

Advisory Opinion #110

Parties: Promontory School of Expeditionary Learning and Perry City

Issued: February 16, 2012

TOPIC CATEGORIES:

D: Exactions on Development

R(v): Other Topics (Interpretation of Ordinances)

To be valid, exactions must have a link to a legitimate government interest, and be roughly proportionate to the impact of the development. The Utah Code provides additional clarification for exactions imposed upon charter schools, emphasizing that a road or sidewalk must be necessary for school safety. A local government has discretion to determine what measures are necessary to promote safety.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by: Promontory School of Expeditionary Learning & Perry City

Local Government Entity: Perry City

Applicant for the Land Use Approval: Promontory School of Expeditionary Learning

Type of Property: Potential Charter School

Date of this Advisory Opinion: February 16, 2012

Opinion Authored By: J. Taylor Adams, Legal Intern,
Elliot Lawrence, Attorney
Office of the Property Rights Ombudsman

Issues

Can Perry City require the Promontory School of Expeditionary Learning to provide certain improvements to 2700 South Street as a condition on approval of the site plan for the school?

Summary of Advisory Opinion

A local government may require exactions, such as dedication of property or installation of improvements, as conditions of development approval. Such exactions, however, must satisfy the “rough proportionality” analysis required by § 10-9a-508 of the Utah Code. There must be an essential link between the exaction and a legitimate public interest, and the exaction must be related, both in nature and extent, to the impact caused by the development. The “nature” aspect of the analysis is satisfied if the exaction addresses a problem, or impact, caused by the proposed development. If it does not, the exaction is invalid. The exaction at issue in this Opinion meets those conditions; another, potential exaction discussed in this Opinion does not.

Utah Code provides additional clarification concerning exactions imposed upon charter schools. A charter school cannot be required to participate in the cost of a road or sidewalk unless it is

contiguous to the school's property and reasonably necessary for the safety of the school children. The exaction at issue in this Opinion meets these conditions and was legally imposed upon the school. Municipalities have discretion to determine the measures to take concerning safety.

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 jointly from Valerie Clark Neslen, on behalf of the Promontory School of Expeditionary Learning, and from Duncan T. Murray, Attorney for Perry City. A copy of that request was sent via certified mail to Perry City Mayor Gerald Nelson at 3005 South 1200 West, Perry, Utah 84302. The return receipt was signed and delivered on December 7, 2011, indicating that it had been received by the City. A copy of the request was also sent via certified mail to the Promontory School of Expeditionary Learning, Attn: Valerie Clark Neslen, Board Chair, at 39 East 1500 South, Perry, Utah 84302. The return receipt was signed and delivered on December 7, 2011, indicating that it had been received by the School. A copy of the materials regarding the request was also sent to the Boyd B. White Estate, Attn: Boyd B. White II, Personal Representative, owner of the property, at 3707 Barton Creek Drive, Eagle Mountain, Utah 84005. Ms. Valerie Clark Neslen submitted a response to the Office of the Property Rights Ombudsman on December 20, 2011 which included a copy of the site plans showing road easements and dedications.

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, submitted by Valerie Clark Neslen, on behalf of the Promontory School of Expeditionary Learning, and received by the Office of the Property Rights Ombudsman, December 2, 2011.
2. Request for an Advisory Opinion, submitted by Duncan T. Murray, on behalf of Perry City, and received by the Office of the Property Rights Ombudsman, December 2, 2011.

3. Response submitted on behalf of the Promontory School of Expeditionary Learning, by Valerie Clark Neslen, Board Chair, dated December 20, 2011, and all attached documents.

Background

Promontory School of Expeditionary Learning (School) was granted a charter by the State Board of Education to establish a public charter school. The school is in the process of purchasing a plot adjacent to 2700 South in Perry, Utah for the construction of its facility, pending approval of the site plan from Perry City. As conditions upon approval of the site plan, the city has imposed the following requirements:

- The School will dedicate an easement at 1050 W for a future roadway.
- The School will provide improvements to 2700 South on that part of the street that is adjacent to the property, including widening of the roadway, and installation of gutters, drains, and a sidewalk along the south side of 2700 South.

The School has agreed to dedicate the easement in an effort to be good neighbors. However, the School claims that the required improvements along 2700 South will lead to a decrease in safety for its future students, and therefore the School questions the city's authority to require the improvements. The School's plan is to have students use existing sidewalks on the north side of 2700 South. The School believes that providing improvements on the south side of the street will encourage parents to use this as a loading/unloading zone rather than the areas provided for in the plan, making the area less safe for pedestrians. They further point out that their budget comes from public funds, and the required widening of the road and construction of a gutter, drains, and sidewalk represents a significant cost.

The City claims that the imposed requirements are legal because they are necessary for the safety of the school children. Some of the children will get to and from the school by walking or by bicycle, and these children need a place to walk, as well as a place to access to the crosswalks across 2700 South and existing sidewalks on 2700 South and 1050 West.

The School and City jointly requested an advisory opinion from the Office of the Property Rights Ombudsman.

Analysis

I. The Dedications Required by the City are Exactions, Which Must Comply with Section 10-9a-508 of the Utah Code.

A. The Dedications are Exactions, which is subject to "Rough Proportionality" Analysis

The City's requirement that the School widen the roadway and install a gutter, drains, and a sidewalk constitutes an "exaction" under Utah law. "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").¹ The term "exaction" includes any condition on development, including not only dedication of property, but also payment of money, installation of specific improvements, or other requirements imposed by a public entity. 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. Since the City is asking the School to complete improvements to the road as a condition of approval for the site plan, the City is requiring an exaction, which must satisfy § 10-9a-508(1) of the Utah Code.

In 2005, the Utah Legislature enacted § 10-9a-508 of the Utah Code, which authorizes cities to impose exactions on new development, within established limits:

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

UTAH CODE ANN. § 10-9a-508(1).² The Utah Supreme Court observed that the language of this statute was borrowed directly from the U.S. Supreme Court analyses in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 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 two landmark cases, the U.S. Supreme Court promulgated rules for determining when an exaction may be validly imposed under the federal constitution's Takings Clause.³ This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis has been codified in § 10-9a-508.

The Utah Supreme Court further honed the "rough proportionality" analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 45 ("B.A.M. II"), which was a second appeal stemming from the same development project at issue in the earlier decision. This opinion held 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 45, ¶ 9. The "nature" aspect focuses on the relationship between the purported impact and proposed exaction.

¹ 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.")

² There is a corresponding statute applicable to counties found at § 17-27a-509 of the Utah Code.

³ See U.S. CONST., amend. V. ("nor shall private property be taken for public use, without just compensation"). The Supreme Court has interpreted the Takings Clause as limiting a government's ability to impose conditions on development. Furthermore, "[t]he Utah Constitution reinforces the protection of private property against uncompensated governmental takings . . ." *B.A.M. I*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. See also UTAH CONST. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation").

The court explained 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 45, ¶ 10.

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 45, ¶ 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.

B. The Dedications Satisfy the First Prong of the Rough Proportionality Test

In order to be a valid exaction, the City’s requirement must satisfy all aspects expressed in § 10-9a-508(1). First, there must be an essential link between a legitimate interest and the requirement. The City has a legitimate governmental interest in safe and efficient traffic flow⁴ for both vehicles and pedestrians. Requiring the widening of the road and the addition of a sidewalk is a reasonable means of accomplishing the City’s objectives.⁵ In addition, installation of curbs, gutters, and sidewalks improves aesthetics and helps control stormwater. Since the City’s legitimate interests are promoted by the dedication, the first prong of § 10-9a-508 is satisfied.

C. The Requirements Satisfy the Nature Aspect of the Analysis

The requirements to widen the 2700 South and install a gutter, drains and a sidewalk satisfy the “nature” aspect of the analysis. These improvements address the problems created by the impact of the proposed school. Expected enrollment at the school is 450 students. Some students will walk or ride bicycles to and from school. It is expected that many of these students will get to and from school by car. In addition, there will be traffic from the School’s faculty. Thus, the School will have the impact of a substantial increase in traffic (vehicular and pedestrian) in the

⁴ 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.”) also UTAH CODE ANN. § 10-8-8.

⁵ Note that the first step of the evaluation under § 10-9a-508(1)(a) requires an essential link between the requirement and a legitimate governmental interest. This first prong of the test does not require a connection between the exaction and a need attributable to new development. As has been discussed, the “nature aspect” expressed in § 10-9a-508(1)(b) concerns the relationship between the exaction and the need created by new development. *B.A.M. II*, 2008 UT 45, ¶ 10.

neighborhood. The required improvements to the road and the addition of a sidewalk directly address this impact.

D. The Requirements Satisfy the Extent Aspect of the Analysis

The requirement to provide improvements to 2700 South appear to satisfy the “Extent” aspect of the analysis. As has been discussed, the *B.A.M. II* court held that the extent analysis must include a comparison of the burden incurred by the City resulting from the impact of the development against the cost to the developer to provide the improvements. If the cost of the widening of the road and construction of the gutter, drains, and sidewalk is roughly equivalent to the cost the City would spend to assuage the impact from the School, the condition is a proper exaction. If the costs are not roughly equivalent, the exaction violates § 10-9a-508.

This analysis has not been provided, but it seems likely that the exaction in this case is proportionate to the impact of the development. If the School did not provide the improvements, the City, in order to assuage the impact created by the School, would likely have to carry out those same improvements at the same cost. Accordingly, the extent aspect of the exaction analysis is satisfied.

II. Exactions Imposed upon Charter Schools

A. Charter Schools May be Required to Contribute to the Cost of Roads and Sidewalks, if Reasonably Necessary for Safety.

Section 10-9a-305(4)(b) of the Utah Code states that

A municipality may not . . . require a school district or charter school to participate in the cost of any roadway or sidewalk, that is not reasonably necessary for the safety of school children and not located on or contiguous to school property. . . .

Accordingly, in addition to satisfying the exaction analysis (above), an exaction of a roadway or sidewalk upon a charter school must meet two additional requirements; it must be located on or contiguous to school property, and it must be reasonably necessary for the safety of the school children.⁶ There appears to be no dispute that the roadway and sidewalk exaction are on or contiguous to the school property. The remaining question, then, is whether the improvements are reasonably necessary for safety. The City feels that the sidewalk and road improvements are necessary for the safety of the children. Conversely, the School argues that the sidewalk and

⁶ Section 10-9a-305(4)(b) does not create an alternative analysis for exactions, but merely clarifies that charter schools may only be asked to contribute to the cost of roads and sidewalks that are necessitated by the school. The protections are already part of the “nature” aspect of exactions analysis—whether a proposed exaction “solves” a “problem” created by the school. In other words, the proximity of the road or sidewalk, and the necessity based on safety is already part of exactions analysis, and § 10-9a-305 simply clarifies and emphasizes the protections already extended to charter schools.

improvements are not necessary for safety, and in fact will reduce the safety of the school children.

B. The City has Discretion to Regulate Safety

It is within the discretion of the City to determine what is “reasonably necessary for the safety of school children,” because cities have broad discretion to regulate the use of sidewalks and pedestrian traffic. Cities have the authority to establish roads and sidewalks:

A municipal legislative body may lay out, establish, open, alter, widen, narrow, extend, grade, pave, or otherwise improve streets, alleys, avenues, boulevards, sidewalks, parks, . . . public grounds, and pedestrian malls . . .

UTAH CODE § 10-8-8. Furthermore, a city “may regulate and control the use of sidewalks . . .” *Id.* § 10-8-23; *see also* § 10-8-25 (cities may regulate vehicular and pedestrian traffic). In *Carrier v Lindquist*, 2001 UT 105, the court held that a city has a legitimate governmental interest in safe and efficient traffic and pedestrian flow. A decision to build a sidewalk is fully within a city’s discretion. “[T]he necessity, expediency, or propriety of opening a public street or way is a political question.’ The same is true as to the construction of sidewalks . . .” *Brathwaite v. West Valley City*, 860 P.2d 336, 338 (Utah 1993); (*quoting Town of Perry v. Thomas*, 82 Utah 159, 165, 22 P.2d 343, 345 (Utah 1933)). Since a decision concerning when and where a sidewalk may be built is entirely within a city’s discretion, a city may therefore determine that a sidewalk is reasonably necessary to protect school children.

C. The Requirements Put in Place by the City Are Legal

Section 10-9a-305 requires that a decision on the necessity of a sidewalk be based on the safety of school children. As long as the City has a reasonable basis to support a decision, there is no reason to overturn it. “The propriety, advisability, necessity, extent, and character of public improvements is vested in the discretion of the municipal authorities and is not subject to judicial interference unless exercised capriciously, arbitrarily, oppressively, or fraudulently . . .” *Davidson v. Salt Lake City*, 81 Utah 203, 209, 17 P.2d 234, 237 (Utah 1932).

The City concluded that installing a curb, gutter, and sidewalk is reasonably necessary to promote the safety of the children attending the school. The City noted that there is no sidewalk on the south side of 2700 South, where the school will be located. Although many children will be dropped off, several will walk or ride bicycles to school. The sidewalk will connect to crosswalks which will be used by the school children. In short, the City concluded that “[s]afe areas for pedestrian traffic are needed in front of the school.” Charter School Improvements – Summary of Key Facts (submitted with Request for Advisory Opinion). There is thus a reasonable basis for the City to determine that a curb, gutter, and sidewalk are reasonably necessary for the safety of school children.

III. The City Cannot Legally Require the School to Build a Road at 1050 West

The School has agreed to dedicate a 60' easement for a future roadway at 1050 West. As this is a directly related issue to the issues that have been discussed in this opinion, we will consider whether the City can properly impose an additional requirement that the School build or provide improvements to this road. To clarify, the City has not imposed on the School the requirement to build or improve 1050 West. We are considering whether the City would be able to do so. Having followed the same analysis for exactions discussed in part I of this Opinion, this Opinion concludes that requiring the School to build or provide any improvements to this road constitutes an illegal exaction.

A. An Exaction Requiring the School to Build the Road does not satisfy “rough proportionality” analysis

A requirement to build or provide improvements to the road does not appear to satisfy the extent aspect of the rough proportionality analysis. If dedicated and improved, 1050 West would not connect to any existing road. It would simply dead-end at the edge of the School's property. The impact, to traffic and otherwise, caused by the school would in no way be relieved by the school building this section of 1050 West. The exactions placed upon a developer must be based upon the actual impact to the municipality as a result of the development. The City may not compel the School to build or improve the roadway at 1050 West, as this requirement is not tied to the actual impact to be caused by the school.

B. The dedication fails to comply with Utah Code § 10-9a-305(4)(b)

In addition, as discussed above, Utah Code prevents a municipality from requiring a charter school to participate in any road that is not reasonably necessary for the safety of the school children. Again, as this road does currently exist, and the portion within the School's property would not connect to an existing roadway, it cannot be construed to be necessary for the safety of the school children. The City is thus prevented from requiring the School to build or provide improvements to 1050 West.

Conclusion

Perry City may properly require the School to widen 2700 South and construct a gutter, drains and a sidewalk. These improvements directly address the impact created by the school, and appear to be roughly proportionate in extent to that impact. Furthermore, the City is not prevented by Utah Code § 10-9a-305(4)(b) from requiring the School to carry out these improvements. The road is contiguous to the school's property, and the improvements are reasonably necessary for the safety of the school children. The city has discretion to make determinations concerning safety.

Perry City may not require the School to build or provide improvements to 1050 West. This requirement does not satisfy the rough proportionality test. Fulfilling this requirement would not assuage the impact created by the school.

In addition, Utah Code § 10-9a-305(4)(b) prevents the City from imposing this as a condition on approval of the School's site plan, as it is not reasonably necessary for the safety of the school children.

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:

Mayor Gerald Nelson
Perry City
3005 South 1200 West
Perry, Utah 84302

Promontory School of Expeditionary Learning
Attn: Valerie Clark Neslen, Board Chair
39 East 1500 South
Perry, Utah 84302

On this _____ Day of February, 2012, 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