Advisory Opinion 198

Parties: Joshua Spears; Wasatch County

Issued: July 5, 2018

TOPIC CATEGORIES:

Exactions on Development

A requirement that a new planned unit development contribute to affordable housing either through a fee or by reserving or dedicating affordable units—whether inside or outside of the development—is an exaction, because it is a condition imposed upon new development. As an exaction, the requirement must satisfy the "rough proportionality" test, using the analytical structure required by the Utah Supreme Court and later made statute. Under that analysis, a valid exaction must satisfy a need created by the new development, or solve a problem caused by the new development. If so, the exaction must be proportional to the need or problem. Since Wasatch County ("**County**") has not been shown that more affordable housing is needed due to the new planned unit development at issue here nor is there any rationale for the 10% dedication level, the affordable housing requirement does not satisfy the rough proportionality analysis, and is not a valid exaction.

This analysis is not altered by the fact that the County permits developers to submit an affordable housing report before requiring a contribution, at least where there are no set criteria in place for determining whether the development creates an impact on affordable housing. The determination of whether an affordable housing contribution is required for a development under this scheme is arbitrary and capricious and is not a sufficient option for the relevant developer

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ADVISORY OPINION

Advisory Opinion Requested by:	Joshua Spears
Local Government Entity:	Wasatch County
Property:	Residential Planned Unit Development
Date of this Advisory Opinion:	July 5, 2018
Opinion Authored By:	J. Craig Smith and Aaron M. Worthen, Smith Hartvigsen, PLLC

Issues

May a local government require a developer to either reserve or dedicate land for affordable housing, or pay a fee to affordable housing programs, in exchange for approval of a development? If so, is this requirement an exaction?

If an affordable housing contribution is an exaction, can a local government nevertheless avoid an exaction analysis if it permits developers to submit an affordable housing report that may exempt them from providing a contribution, if the developers can demonstrate no affordable housing needs are created by their development?

Summary of Advisory Opinion

A requirement that a new planned unit development contribute to affordable housing either through a fee or by reserving or dedicating affordable units—whether inside or outside of the development—is an exaction, because it is a condition imposed upon new development. As an exaction, the requirement must satisfy the "rough proportionality" test, using the analytical structure required by the Utah Supreme Court and later made statute. Under that analysis, a valid exaction must satisfy a need created by the new development, or solve a problem caused by the new development. If so, the exaction must be proportional to the need or problem. Since Wasatch County ("**County**") has not been shown that more affordable housing is needed due to the new planned unit development at issue here nor is there any rationale for the 10% dedication level, the affordable housing requirement does not satisfy the rough proportionality analysis, and is not a valid exaction.

This analysis is not altered by the fact that the County permits developers to submit an affordable housing report before requiring a contribution, at least where there are no set criteria in place for determining whether the development creates an impact on affordable housing. The determination of whether an affordable housing contribution is required for a development under this scheme is arbitrary and capricious and is not a sufficient option for the relevant developer.

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 ANN. § 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 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 Joshua Spears for the Ucanogos PUD on February 28, 2018. The County submitted a response to the Office of the Property Rights Ombudsman, which was received on June 1, 2018, and Joshua Spears replied the same day. Additional information was sought from the County on June 14, 2018 and received on June 28, 2018. The Office of the Private Property Ombudsman assigned the task of reviewing the facts and law and drafting an Advisory Opinion to J. Craig Smith, an attorney with the law firm of Smith Hartvigsen, PLLC. Mr. Smith is a member of the approved panel of outside attorneys pre-qualified to take assignments from the Office of the Private Property Ombudsman. Mr. Smith utilized an associate lawyer at Smith Hartvigsen, Aaron M. Worthen, to assist him in this task.

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, filed February 28, 2018 with the Office of the Property Rights Ombudsman, by Joshua Spears.

2. Response from Wasatch County, including attachments, submitted by Jon Woodard, County Attorney, received on June 1, 2018.

3. Reply from Joshua Spears, including attachments, received on June 1, 2018.

4. Additional affordable housing reports submitted to Wasatch County by other developers, received on June 28, 2018.

5. Wasatch County Ordinances.

Background[1]

On November 6, 2013, the Wasatch County Council ("**County Council**") modified its general plan to include the current version of the "**Moderate Income Housing**" portion of its general plan. The portion of the plan includes a study performed by the Mountainlands Community Housing Trust ("**Mountainlands**") using the Utah Workforce Housing Estimating models to show the current affordable housing supply in Wasatch County, and how the supply was anticipated to change in the next 10 years ("**Mountainlands Study**"). The Mountainlands Study showed households with income at or below 60% of the median income level would face

[1] Mr. Spears did not object to any part of the County's background section, nor did he provide any background information of his own. Accordingly, the County's background is accepted as being generally accurate and is relied upon to a large extent.

an increasing shortage of housing in Wasatch County. The Mountainlands Study showed households with an income level at 80% of the median income level would face little change in the availability of housing. Households at or above the median income would see an increasing surplus of housing. The County Council found that some developments would create a need for moderate income housing, while others would not.

Also on November 6, 2013, the County Council also adopted Moderate Income Housing as Section 16.30 of the Wasatch County Code. In enacting the ordinance, the County Council made extensive findings regarding the need to meet affordable housing needs, and the need to follow requirements imposed by the Utah Code for moderate income housing. The County Council also cited studies in the ordinance it relied on in formulating the Moderate Income Housing Code.

On June 31, 2016, Reed Robinson ("**Robinson**") applied for preliminary approval of Ucanogos Phases 2-5 for 19 buildable residential lots (the "**Development**"). In a Preliminary Staff Report, the Wasatch County Planning Department recommended the Development meet moderate income housing requirements by providing a report pursuant to Wasatch Code 16.30.03. The County Council approved the Preliminary Application, adopting the findings and conditions of the Preliminary Staff Report

On July 26, 2016, Robinson applied for final approval of Phase 2. In a Final Staff Report, the County Planning Department again required that prior to recording final plat, Robinson provide a moderate income housing report. The Planning Commission approved the Final Application for Phase 2, adopting the findings and conditions of the Final Staff Report.

In an attempt to meet the requirements of the Moderate Income Housing Code and the conditions of approval, the engineer for the Development, Summit Engineering, provided a Moderate Income Housing Report on September 8, 2016) ("**Summit Report**"). It stated that "no additional moderate income housing is needed as a result of this subdivision." The County Planning Department forwarded the Summit Report to Mountainlands to evaluate its compliance with the Code. On October 13, 2016, Steve Laurent from Mountainlands responded to the Summit Report by indicating that it was insufficient because, among other things, "it fails to provide an estimation of the moderate income housing impacts created by the development" as required by Wasatch Code Section 16.30.03. Mountainlands recommended the applicant provide additional information and analysis so that the County could make its determination. If the applicant did not provide additional information to meet this requirement, Mountainlands recommended the County have an independent study performed at the expense of the developer. It also indicated that the developer could satisfy its affordable housing requirement by paying a fee of $53,200.00 for all 19 units, building two affordable housing units in the Development, or building two affordable housing units on another site.

Robinson reached out to Mountainlands to try to reach a resolution that would allow the Development to move forward with Phase 2. Mountainlands recommended the County allow the Development to move ahead with paying a partial fee, if certain recommended conditions were met.

Mountainlands sent a letter to the County Planning Department advising them of this recommendation on November 1, 2016. On January 10, 2017, Robinson paid the affordable housing fee for Phase 2 of the Development in the amount of $16,800.00. The final plat for Ucanogos Phase 2 was recorded on January 19, 2017.

On March 15, 2017, the County Council in a public meeting reviewed the Summit Report. Mr. Joshua Spears, as the representative of the Development owner for Ucanogos Phases 2-5 was in attendance. Mr. Spears asked that the County Council table the matter so that a more thorough analysis could be done of whether the Development would create a need for affordable housing. At the time, the County had a new study pending to analyze the affordable housing needs in the County, and to possibly re-evaluate the Moderate Income Housing Code. Several council members explained that Ucanogos Phases 2-5 were vested under the old [existing] code, so regardless of what the new County study found, the applicant would remain vested in the old [existing] code. Councilman Farrell made a motion that the County have an independent study performed on the affordable housing of the 19 units based on the County Code. This motion would have had the County perform a study, as allowed under the old [existing] code, and determine what impact the Development would have on affordable housing. The motion failed to pass, with a 3-3 vote. Councilman Peterson made a motion to accept the Summit Report. This motion failed to pass, with a 3-3 vote. After some more discussion, the County Council voted to continue the matter to the next meeting. On April 12, 2017 the County Council continued the matter with the only discussion being that the matter has been asked to be continued.

The County has received a new moderate income housing nexus study, but has not formally accepted the study or changed the Moderate Income Housing Ordinance. The County believes this study shows a nexus between development in the County and the need for more moderate income housing in the County. However, under the principles first enunciated in *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980), and later adopted statutorily as UCA § 17-27a-508, the governing law is the old [existing] code.

On February 28, 2018, Mr. Spears filed a request with the Utah Property Rights Ombudsman for an advisory opinion. He explained that he is being asked to pay an affordable housing fee to Wasatch County. He believes this is unlawful because affordable housing is an exaction that "does not meet the rough proportionality analysis," citing a 2011 Ombudsman opinion on that issue involving Morgan County, Advisory Opinion #96. He has also presented a report that all impact fees negatively affect affordable housing.

Analysis

I. The Affordable Housing Requirement is an Exaction, Which Must Satisfy Rough Proportionality Analysis, Even if a Developer Has not Exhausted the Affordable Housing Report Process

A. The Affordable Housing Requirement is an Exaction, Which Must Satisfy Rough Proportionality Analysis.

The requirement that the Development provide moderate income housing is an exaction because it is a condition that must be satisfied to obtain approval for land development. "Exactions are conditions imposed by governmental entities on developers for the issuance of a building permit or subdivision plat approval." *B.A.M. Development, LLC v. Salt Lake County,* 2006 UT 2, ¶ 34, 128 P.3d 1161, 1169 ("***B.A.M. I***")[2]. The term "exaction" includes *any* condition on development, including not only dedication of property, but also payment of money, installation of specific public improvements, or other requirements imposed by a public entity.[3] Furthermore, the term "exaction" includes conditions imposed by a general legislative enactment as well as those imposed by decisions or negotiations on specific proposals. *Id.*, 2006 UT 2, ¶ 46, 128 P.3d at 1170. The Wasatch County Code includes a requirement that Planned Unit Developments such as the Development which have more than six units must submit an affordable housing report to determine whether the development would impact the County affordable housing needs. If the County determines that the development would impact its affordable housing needs—or if the developer stipulates that there is an impact without submitting a report—the developer is required to set aside an equivalent of 10% of the development for moderate income housing.[4] A developer can satisfy this requirement by building moderate income units on site, building moderate income units off site, paying a fee in lieu of constructing moderate income housing on site, or dedicating land of value equal to the amount of the fee in lieu.[5]

The County argues that mandating that 10% of the development be used for moderate income housing (or the alternatives) is not an exaction, but is instead a garden variety regulatory taking. Accordingly, the County's position is that "Mr. Spears must prove that the regulation has denied the viable use of the land."[6] The County further notes that "[r]egulations that cause property values to lower by as much as 95% have been upheld as constitutional." [7] Thus, because "[o]nly 10% of the property in Mr. Spears' project would be restricted to meet moderate income housing requirements, . . . [and he] could still rent or sell that property at a price that is affordable to a household earning 80% or less of area median income," the County asserts that there is no exaction here.

This argument improperly categorizes the County's requirements as a standard regulatory taking rather than an exaction. Indeed, the *Chevron* case cited by the County distinguishes

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[2] *See also Salt Lake County v. Board of Education, Granite School District*, 808 P.2d 1056, 1058 (Utah 1991) (holding that "development exactions" are "contributions to a governmental entity imposed as a condition precedent to approving the developer's project.")

[3] *Id.* ("Development exactions may take the form of (1) mandatory dedications of land . . . as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees." (internal quotations omitted)).

[4] WASATCH CODE § 16.30.03.

[5] WASATCH CODE § 16.30.03-05.

[6] *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 259 (Utah Ct. App. 1998); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540, (2005)

[7] *Smith*, at 259; *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978).

exactions from ordinary regulatory takings. *See Chevron* 544 U.S. at 538 (exempting "the special context of land-use exactions" from the traditional regulatory taking analysis). Indeed, any regulation requiring a developer to build specific buildings and charge a specific rate (or take some other similar action) before their development can be approved is of a different ilk than a general land use regulation. The Utah Supreme Court is in accord. *See B.A.M. I* cited above. And courts have consequently mandated a separate test to govern exactions.

Local governments are entitled to impose exactions as conditions on new development, but those exactions must satisfy rough proportionality analysis mandated by the Takings Clause of both the United States and Utah Constitutions. The Utah Code authorizes exactions subject to certain limitations and, in effect, codifies existing federal and state case law:

> A county 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. § 17-27a-507(1). The Utah Supreme Court observed that the "rough proportionality" test derives from the U.S. Supreme Court's analyses in *Nollan v. California Coastal Commission,* 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. I,* 2006 UT 2, ¶ 41, 128 P.3d at 1170.) In those cases, the U.S. Supreme Court promulgated rules for determining when an exaction may be validly imposed under the federal constitution's Takings Clause. This has come to be known as the *Nollan/Dolan* "rough proportionality" test, which has been codified in § 17-27a-507.[8]

The first aspect of the analysis focuses on the connection between the exaction and a legitimate governmental interest. The exaction must have an "essential link" to a legitimate interest. In other words, an exaction must promote or satisfy a legitimate public interest that the new development is impacting. If it does not, the exaction is not valid.

The Utah Supreme Court further honed the "rough proportionality" analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 ("***B.A.M. II***"), which was a second appeal stemming from the same development project at issue in the earlier decision. This opinion explained that rough proportionality 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 74, ¶ 9, 196 P.3d at 603. The "nature" aspect focuses on the relationship between the purported impact and proposed exaction. The court agreed that the approach should be expressed "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 74, ¶ 10, 196 P.3d at 603-04.

The "extent" aspect 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

[8] The same analysis would also likely apply under the Takings Clause in the Utah Constitution, Article I, Section 22.

> 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 74, ¶ 11, 196 P.3d at 604. The court continued by holding that "roughly proportional" means "roughly equivalent." In addition to the other aspects of rough proportionality discussed above, in order for an exaction to be valid the cost of compliance must be roughly equivalent to the cost that a governmental entity would incur to address (or "assuage") the impact attributable to new development. As an exaction, the County's affordable housing requirement must also satisfy this aspect of the test.

B. *The Affordable Housing Requirement Fails the Rough Proportionality Test and is not a Valid Exaction.*

The County's Affordable Housing Requirement does not appear to be a valid exaction, because there has been no showing that the Development causes a need for affordable housing, or assuming a need is created the 10% dedication is proportional. As has been discussed, an exaction must be roughly proportionate in nature to the impact of the new development. The Utah Supreme Court held that this aspect should be analyzed as a problem and a solution. "[T]he impact is the problem, or the burden which the community will bear *because of the development*." *Id.*, 2008 UT 74, ¶ 10, 196 P.3d at 603-04 (emphasis added). Thus, the exaction must be intertwined with a problem (or impact) attributable to a new land development. Simply promoting a legitimate public interest is not enough to make an exaction valid. The exaction must be a reasonably necessary solution to address a problem caused or worsened by the new development.

The County's Affordable Housing Requirement fails the test. There has been no showing that the Ucanogos Phases 2-5 creates a need for affordable housing, much less a showing that it creates a need at a rate of 10% of the Development. The County has a legitimate interest in promoting quality housing for all of its residents, not only to provide opportunities for low and middle-income families, but also to promote a diverse and sustainable mix of available housing. However, that interest does not warrant an exaction on the Development—unless the County can show that the Development somehow causes a significant need for affordable housing and that the exaction is roughly equivalent to the cost of the County to address the need created by the Development. Without a roughly equivalent connection between the amount of the exaction and the Development's impact, it is not fair or legal to impose this public burden, affordable housing, on the Development. By establishing a system that permits some—but not all—developments to avoid the affordable housing requirements, the County has implicitly conceded that it is not immediately apparent whether or how much impact a specific development creates on affordable housing. Thus, the County is required to demonstrate that the Development both creates an affordable housing impact and the Development's impact is roughly the value of 10% of the value of the entire Development. The County has not done so here. Since the County has not demonstrated that its affordable housing requirement "solves" a "problem" created by the Development, it cannot be a valid exaction under the analysis required by both the Utah Code and the Utah Supreme Court.

C. The County's Invitation to Provide an Additional Affordable Housing Report Does not Preclude the Finding of an Illegal Exaction

An exaction is subject to rough proportionality analysis even if a local government allows some developers to avoid the exaction if they provide a report demonstrating that their development does not create an impact on the local government's affordable housing problem. An exaction is a type of taking regulated by constitutional protections which prohibits takings of private property without just compensation, and must be validated through rough proportionality analysis. *See B.A.M. I*, 2006 UT 2, ¶¶ 31-34, 128 P.3d at 1168-69. Permitting some developers to avoid the exaction does not change the law's status as an exaction, nor does it change the rough proportionality analysis.

The County argues that, in any event, any claim for an illegal exaction is not ripe because the developer has failed to take advantage of the opportunity to submit a "compliant" affordable housing report and thereby potentially avoid any affordable housing requirements. After all, the County asserts the original Summit Report did not provide "an estimation of the moderate income housing impacts created by the Development as required by Wasatch Code 16.30.03." However, the County concedes that the developer would be required to pay for the additional report, and that there is no guarantee that the developer would be exempt from the affordable housing requirements if a new report was submitted. In other words, under the County's suggested approach the developer may have to spend more money only to find out that it still has to comply with the affordable housing requirements.[9]

After reviewing the Summit Report and comparing it with other reports that the County has received for other developments, it is unclear why the Summit Report was deemed insufficient. As with the other affordable housing reports, the Summit Report discussed the median income of the County and the anticipated average lot price in the Development. Indeed, in the words of Councilman Mike Petersen, it appears that "the applicants have done what the Council have asked them to do," and "[t]he study is pretty much the same as the other ones [that] have been presented and [we are] treating them a little bit differently." March 15, 2017 Council Minutes. For this reason, it appears that the affordable housing report process is not a meaningful option for the developer.

This is particularly true because the County Code broadly authorizes that "[a]t the sole discretion of the County the County reserves the right to have an independent study performed, at the expense of the developer . . . ." This permits the County to choose to impose an additional expense on a developer whenever it desires and without any oversight. Additionally, the County Code directs the County Council to "determine if the applicant must meet the Moderate Income Housing requirements," but it does not provide any guidelines or standards to follow when determining which developments must do so. It is accordingly unclear what factual findings the County Council would or could make that would exempt—or not exempt—a development from the affordable housing requirements, presenting potentially significant due process and related concerns. *See generally*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J. concurring in part and concurring in the judgment) (discussing due process and separation of

[9] By asking the developer to fund a new report, the County is essentially asking him to fund the County's efforts to satisfy its burden to demonstrate that its exaction is roughly proportional. This is similar to a government entity requiring developers to fund public facilities plans in the impact fee arena.

powers issues found in vague laws). Therefore, the entire affordable housing report process does not meet the applicable constitutional and statutory safeguards. And the developer should not be required to continue in that process before obtaining an opinion on the legality of the impending exaction.

Conclusion

The affordable housing requirement, whether fulfilled by reservation of units, by payment of a fee, or dedication of land, is an exaction that must satisfy rough proportionality analysis. An exaction is any condition imposed on the approval of a land use application. The affordable housing requirement does not meet the rough proportionality standard in this case, because there is no showing that Mr. Spears' Development causes a need for affordable housing. It is thus not proportional in nature, according to the analysis required by the Utah Supreme Court.

Additionally, under the circumstances presented in this case, the County's alternative affordable housing option—which provides at least the theoretical possibility that Mr. Spears would not have to satisfy the affordable housing requirement—is not a meaningful option and does not bar a determination that the affordable housing requirement is an illegal exaction.

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