Advisory Opinion #119

Parties: Travis S. Taylor and Saratoga Springs

Issued: December 21, 2012

TOPIC CATEGORIES:

D: Exactions on Development
J: Requirements Imposed Upon Development

Development agreements are important land use tools, but like all public actions, they are subject to constitutional provisions guaranteeing property rights. If the circumstances which led to a development agreement are significantly altered, the obligations incurred by the property owner should be reassessed to guarantee that the obligation is fair.

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

GREG BELL
Lieutenant Governor

State of Utah
Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Travis S. Taylor
Local Government Entity:	City of Saratoga Springs
Applicant for the Land Use Approval:	J. Thomas Homes, LLC
Type of Property:	Residential Subdivision
Date of this Advisory Opinion:	December 21, 2012
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

Should the owners of a single phase of a larger development be responsible to construct and dedicate a public park required in a development agreement governing the entire subdivision?

May a City enforce the terms of a development agreement allowing them to withhold building permits until all public improvements are completed?

Summary of Advisory Opinion

A development agreement is a valid and useful land use tool, and parties may agree that the developer dedicate property for public use in exchange for good and valuable consideration. However, like all public actions, development agreements are subject to constitutional provisions guaranteeing property owners' rights. Both the Federal and Utah Constitutions provide that a developer may only be required to contribute a fair share towards public improvements. Requiring a developer to exceed its contractual obligations can violate these constitutional protections.

If one of the basic circumstances of a development agreement is significantly altered, fairness and justice require that the obligations of a property owner to contribute public improvements be reassessed, to guarantee that the owner only pays a fair portion. The developer in this case does have an obligation, through the development agreement, to contribute toward improvements to the public park. However, altered circumstances require that the amount to be contributed by this developer be reevaluated to ensure that they do not exceed the developer's obligations.

A City is entitled to rely upon and enforce terms of a valid agreement, including withholding building permits until public improvements are completed.

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, 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 Travis Taylor on July 19, 2012. A copy of that request was sent via certified mail to Mark Christensen, City Manager of the City of Saratoga Springs, at 1307 N. Commerce Drive, Saratoga Springs, Utah. 84045. The City received that copy on August 6, 2012.

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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, with attachments, submitted by Travis S. Taylor, received by the Office of the Property Rights Ombudsman on July 19, 2012.
2. Response from the City of Saratoga Springs, submitted by Kevin Thurman, City Attorney, received October 9, 2012.

Background

J. Thomas Homes, LLC owns a portion of "The Benches," a large residential and business development in Saratoga Springs, near the western shore of Utah Lake. The City of Saratoga Springs originally approved The Benches in 2004, and construction of the residential areas has progressed since then. J. Thomas Homes purchased "Phase 8" of The Benches, intending to complete that phase. Phase 8 includes 30 residential lots and about 6 acres of open space. Most of the open space is in a large "boot shaped" parcel, and the remainder is in two small parcels in middle of the residential lots.[1]

The Benches development is governed by a Master Development Agreement, which was signed by the City and the original developer in August of 2004. A "Subdivision Development Agreement," governing Phase 8 specifically, was signed by the original developer and the City in

[1] It is not clear from the materials provided for this Opinion, but the smaller parcels appear to be part of a series of small parcels connecting the larger park area with another large park in a different part of The Benches development. All of the parcels in the series are separated by public streets, and may be part of storm drain system, because the other park area is also designated as a retention pond. The park area in Phase 8 is not designated as a retention pond in the information provided.

February of 2006. J. Thomas Homes is subject to both agreements, as the owner of Phase 8.[2] The Master Development Agreement states that The Benches would eventually include 419 single-family homes, plus commercial and business properties.[3] The Agreement allows the developer to reduce the minimum lot size by 10% (from 10,000 square feet to 9,000 square feet), providing more lots that would normally be allowed for that area.[4] The developer committed to install various improvements, including parks and open space. The agreement specified the amount of open space, and required completion of at least 9.31 acres of parks and open space (out of 18.5 total) with the development of the first six phases, including what became known as Phase 8.[5] A map attached an exhibit concerning parks and open space includes two labels stating "[t]o be developed with the first 140 lots."[6] Both labels are located near large park areas, including the "boot shaped" parcel in Phase 8. A third label indicates another large park area "[t]o be developed with Phase 5." (*See* Master Development Agreement, Saratoga Springs and Rindlesbach Construction, Inc., dated August 17, 2004, Exhibit E-4).[7]

After the Master Development Agreement was approved, the City rezoned the area to "R-1," to allow The Benches development. Construction on the development began, and several residential lots were completed and sold. In February of 2006, the City and the developer of The Benches entered the "Subdivision Development Agreement," which specifically applies to Phase 8. The Subdivision Development Agreement did not materially alter the terms of the Master Development Agreement, but required the developer to post a performance bond to fund completion of public improvements if the developer failed to finish them. The Subdivision Agreement also provided that "[t]he Subdivision Improvements and all off-site improvements . . . must be completed before the City will issue and building permits or certificates of occupancy." (Subdivision Development Agreement, Saratoga Springs and Rindlesbach Construction Inc., dated February 17, 2006, ¶ 1). The original developer evidently posted the performance bond, which includes about $521,600.00 for park landscaping.

Development of Phase 8 has been delayed for several years because the required public improvements (including the parks) were not completed. The City states that it has initiated the process to obtain the bond money, but that process is expected to take some time. J. Thomas Homes purchased Phase 8, and applied for building permits, but the City refused to grant any permits until all required improvements were completed and accepted. Based on the information provided for this Opinion, the only improvement that needs to be completed is the park, although it appears that the park properties have been dedicated to the City.

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[2] Both agreements include assignment clauses.
[3] The City also reserved water and sewer capacity for The Benches.
[4] At the time the Master Development Agreement was approved, the minimum lot size was 10,000 square feet.
[5] The area that would become Phase 8 is identified in the Master Development Agreement as Phase 3-2. The designation was changed later. Phase 8 contains about 1/3 of the total open space required for The Benches.
[6] The lots in Phase 8 are among the "first 140 lots" scheduled to be developed.
[7] The information provided for this Opinion indicates that the City requires 15% of a new development to be dedicated as parks or open space. The open space dedicated for The Benches totals 18.5 acres, which is about 5.1 acres less than the required 23.68 acres (based on the 15% requirement). It is not clear if the City will demand the additional acreage from other phases of the development.

J. Thomas Homes argues that it should not be responsible to develop the parks in Phase 8 alone, because the cost would impose too great a burden on the 30 lots to be developed. The City points to the agreements, specifically the Subdivision Development Agreement, which explicitly states that no building permits may be issued until all improvements have been completed. The City notes that J. Thomas Homes is obligated by those agreements, and that they have also benefitted from them. The property owner also argues that the City ignored the previous developer's failure to complete the improvements, and has thus waived its right to enforce the agreements.

Analysis

I. The Developer Cannot be Obligated by the City to Dedicate or Construct More Than Its Fair Share of the Improvements.

A. A Development Agreement May Impose Development Controls, and Require Dedication of Public Improvements, but Only Within Constitutional and Legal Limits.

Local governments may enter development agreements with developers and private property owners to control the use and development of property.[8] Like all governmental activity, however, development agreements must operate within statutory and constitutional limits:

> Local governments, as subdivisions of the State, exercise those power granted to them by the State Legislature, . . . and the exercise of a delegated power is subject to the limitations imposed by state statutes and state and federal constitutions. A state cannot empower local governments to do that which the state itself does not have authority to do.

State v. Hutchinson, 624 P.2d 1116, 1121 (Utah 1980); *see also Price Development Co. v. Orem City*, 2000 UT 26, ¶ 19, 995 P.2d 1237, 1245. As a corollary, a local government cannot do indirectly what it is prohibited from doing directly.

> [L]ocal government [is given] great latitude in creating solutions to the many challenges it faces, unless the action is arbitrary, or is directly prohibited by, or is inconsistent with the policy of, the state or federal laws or the constitutions of [Utah] or the United States.

Price Development, 2000 UT 26, ¶ 10, 995 P.2d at 1243 (quotations omitted).[9] Government actions must yield to constitutional provisions in particular. Our state and national constitutions provide the framework for our government's organization, and define the limits of our government's power. "The purpose of a constitution is to provide an orderly foundation for government and to keep even the sovereign within its bounds. Therefore, [governmental] power

[8] *See* UTAH CODE ANN. §§ 10-9a-102(a); 17-27a-102(a) (Development agreements included among authorized actions to control the use and development of land, "unless expressly prohibited by law.")
[9] *But see Price Development*, 2000 UT 26, ¶ 20, 995 P.2d at 1245 (Governments may accomplish objectives through lawful alternatives).

itself must be exercised within the framework of the constitution." *Colman v. Utah State Land Board*, 795 P.2d 622, 635 (Utah 1990) (*quoting Marbury v. Madison*, 5 U.S. 137 (1803)). This limitation applies to any government action, including development agreements. "The exercise [of a local government's planning] power must conform with [state statutes] even if embodied in a contract; a developer and a [local government] cannot do by contract what the statute prohibits." *Toll Brothers, Inc. v. County of Burlington*, 944 A.2d 1, 18 (N.J. 2008).

Thus, as long as a development agreement is entered voluntarily with consideration negotiated at arms length, and is otherwise legal, it is valid and enforceable. However, government may not use a development agreement to exceed its constitutional authority. In a development agreement, the developer can obligate itself to dedicate property or construct improvements in exchange for consideration. However, when government requires a developer to dedicate property beyond the developer's legal or contractual obligation to do so, it runs afoul of those constitutional provisions—even if it is doing so under the umbrella of a development agreement.

B. Because the Ownership Circumstances Have Changed, Reevaluation of the Obligations Required by the Development Agreements Is Necessary.

The original developer of The Benches agreed to construct and dedicate a number of public improvements, including several acres of parks. The City of Saratoga Springs granted some concessions to the developer, including a reduction in minimum lot size, and a guarantee of water and sewer service.[10] Thus, the developer of The Benches has validly gained both rights and obligations under the Development Agreements.[11] The parties acknowledge that the current owner of Phase 8, J. Thomas Homes, succeeded to the rights and obligations of those Agreements. Since J. Thomas Homes has only the right to develop Phase 8 (a fraction of the entire Benches Subdivision), it follows that J. Thomas Homes has succeeded to a like fraction of the obligations under the Development Agreements. Those who have had or will have the right to develop the remainder of the Benches likewise have had or will have a portion of the obligation to perform under the Master Development Agreement.

Thus J. Thomas Homes has some obligation under the Development Agreements to provide dedications and improvements to the park property. However, requiring J. Thomas Homes to provide all of the improvements to the park properties is an attempt to obligate the developer to provide improvements and meet obligations that are another's responsibility. Because J. Thomas Homes only purchased a portion of the original development, reevaluation of the obligation is required to ensure that the developer is being required to provide only its fair portion of the improvements. "[I]n a general sense concerns for proportionality animate the Takings Clause . .

[10] The City also states that it amended its general plan and rezoned the property to fulfill its obligation under the Master Development Agreement. There is no dispute that the zoning change was implemented; however, it is problematic because a city may not bargain away its zoning authority. *See Sandy City v. Salt Lake County*, 827 P.2d 212, 221 (Utah 1992) (Zoning authority cannot be delegated).

[11] This Opinion does not attempt to evaluate the respective costs and benefits of this exchange. For the purposes of this Opinion, it will be presumed that the dedications required by the Master Development Agreement were fair and just.

.." *Monterey v. Del Monte Dunes at Monterey, LTD*, 526 U.S. 687, 702 (1999).[12] The Federal and Utah constitutions both mandate that the property owner only be required to contribute a fair share to public improvements, which reflects the impact attributed to the owner's development. Since the ownership of Phase 8 has changed, and since J. Thomas Homes owns only a portion of the entire property obligated to build the park, the requirements placed upon J. Thomas Homes must be reconsidered.

The decision of the New Jersey Supreme Court in *Toll Brothers* is instructive. In that case, the property owners had entered a development agreement governing a large commercial development. After the agreement was signed and the project duly approved, economic conditions forced the developer to scale back the development. The county which had agreed to the project insisted that the developer was obligated to construct all of the public improvements listed in the development agreement, despite the economic slowdown. The New Jersey Supreme Court disagreed, and held that forcing the developer to comply with the agreement was not fair, and would require the developer to bear a disproportionate share for the cost of the public improvements. Even though the developer voluntarily and knowingly signed the development agreement, takings analysis forced a reevaluation of the exactions. *Toll Brothers*, 944 A.2d at 13-14. The court emphasized that "[t]he fundamental requirement . . . is that the *end result* must be equitable." *Id.* (emphasis in original).[13]

In this case, the original developer and the City signed the Master Development Agreement, in which the City granted some concessions, and the developer agreed to construct and dedicate parks to serve all of The Benches development. Later, the same parties approved the Subdivision Development Agreement, which specifically governs Phase 8. The latter agreement did not change the commitment to dedicate park land, including a large portion located in Phase 8. The original developer proceeded with construction on other phases, but sold Phase 8 to J. Thomas Homes, who also succeeded to the obligations of the two agreements. Phase 8 represents less than 10% of the total homes proposed for The Benches, and about 21% of the "original 140 homes" to be constructed along with the parks. Like the developer in *Toll Brothers*, it would not be fair for J. Thomas Homes to bear the full cost of the park, because the cost is disproportionate to the impact of the 30 homes proposed for Phase 8. The two agreements do not exempt the dedication from the protections extended by the Takings Clause.

[12] *See also Armstrong v. United States*, 364 U.S. 40, 49 (The Takings Clause "was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.")

[13] Analysis under the Takings Clause "considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts." *Monterey*, 526 U.S. at 703 (citing *Dolan*, 512 U.S. at 385); *see also Call v. West Jordan*, 614 P.2d 1257, 1259 ("[I]f the burden cast upon the subdivider is reasonably attributable to his activity, then the requirement [of dedication or fees] is permissible. . . Insofar as the establishment of a subdivision within a city increases the recreational needs of the city, then to that extent the cost of meeting that increase may reasonably be required of the subdivider.") (citations, alterations and emphasis omitted).

This does not mean that the City must abandon the park, only that the costs must be fairly allocated amongst the current owners of the original subdivision, including J. Thomas Homes.[14] It is also noteworthy that the funds for the park are already available, because the original owner posted a bond for completion of public improvements in Phase 8, including $521,600 for park landscaping. It appears that the City is entitled to the bond money devoted to the park improvements, because the improvements have not been installed.[15] Since the funds for the park improvements are available, the City may finish the park as anticipated.[16]

To conclude, the development agreement could validly require the developer to improve and dedicate land for a park. However, the conditions required by development agreements are still subject to constitutionally-required analysis to protect the rights of property owners. Because ownership of the property has fundamentally changed since the development agreements were approved, it may be necessary to reevaluate the exactions in order to preserve fairness and equity. The owner of Phase 8 should only be obligated for its fair portion of the park requirement, and any benefits received should offset the cost to comply with the exaction. It appears that the City has adequate resources to finish development of the park property, and should work with the owner to reach an acceptable compromise.

II. The City May Require That the Park be Completed Before Building Permits Are Issued.

The City may require that the park improvements be completed before it issues building permits for Phase 8. The Subdivision Development Agreement specifically provides that "[t]he Subdivision Improvements and all off-site improvements required to provide services to the Subdivision must be completed before the City will issue any building permits or certificates of occupancy." (Subdivision Development Agreement, Saratoga Springs and Rindlesbach Construction Inc., dated February 17, 2006, ¶ 1). That agreement is still in effect, and the City may therefore implement that provision.

J. Thomas Homes argues that the City has waived any rights to enforce the agreement, because it accepted alternative performance under other terms of the two agreements. Such a determination is beyond the authority of the Office of the Property Rights Ombudsman, however, so this Opinion declines to consider it. Nevertheless, in accordance with the analysis above, the City may not do by contract what it cannot legally do otherwise. Thus, even though the Development Agreements permit the City to withhold building permits until the park improvements are complete, the City may not rely on this portion of the Development Agreements to obligate the

[14] The materials submitted for this Opinion do not indicate who owns the other phases of The Benches. Whoever the owner is, they should also be obligated by the terms of the Master Development Agreement, and should thus share in the costs of the park requirements.

[15] The Subdivision Development Agreement requires that all public improvements (including, presumably, the park), be completed within one year after the plat was recorded. If the improvements were not completed, the City may access the bond money to fund completion. It is not clear if the bond represents only the fair costs attributed to Phase 8, or if it reflects the impact of the entire development. In either case, the money for the park is available, and probably includes the fair cost allocated to Phase 8.

[16] As an alternative, J. Thomas Homes could begin completion of the park improvements, with the understanding that the City would use the bond proceeds to reimburse them for any costs over and above their fair share.

developer to pay for all of the improvements to the park beyond the developer's share. Once the developer is willing and able to perform its portion of the park improvements, the City must cooperate with the developer in completing the park so that it can issue building permits to the developer.

The Subdivision Development Agreement also provides that the City is entitled to the bond proceeds to complete any public improvements that are not finished. Those funds could have been used some time ago, after it became clear that the park would not be finished in a timely manner. It is hoped that the City and the owner may use the resources available to them to reach an acceptable compromise which allows development of Phase 8 to proceed, as well as completion of the park. There has already been a significant delay in construction, and the parties should work together to complete the project.

Conclusion

Our Federal and State Constitutions guarantee rights to individual citizens and property owners. These guarantees are paramount, and government authority must yield to constitutional provisions. Even development agreements—entered voluntarily and knowingly by property owners—must pass constitutional muster. If the essential circumstances of an agreement change, it may be necessary to reevaluate any conditions required by the agreement, in order to preserve the constitutional rights of the parties.

In this case, an essential circumstance forming part of the basis of two development agreements has been radically changed: The current owner of Phase 8 owns far less than the original signer of the two agreements. Fairness and justice dictate that the current owner's obligation for the park property be reassessed, so that the current owner pay only the fair share attributable to the development of Phase 8, and not be burdened with the costs allocated to the entire subdivision. The developer of the other areas of The Benches should bear a proportionate share of the costs, because the park will serve the entire subdivision. The performance bond established pursuant to the agreements may represent the fair costs attributable to the entire subdivision. The City may use the bond money to complete the park.

The Subdivision Development Agreement expressly states that all public improvements are to be completed prior to construction of homes, and that the City is entitled to withhold building permits until the improvements are completed. This places a burden upon the developers, and may delay construction of the development even further, but the City must cooperate in completing the park when the developer is willing and able to perform its share of the improvements, so that it can issue building permits to the developer.

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 Utah 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 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 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 be awarded 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:

Mark Christensen, City Manager
City of Saratoga Springs
1307 N. Commerce Drive, Ste. 200
Saratoga Springs, UT 84045

On this _____ day of December, 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