

Advisory Opinion #136

Parties: Highland City

Issued: December 26, 2013

TOPIC CATEGORIES:

- D: Exactions on Development
- J: Requirements Imposed on Development
- Other Topics (v): Interpretation of Ordinances

A local government may allow voluntary dedications from developers for open space or parks, as long as the developer receives a fair exchange in the form of development concessions or other incentives. Since the dedications are voluntary, they are not exactions, and the property may be sold or disposed of in the same manner as other property belonging to the local government.

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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ADVISORY OPINION

Advisory Opinion Requested by: Highland City

Local Government Entity: Highland City

Applicant for the Land Use Approval: Various Developers

Type of Property: Residential

Date of this Advisory Opinion: December 26, 2013

Opinion Authored By: Elliot R. Lawrence
Office of the Property Rights Ombudsman

Issues

Is open space dedicated in exchange for density bonuses, as provided by ordinance and stated in a development agreement an exaction?

May a local government sell or transfer land dedicated in exchange for density bonuses?

Summary of Advisory Opinion

The exercise of governmental powers is always subject to statutory and constitutional limits. Although local governments enjoy broad discretion to carry out their objectives, they cannot exceed the authority granted to them by the state legislature, and they may not exceed the limits proscribed by statute or by the state and federal constitutions. These restrictions remain in place when a government entity enters an agreement with a private party. The statutory and constitutional framework that defines and restricts governmental authority is essentially incorporated into any agreement.

The City's ordinances allowing developers to dedicate open space in exchange for development concessions are valid, and carry out a legitimate government objective. As long as the developers receive development rights in a fair exchange for the property, the dedications should be constitutionally acceptable. Because the dedications are voluntary, they are not exactions, and the exaction statute in the Utah Code does not apply. The City may therefore sell property dedicated under its ordinances in the same manner as it could sell other property.

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 Highland City, on October 4, 2013. A copy of that request was sent via certified mail to Shane Morris, a property developer referred by Highland City, at 1186 North 210 East, American Fork, UT 84003, the address provided by Highland City. The letter to Mr. Morris was returned to this Office on November 8, 2013 unopened. Mr. Morris' address was verified the Division of Corporations and sent via certified mail to Shane Morris at 1186 North 210 West, American Fork, Utah 84003. The letter to Mr. Morris was once again returned to this Office on December 9, 2013 as unclaimed.

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 Timothy G. Merrill, attorney for Highland City, received by the Office of the Property Rights Ombudsman, October 4, 2013.

NOTE: This Opinion was requested by Highland City to review its ordinances. This request was apparently made at the suggestion of homebuilders developing land in the City. No response to the request was received.

Background

This Opinion concerns ordinances adopted by Highland City allowing clustering or higher densities of residential units (*i.e.*, “density bonuses”) for developers who donate open space. The City has asked the Office of the Property Rights Ombudsman to evaluate (1) whether open space dedicated to the City as provided in these ordinances constitutes an exaction within the meaning of § 10-9a-508, and (2) if open space dedicated under the ordinances may be sold or transferred by the City.

Like most local governments, Highland City encourages development of parks or open spaces to enhance the City aesthetically, protect natural amenities such as wetlands or forested areas, and to provide recreational opportunities. Highland City has adopted an “open space” ordinance, applicable to its R-1-20 and R-1-40 zones, giving developers the option of dedicating open space in exchange for “clustering” residential density.¹ Following the criteria established in the ordinance, a developer may propose a subdivision plat showing clustered residences and providing areas dedicated for open space. The proposal would be considered as part of the normal plat approval process, and the City may reject the proposal. Dedicating open space in exchange for density clustering is at the option of the developer. Property designated as open space may be dedicated to the City, transferred to an approved private conservation organization, or owned by a homeowner’s association.²

The City’s Development Code also contains separate provisions allowing developers to receive density bonuses in exchange for open space.³ The ordinance establishes a point scale through which developers may “earn” additional density (that is, more homes per acre than the maximum allowed by the zoning ordinance) by dedicating open space. Points are based on the amount of open space dedicated. Additional points may be awarded by “enhancements,” which include such things as trails, “quality” natural areas, “view-sheds,” landscaping, and consistent architectural features within a development.⁴ Like the possible open space dedications in exchange for clustering, the dedication is voluntary, and is subject to approval by the City.⁵

The City’s ordinances spell out the criteria used to evaluate a proposed dedication in exchange for either clustering or density bonuses, as well as the procedure to approve a plat with dedicated open space. These criteria include consideration of the property’s value as open space, preservation of natural vegetation, potential for recreational uses, etc.⁶ The City indicates that it enters into agreements with developers to govern specific developments (including dedication of open space), but the ordinances do not require such agreements.

¹ See HIGHLAND CITY DEVELOPMENT CODE, §§ 5-4-401 to -409 (“Open Space Subdivision Option”). “Clustering” places homes in a smaller area than that allowed by the zoning ordinance. Under the City’s ordinance, the same number of homes could be built, but in a smaller area. This would allow developers an option to dedicate open space that may not be suitable for homes (such as steep slopes or wetland areas), while still constructing the same number of units.

² The property may remain in a natural state, or developed for recreational uses (such as public trails, etc.)

³ See HIGHLAND CITY DEVELOPMENT CODE, §§ 3-4801 to -4809 (“Open Space Density Bonus”). This is similar to approval for clustered development, but a developer could receive approval to build more units per acre. The provision is only applicable to the City’s R-1-40 zone (roughly 1 unit per acre).

⁴ See *id.*, § 3-4806(19). A “view-shed” refers to unobstructed views of natural areas.

⁵ The proposal would be approved by the City’s Planning Commission and the City Council, as part of the subdivision plat approval process.

⁶ See e.g., *id.*, § 5-4-407(1)(g) (“Evaluation Criteria”); and § 3-4807(1)(f) (“Evaluation Criteria”). A specific consideration is whether the open spaces dedicated will connect together, forming a network throughout the City. *Id.*, §§ 5-4-407(1)(f) and 3-4807(1)(d).

Analysis

I. The City May Accept Open Space in Exchange for Development Concessions, Subject to Statutory and Constitutional Limitations.

A. Government Authority is Always Subject to Statutory and Constitutional Limits

Although local governments enjoy broad latitude to carry out their objectives, that discretion is tempered by constitutional and statutory constraints. “Local governments, as subdivisions of the State, exercise those powers 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) (citation omitted). Thus, a local government must act within the statutory and constitutional framework that both defines and limits its authority.

When the State has granted general welfare power to local governments, those governments have independent authority apart from, and in addition to, specific grants of authority to pass ordinances which are reasonably and appropriately related to the objectives of that power, . . . [C]ourts will not interfere with the legislative choice of the means selected unless it is arbitrary, or is directly prohibited by, or is inconsistent with the policy of, the state or federal laws or the constitution of this State or of the United States.

Id., 624 P.2d at 1126.

These limits apply even when local governments enter contracts with private entities. The Utah Supreme Court has explained that while local governments have broad authority to contract with private interests, they may not violate statutory or constitutional provisions. *See Price Development Company, LP v. Orem City*, 2000 UT 26, ¶ 23, 995 P.2d 1237, 1245. *Price* concerned agreements to refund tax revenue to retailers in exchange for commitments to remain as tenants in the University Mall.⁷ The agreements were challenged as violating constitutional and statutory restrictions on collection and expenditure of local taxes. The court held that the agreements did not exceed any constitutional or statutory limits, but that such limits could not be ignored. As an incentive to the retailers, Orem proposed to pay them an amount equal to a portion of the sales taxes collected each year.⁸

The court rejected an argument that Orem was effectively granting an illegal tax exemption to the retailers. *Price Dev. Co.*, 2000 UT 26, ¶ 18, 995 P.2d at 1245. The court noted that the

⁷ University Mall is located in Orem. The agreements were sparked by the construction of a new shopping mall in Provo. Orem feared that major tenants would move from University Mall to the new shopping center in the neighboring city, luring shoppers away and reducing the City’s sales tax revenue.

⁸ The payment was capped according to a formula established in the agreement. The money was to help fund improvements to the mall as well as a marketing campaign.

incentive was not a tax exemption, but payments from Orem’s tax revenue. “Local governments must abide by the explicit limitations the constitution and statutes place on [them], but if they can find an *alternative permissible* way to achieve the same end, [a court] will not stand in their way.” *Price Dev. Co.*, 2000 UT 26, ¶ 23, 995 P.2d at 1245 (emphasis added). The court reasoned that once the taxes were collected, Orem could spend the revenue and improve economic conditions by retaining major retailers. Tax incentives are often used to foster private economic investment. There was no statutory or constitutional violation, essentially because Orem had discretion over how to spend its tax revenue. The city had thus found an alternative way to achieve the same result as a tax exemption.

The court contrasted Orem’s incentive program with a tax exemption addressed in *Mountain States Telephone & Telegraph Co. v. Ogden City*.⁹ In that case, Ogden granted tax exemptions to utility franchises.¹⁰ The court held that Ogden did not have authority to grant such exemptions, and so its scheme was invalidated. In contrast, Orem’s incentive program did not grant illegal exemptions, but spent city revenue for an acceptable purpose. Orem’s agreements validly spent public revenue, while Ogden’s exemptions were unauthorized uses of public authority.

A government entity may not escape statutory or constitutional limits simply by signing an agreement. Government is always subject to limits imposed by statute, and especially to limits imposed by state and federal constitutions. *See Hutchinson*, 624 P.2d at 1121.¹¹ Those limits are, in essence, incorporated into any agreement entered by a public agency.¹² Although local governments have broad latitude to enter and execute development agreements, they nevertheless do not cease to be public agencies when an agreement is signed.¹³

B. The City May Grant Development Concessions in Exchange for Open Space.

The City’s ordinances allowing developers to dedicate open space in exchange for development concessions are within the City’s authority. *See UTAH CODE ANN. § 10-9a-102(2)*.¹⁴ The City, however, is subject to statutory and constitutional provisions which protect property owners from

⁹ 26 Utah 2d 190, 487 P.2d 849 (1971).

¹⁰ The agreement allowed utility franchises to pay a 2% tax on gross revenue generated within the city in lieu of other taxes. *Mountain States*, 26 Utah 2d at 191, 487 P.2d at 849.

¹¹ *See also Toll Brothers v. County of Burlington*, 944 A.2d 1, 18 (N.J. 2008) (“The exercise of . . . power must conform with the [New Jersey Municipal Land Use Law] even if embodied in a contract; a developer and a municipality cannot do by contract what the statute prohibits.”)

¹² *See Building Industry of Central California v. City of Patterson*, 90 Cal. Rptr. 3d 63, 75 (Cal. Ct. App 2009) (*amended portions at 2009 Cal. App. LEXIS 399*). The California Court of Appeals held that “constitutional scrutiny” prohibiting extortionate fees and exactions applied to an “in lieu” fee established by a development agreement. That scrutiny limited governmental authority and was “incorporated into the Development Agreement.”

In a sense, limits on parties are incorporated into any contract. For example, a person cannot enter a valid contract to carry out an illegal act, such as the sale of stolen goods; nor may a party enter a contract if performance is impossible; such as the sale of property which does not belong to the party. A contract does not make the act valid, and the limitations are at least implied in a contract, if not expressly stated. In a similar manner, a government entity may not enter a contract to do something that would violate the entity’s authority.

¹³ “A municipality cannot act as an individual does. It must proceed in conformity with the statutes, or . . . the common law, by ordinance or resolution or emotion. Especially this is so where real property is concerned.” *Toll Bros.*, 944 A.2d at 18 (citations and original alterations omitted).

¹⁴ “Open space” listed as one of the areas in which municipalities may regulate.

excessive fees and requirements. Thus, when it carries out its ordinances, and allows developers to dedicate open space in exchange for additional density or clustering, the City must act within the framework of regulations protecting private property rights.

This Opinion does not address a specific proposal from any specific developer to dedicate open space, and so this analysis is limited to general terms only. The City's ordinances anticipate a voluntary exchange of open space for development concessions. This indicates that a developer receives value (in the form of the development concessions), and that the City also receives value (in the form of the open space). As long as the exchange is voluntary and is a fair exchange of value, it should not cross any constitutional barriers.¹⁵

II. Because the Open Space Dedication are Voluntary, They Are not Exactions.

A. Voluntary Dedication Are Not Exactions

Because developers have the option to dedicate open space to take advantage of the City's ordinances, the dedications are not exactions. "A development exaction is a *government-mandated* contribution of property imposed as a condition of approving a developer's project." *B.A.M. Development, L.L.C. v. Salt Lake County*, 2012 UT 26, ¶ 16 (emphasis added). If a dedication is voluntary, it is not "government-mandated," and cannot be an exaction. On the other hand, a dedication that was required in order to obtain development approval would be mandatory, and would therefore be an exaction. Local governments may require exactions, which are governed by language in the Utah Code.¹⁶ However, since a voluntary dedication cannot be an exaction, the statute would not apply.

Although a voluntary dedication is not an exaction, it still must be fundamentally fair to the developer. This comports with the general principles of fairness which underlie takings and exactions law, which is to "bar 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Dolan v. Tigard*, 512 U.S. 374, 384 (1994).¹⁷ In order to satisfy constitutional scrutiny, the dedication must not be extortionate. As has already been discussed, as long as the development concessions are a fair exchange for the open space, the dedications would likely satisfy constitutional requirements.

¹⁵ See generally *Price*, 2000 UT 26, ¶ 27, 995 P.2d at 1247. In *Price*, the court stated that when public property is transferred, the public entity must receive fair value. Following a similar approach, if the City concedes development rights, it should also receive fair value for those rights. If necessary, an appraisal may determine the values of the development rights and open space.

¹⁶ See UTAH CODE ANN. §§ 10-9a-508 and 17-27a-507. These sections adopt the *Nollan/Dolan* "rough proportionality" analysis, and also regulate other aspects of exactions. *See B.A.M. Development v. Salt Lake County*, 2006 UT 2, ¶ 46, 128 P.3d 1161, 1170.

¹⁷ The Utah Constitution provides similar protections. *B.A.M. Development*, 2006 UT 2, ¶ 31, 128 P.3d at 1168.

B. The City May Sell Land Dedicated as Open Space.

Because the exaction statute does not apply to voluntary dedications, nothing restricts the City from selling open space given in exchange for development concessions. The exaction statute includes a restriction on property acquired as an exaction:

- (4)(a) If a municipality plans to dispose of surplus real property that was acquired under this section and has been owned by the municipality for less than 15 years, the municipality shall first offer to reconvey the property, without receiving additional consideration, to the person who granted the property to the municipality.
- (b) A person to whom a municipality offers to reconvey property under Subsection (4)(a) has 90 days to accept or reject the municipality's offer.
- (c) If a person to whom a municipality offers to reconvey property declines the offer, the municipality may offer the property for sale.
- (d) Subsection (4)(a) does not apply to the disposal of property acquired by exaction by a community development and renewal agency.

UTAH CODE ANN. § 10-9a-508(4). With some exceptions, this statute requires that any property acquired as an exaction must be offered back to the original owner.

Since the exaction statute does not apply, the City is free to sell any open space dedicated under its ordinances. The City is not obligated to offer the property back to the original dedicator. It may sell or transfer the property in the same manner as any other property not subject to the restrictions of § 508(4).¹⁸ Additional restrictions may apply to the future and ongoing use of such property, such as whether it must remain open space after sale. Those restrictions would depend on the types of agreements or restrictions upon the property in place at the time of dedication.

Conclusion

In all actions, government agencies are subject to statutory and constitutional provisions. Local governments have broad discretion to carry out their objectives, but their authority is defined by state statute, as well as constitutional provisions. A local government cannot do what is prohibited by law. This restriction applies when governments enter voluntary agreements with private parties. A local government does not cease being a public entity simply because it enters a contract. The statutory and constitutional framework that limits governmental authority should be considered as being incorporated into agreements entered by governmental agencies.

¹⁸ The City would be subject to other statutes and ordinances governing the sale or disposal of its property.

The City's ordinances providing that developers may dedicate open space in exchange for development concessions is a valid exercise of the City's authority, and carries out a legitimate governmental objective. As long as the property owner receives a fair exchange for the open space, it should be constitutionally acceptable. Because the dedications are voluntary, and not mandatory, they are not exactions, and the exaction statute in the Utah Code does not apply. Thus, that statute places no restrictions on the City's ability to sell property that is dedicated as open space under its ordinances.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in Utah Code § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Wini Jensen, City Recorder
Highland City
5378 W. 10400 North
Highland, UT 84003

On this _____ Day of December, 2013, 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