test. It appears that is the case here. Thus, we only address whether the additional overlay fee to complete the streets in accordance with the City's standards satisfies rough proportionality.

In light of the contrary estimates Mitchell obtained showing a significantly lower cost than the City's fee, the City's basis for its calculation is patently insufficient. When a challenge arises, especially of this magnitude, the City may not simply conclude "this is what it costs" without providing a detailed basis for the costs and a showing that the cost is justifiable. As indicated above, the city "must make some sort of *individualized determination* that the required dedication" is proportionate. *See Dolan v. City of Tigard*, 512 U.S. at 391-92. The City has not done this here. Thus, although the City's approach in requiring an asphalt overlay is legal, it has failed to show that this fee, as calculated and applied to Mitchell, satisfies the extent aspect of rough proportionality.

By the same token, neither has Mitchell shown that the fee violates rough proportionality. Mitchell's only basis for a challenge is a claim that it can get the job done for a fraction of the price. This certainly calls the extent aspect of rough proportionality into question, but it does not provide adequate proof without more information about its bid and the reasons that the two bids are disparate. Although the City's fee certainly appears high in relation to Mitchell's estimates, there is no *res ipsa loquiter* in exactions. A very high exaction is not necessarily disproportionate simply because it is very high. Sometimes the cost to assuage an impact is very high, and quite proportionate.

Accordingly, the City's fee does not currently satisfy the rough proportionality test. The City must adequately justify its fee to show that it reflects actual costs. Taking a "this fee is what it is, like it or not" approach is unacceptable without an individualized determination. In the process of justifying its fee, the City should carefully consider information the developer has provided suggesting the work could be sufficiently done at a much lower rate.

Moreover, because of how the City has imposed the exaction, and in light of the highly disparate estimates, the City carries an unsatisfied obligation if it retains a fee higher than the actual cost of the work. The City may only use fees for cost recovery. The law of exactions prohibits the City from using any portion of the fee as a revenue source to pay for other projects and services. Using an exaction fee for such purposes would impermissibly require Mitchell to pay for impacts beyond its own. *See Banberry Development Corporation v. South Jordan City*, 631 P..2d 899, 903 (Utah 1981).

Consequently, if the City does not use all of the assessed fee money on the identified improvements, it must refund Mitchell the remaining unused amount at that future point.[3] Accordingly, the City has an affirmative obligation to carefully account for the assessed fee amount to ensure any excess is appropriately refunded to Mitchell in the event the actual cost proves to be less than the fee amount when the improvements are actually constructed.

[3] This type of approach is applied consistently in Utah law to other forms of exactions, monetary and otherwise. A city must return to a party in interest impact fees that are not lawfully "spent or encumbered" within six years. UTAH CODE § 11-36a-603. When a city surpluses land obtained by exaction less than 15 years after the city acquired it, the city must offer to re-convey the land to the party from whom it was exacted without additional compensation before the city may otherwise dispose of it. UTAH CODE § 10-9a-508(4). The governing principle stands for the proposition that if a city does not use exacted land or money for the purpose for which it was exacted, it must return the property to the contributing entity. Otherwise, the result is an unconstitutional taking of property.

CONCLUSION

The overlay fee charged to Mitchell by the City is not an impact fee, because it is a fee for project improvements, which is plainly excepted from the definition of an impact fee under State law. Consequently, the City does not have to follow procedures in the Impact Fees Act relative to calculating and assessing the fee.

The overlay fee is nonetheless an exaction that must satisfy a rough proportionality analysis. In this case, the overlay fee does not satisfy the extent aspect of this test. The test requires an individualized determination that the fee is proportionate, considering the circumstances of the development, including Mitchell's claim that the overlay can be done at a much lower price. Moreover, in order to ensure proportionality, any leftover funds should be refunded to Mitchell when the City actually finishes the one-inch overlay on the local streets within the Subdivision.

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:

Amanda Ercanbrack
Provo City Recorder
351 West Center Street
Provo, UT 84601

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