Advisory Opinion #100

Parties: Ken Macqueen and West Valley City

Issued: June 20, 2011

TOPIC CATEGORIES:
D: Exactions on Development
J: Requirements Imposed upon Development

Ordinance provisions concerning minimum and maximum setbacks, parking, and building size are generally applicable requirements, and are permissible, because it is reasonably debatable that they promote public purposes. Ordinances requiring dedication of property for public use are exactions which must comply with rough proportionality analysis.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Ken Macqueen
Local Government Entity:	West Valley City
Applicant for the Land Use Appeal:	Ken Macqueen
Type of Property:	Commercial Road-Front Property
Date of this Advisory Opinion:	June 20, 2011
Opinion Authored By:	Brent Bateman, Attorney, Office of the Property Rights Ombudsman Joshua Horrocks, Legal Intern, Office of the Property Rights Ombudsman

Issues

Do the requirements in West Valley City's Landscaping Ordinance amount to a constitutionally prohibited regulatory taking of private property?

Summary of Advisory Opinion

West Valley City's ordinance provisions concerning minimum and maximum setbacks, parking, and building size are generally applicable zoning requirements, and are permissible because it is reasonably debatable that they promote the purposes of LUDMA. Even though they may prevent building the type of building that the property owners feel would maximize the potential of the property, they are not takings or otherwise illegal. Ordinance requirements concerning dedication of property for public use, such as dedicating and building public sidewalks, installing street lamps, etc., are exactions. When a land use application is submitted by the property owner and considered by the City, the City must show that those exactions comply with the *B.A.M.* test in order to impose them.

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 Ken Macqueen on January 27, 2011. A copy of that request was sent via certified mail to Sheri McKendrick, West Valley City recorder. Claire Gillmor, Senior Attorney for the City submitted a response to the Office of the Property Rights Ombudsman, which was received on February 17, 2011. Mr. Macqueen then submitted a response to that communication on February 23, 2011, which the City responded to on March 8, 2011. The final received response was received from Mr. Macqueen on March 22, 2011.

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, including attachments, filed January 27, 2011 with the Office of the Property Rights Ombudsman by Ken Macqueen.
2. Response from West Valley City, including attachments, submitted by Claire Gillmor, Senior Attorney for the City, received on February 17, 2011.
3. Response to response, submitted by Ken Macqueen, property owner, on February 23, 2011.
4. Return Response from West Valley City, submitted by Claire Gillmor, received on March 8, 2011.
5. Final Response submitted by Ken Macqueen on March 22, 2011.

Background

After losing his building to a fire in January 2010, Mr. Macqueen seeks to rebuild his business, the Carpet Barn, on the same property. The property is located on Redwood Road in a commercial district within West Valley City. Rather than rebuilding the previous structure, Mr. Macqueen would prefer to build a modified larger building on the lot to suit his present needs.

In preparing for his development, the property owner attended a “development meeting” in order to review the plans before a formal application was submitted. At that meeting, he was told that

he must meet the requirements of the city's landscape ordinance in order to obtain a building permit. The landscape ordinance, which was passed in 2001 and found at West Valley City Municipal Code section 7-13-101 *et seq*., imposes multiple requirements upon the permit. Those include, according to the property owner, a requirement that the property owner dedicate to the city a ten foot public easement for pedestrians and bicycles, remove the current sidewalk and replace it with new sidewalk, purchase and install sidewalk lampposts, and provide specific landscaping along a 20 foot wide strip along the frontage of the property.[1] In addition, West Valley City Municipal Code section 7-14-204, Single Building Orientation, requires that single building within the area shall comply with one of three orientation standards, one of which requires a maximum thirty-foot setback from the street for at least 30% of the building. The property owner feels that none of those standards permit him to build the optimal building for his business – a large warehouse toward the back of the lot.

Mr. MacQueen argues that by imposing the landscaping requirements, the City is imposing unfair and illegal conditions and exactions upon his building permit approval. Mr. Macqueen also argues that the building orientation requirement deprives him of optimal use and benefit of his property, and is thereby a regulatory taking of his property.[2] These circumstances have led the owners to ask for review of the ordinance in order to advise whether these regulations amount to a regulatory taking under the laws of both the United States and Utah.

Analysis

I. There is No Statutory Requirement That a Land Use Application be Pending Prior to a Request for an Advisory Opinion.

In its response, West Valley City suggests that the present Advisory Opinion request is untimely because the property owner has not made application to the City or requested a permit for development of the property. Accordingly, the City has not taken any formal action or made any formal decisions regarding the property. The present Advisory Opinion request arises out of discussions conducted in "development meetings" prior to making a land use application.

While it appears true that no formal land use application has been submitted, and thereby no formal action has been taken, an Advisory Opinion is appropriate in this matter.[3] The Utah Legislature has limited the availability of Advisory Opinions to those that are requested prior to the issuance of a "final decision on a land use application." UTAH CODE ANN. 13-43-205. The City argues that accordingly an Advisory Opinion is not available unless a land use application is actually pending. However, the plain language of this statutory provision only poses a cut-off date. Nothing in the statute forbids an Advisory Opinion where no application is pending. In fact, several subjects deemed by the legislature as appropriate for Advisory Opinion do not require a land use application in order to be ripe for dispute – such as impact fees and nonconforming uses. In addition, the Advisory Opinion process has been established as a tool to aid in dispute

[1] A cost of compliance at roughly $40,000 has been given by the Macqueens in their documents.
[2] The Macqueens suggest the coupling of parking and building placement requirements with the landscape ordinance offer no other way to place their desired building on the property; which deprives them of full use of the property.
[3] Nevertheless, as shown below, the lack of a pending application may make a full analysis of all issues impossible.

resolution. Because Advisory Opinions are a dispute resolution mechanism, public policies favoring dispute resolution advocate making Advisory Opinions available to more, rather than fewer, people, and using Advisory Opinions early in potential disputes. Because a dispute has arisen in this matter, in many ways, the timing of this Advisory Opinion is ideal. Hopefully, the Advisory Opinion can advise the parties and assist to resolve a dispute prior to the expenditure of significant money and time.

II. Some of the Imposed Requirements are Exactions, and Some are Zoning Restrictions.

Mr. Macqueen challenges the City's requirements as unconstitutional takings. The requirements Mr. Macqueen objects to fall into two general categories; some of the requirements imposed are exactions, but others are generally applicable zoning restrictions. Each category requires a particular analysis.

The power of local governments to impose zoning restrictions arises under the general police power, in order to provide for the health, safety, and welfare of the community. In Utah, local governments are given wide discretion to determine how best to advance the health, safety, and welfare of their own community, and have been given authority to create and adopt local ordinances, including zoning ordinances, to accomplish that objective. Under Utah law, local land use ordinances are deemed valid unless it can be shown that they are arbitrary, capricious, or illegal. *Bradley v. Payson City Corp.*, 2003 UT 16, ¶10. Enactments of zoning ordinances are legislative acts of the local government. *Id*. Legislative acts will be upheld "if it is reasonably debatable that the decision, ordinance, or regulation promotes the purposes of this chapter and is not otherwise illegal." UTAH CODE ANN. 10-9a-801(3)(b). In other words, if it is *reasonably debatable* that a zoning restriction placed in an ordinance advances the public welfare, then that zoning restriction will not be arbitrary or capricious, and will be upheld if it is not otherwise illegal.

An exaction, on the other hand, arises where, as a condition of development approval, a local government requires the developer to make certain dedications to the public. *See Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). *See also B.A.M. Dev., L.L.C. v. Salt Lake County*, 2006 UT 2, ¶ 34,128 P.3d 1161, 1169 (*B.A.M. I*) ("[E]xactions resemble physical takings in the sense that they typically require the permanent surrender of private property for public use."). In *B.A.M. I* the Utah Supreme Court listed several examples of exactions such as mandatory dedications, including connection fees, impact fees, and fee-in-lieu of mandatory dedications. *Id*. at 1169. These examples establish that where the City requires some dedication of private resources for public use in order to obtain development approval, an exaction has occurred.

Ordinance requirements such as minimum or maximum setbacks, parking, building orientation standards, and general landscaping are not exactions because they do not require dedication of property to public use. Instead, they are generally applicable zoning restrictions that have been determined by the City to advance the public welfare. Those requirements are thereby analyzed under the reasonably debatable standard. However, several requirements imposed by the City require dedication of property for public use, and are therefore analyzed as exactions. These include dedication of easements for public egress, construction of sidewalks and other public

rights-of-way, and street lamps for lighting public rights of way. These dedications must satisfy the *B.A.M.* "rough proportionality" analysis. If they do not, they are "otherwise illegal," UTAH CODE § 10-9a-801(3)(b), and invalid on that basis.

III. The Building Orientation Requirements are Legislatively Imposed and are Analyzed under the Reasonably Debatable Standard.

West Valley City Municipal Code section 7-14-204 requires that a single building placed on a lot conform to one of three conditions regarding orientation to the abutting street: (a) a maximum setback of 30 feet with 30% of the building frontage on that setback, (b) a maximum of 70% of the parking located between the building and the street, with the remaining parking in back of the building, or (c) more than 70% of the parking between the building and the street with the inclusion of additional landscaping in the parking lot. The property owner states that none of these options permits optimal orientation of the building on the lot to use the property to its fullest potential, and therefore must be an unconstitutional taking.

Zoning ordinances by definition restrict the activities that can be conducted on property. If every property owner were permitted to undertake any activity they desired on their property, community planning would be moot. Nothing would prevent, for example, a tavern from being located next to a school, or a factory being located on a cul-de-sac in a residential neighborhood. Restrictions such as setbacks, parking, use restrictions in particular zones, etc., provide order and organization to communities, and promote the public welfare. They are thus upheld despite the fact that some desired uses or configurations of a particular lot, which would make that lot more valuable, may be unavailable as a result. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125, 98 S. Ct. 2646, 2659-60, 57 L. Ed. 2d 631 (1978) ("zoning laws are, of course, the classic example, which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.")

Communities in Utah, under authority of the State's police power, are given authority to determine what standards work best in the area, and given latitude to create zoning ordinances to advance those standards. Under the law, it need only be reasonably debatable that those ordinances advance those purposes in order to be upheld. UTAH CODE § 10-9a-801(3) states that courts shall presume a land use ordinance is valid, and determine only whether it is "arbitrary, capricious, or illegal." If it is "reasonably debatable that the ordinance promotes the purpose of this chapter and is not otherwise illegal," the ordinance is valid. *Id*. This standard vests the local community with tremendous discretion.

The Land Use Development and Management Act includes among its purposes "to provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, and aesthetics of each municipality . . . ." UTAH CODE ANN. § 10-9a-102(1). It is reasonably debatable that the building orientation standards advance those purposes. They could be said to improve the health and safety of the community by reducing the concentration of traffic and parking, the comfort of the community by providing space for

movement, and the aesthetics of the community by providing landscaping and open spaces.[4] Accordingly, those restrictions are not arbitrary or capricious under Utah law.

Moreover the building orientation restrictions are not illegal. The property owner expresses concern that the restrictions may be a taking.[5] However, no taking is found here. "[F]or there to be a taking under a zoning ordinance, the landowner must show that he has been deprived of all reasonable uses of his land." *Cornish Town v. Koller*, 817 P.2d 305, 312 (Utah 1991). A reasonable use, or economically viable use, does not mean the "highest and best use." *Smith Inv. Co. v. Sandy City*, 958 P.2d 245, 259 (Utah Ct. App. 1998). Generally where economic value remains in the property, no taking has occurred. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.")[6] The building orientation restrictions provide three options for building or parking orientations. Although the restrictions do not permit the property owner to construct any building that he would like, he is not prohibited from constructing a building with economic value. Accordingly, no taking has occurred.

Almost all zoning requirements have the potential deprive the property of what an owner might consider optimal use, but as along as the restriction does not "go too far"[7] and remove essentially all economic value, the zoning requirements are not a taking, and are not illegal on that basis.

IV. The Exactions are Analyzed under the *B.A.M.* Standard.

Notwithstanding the above, as previously discussed, some components of the ordinance requirements are dedicatory and thereby exactions. Exactions are a form of taking, because a private property owner, as a condition of development approval, is being required to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Dolan v. City of Tigard*, 512 U.S 374, 384 114 S.Ct. 2309 (1994). Exactions are permissible in Utah, as long as they satisfy rough proportionality analysis as codified at UTAH CODE § 10-9a-508:

> (1) A municipality may impose an exaction or exactions on development proposed in a land use application provided that:
> (a) an essential link exists between a legitimate governmental interest and each exaction; and

[4] Note that the standard does not require a showing that the restrictions *actually* advance those purposes, or actually increase the health, safety, comfort, or aesthetics of the community. It need only be *reasonably debatable* that the restrictions advance those purposes.

[5] The property owner is correct that if the restrictions amount to a taking, they are illegal and can be invalidated on that basis.

[6]; *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S. Ct. 114, 117, 71 L. Ed. 303 (1926) (75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394, 394, 36 S. Ct. 143, 143, 60 L. Ed. 348 (1915) (92.5% diminution); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89.5% diminution); *William C. Haas & Co. v. City of San Francisco*, 605 F.2d 1117, 1121 (9th Cir. 1979) (95% diminution); *Sierra Terreno v. Tahoe Reg'l Planning Agency*, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776, 777 (Cal. Ct. App. 1978) (81% diminution).

[7] "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal*, 260 U.S. at 415.

(b) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

This has come to be known as the "rough proportionality" test, which the Utah Supreme Court further honed in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 ("*B.A.M. II*"). 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 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 P3d at 603-04.

The "extent" aspect of the rough proportionality analysis 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 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. The court continued by holding that "roughly proportional" means "roughly equivalent." 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 address (or "assuage") the impact attributable to a new development.

The property owner indicates that in order to get development approval, the Landscape Ordinance will require him to dedicate ten feet of property for use as a public right-of-way, to remove the existing sidewalk and construct a new one, and to install street lights. These requirements appear to be exactions, because they require the property owner to build and dedicate property to the public for public use. If it is true that in order to obtain a building permit these improvements will be required, their validity will be measured using the exaction analysis.[8]

A. The Dedications Likely Will Satisfy the Essential Nexus Prong of the Test.

There must be an essential link between a legitimate government interest and the conditions of the exaction. The sidewalk and street lamps all adhere to a government interest in safe, efficient, and convenient use of public space for pedestrians and bicyclists. Requiring the property owner to make these improvements satisfies the first aspect of the rough proportionality test. Building and maintaining adequate roadways is a legitimate government interest. UTAH CODE § 10-8-8;

[8] As indicated below, the property owner has not applied for a building permit, so these exactions have not been imposed. It may be that the property owner has information to indicate that they will be imposed, but until they are imposed, no exaction has occurred. The following analysis is therefore instructional only to assist in the analysis of the exactions at the time they are imposed.

see also Carrier v. Lindquist, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117.[9] Since these are legitimate interests promoted by the dedication and conditions the first prong of the analysis is resolved.

B. The Dedications Will Likely Satisfy the Nature Aspect of the Analysis.

The nature portion of the test refers to the problem and solution analogy. The construction and presence of a commercial building on a main arterial road creates an impact that the city must assuage. That impact is the problem. The question in the nature portion of the exaction analysis concerns whether the requirements provide the solution to that problem.

A commercial building will generate traffic flow, activity from workers and customers, pedestrian activity, etc., which the city will need to control. Traffic entering and leaving the property creates a need to make a safe pedestrian environment. This is the problem. The presence of the landscaped buffer, stamped entrance-ways to separate the path, wide sidewalk for non-auto travel and the street lamps all help to assuage the impact of the traffic and safety issues created by the development. This is the solution, and it is related in nature to the problem. The nature component of the test is satisfied.

C. The Requirements Must Meet the Extent Aspect of the Analysis.

The final portion of the exaction analysis compares the cost to the City to assuage the impact and the cost to the property owner of the improvements. According to the Utah Supreme Court, these two costs should be roughly equivalent.[10] This requires a determination of the amount of impact on the City caused by the new building. Where the impact is small, the exaction should likewise be small. The greater the impact, the greater the possible exaction.

An analysis of the cost of the impact of the development to the City has not been submitted to this Office, and will not be available until it is known exactly what uses the property owner plans to engage in on the property and how those uses will be configured – that is, until after application has been made. Different uses and configurations will give rise to different impacts, i.e. store hours and operations could affect the impact of pedestrians during the day or night, and thus the ability to exact lighting. In addition, the size of the building and anticipated number of customers and traffic, taking into consideration that a previous building existed on the site, will effect the magnitude of the impact. When a formal application is submitted for review, the City must show and provide information regarding the amount of impact and the impact costs, and equate those to the exactions. If those costs are roughly equivalent, the exaction is valid. If not, the exaction is illegal, and would not be enforceable.

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[9] "In order for a government to be effective, it needs the power to establish or relocate public throughways, even at the expense of some individual citizens, for the convenience and safety of the general public. . . . In fact, cities are vested with the statutory power to 'lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, . . . and may vacate the same . . . by ordinance'. UTAH CODE § 10-8-8." *Carrier*, 2001 UT 105, ¶ 18, 37 P.2d at 1117. Furthermore, "[d]edications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use." *Dolan*, 512 U.S. at 395.

[10] However, mathematical precision is not required. *B.A.M. II*, 2008 UT 74, ¶12.

Conclusion

Some of the requirements in the ordinance are legislative acts and subject to legislative discretion. The building orientation requirements are not a dedicatory action, but a generally applicable zoning restriction. Those regulations are analyzed under the reasonably debatable standard. It is reasonably debatable that the building orientation requirements advance the purposes of LUDMA.

The requirements of the sidewalk, street lamps, and dedicatory easements for public use can be considered exactions on development and must be analyzed under the rough-proportionality test outlined in *B.A.M.* at the time application is made.

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.

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:

Sheri C. McKendrick, City Recorder
West Valley City
3600 Constitution Blvd
West Valley City, Utah 84119

On this _____ Day of June, 2011, 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