

Advisory Opinion #111

Parties: Paras Investments and West Valley City
Issued: February 16, 2012

TOPIC CATEGORIES

**Exactions on Development
Nonconforming Uses and Noncomplying Structures
Interpretation of Ordinances**

Exactions must satisfy rough proportionality analysis. The analysis must be based upon the interests that justified the exaction. Signs identifying a business enjoy First Amendment protections, and a regulation that depends upon the content of the sign must be narrowly tailored. A noncomplying structure may be allowed to continue.

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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: Nick Paras

Local Government Entity: West Valley City

Applicant for the Land Use Approval: Paras Investments, LTD
John Paras Furniture

Type of Property: Retail Store

Date of this Advisory Opinion: February 16, 2012

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

Issues

- I. May a local government require improved landscaping, including dedication of public walkway, as a condition of approval for a new building façade?
- II. May a local government require removal of a noncomplying sign if the owner alters it?

Summary of Advisory Opinion

- I. The landscaping requirements are exactions, which are governed by § 10-9a-508 of the Utah Code. Exactions are justified by the impacts attributed to new development, not on those associated with existing land uses. The landscaping requirements must therefore be justified by the aesthetic impacts caused by the new façade, and not the existing store.
- II. The sign identifying the business is protected by the First Amendment's guarantees of free speech. A local government has some authority to regulate the physical characteristics and placement of signs. A regulation that depends upon the content of the signs is only valid if a compelling public interest requires distinguishing between differing signs, and if the regulation is narrowly tailored to promote the compelling public interest.

Property owners have the right to continue use of a legal noncomplying structure, and local government authority over remodeling, reconstruction, or alteration must respect those

rights. The terms of the City's ordinance requiring compliance must be interpreted as a whole, and in the context in which they were used. According to the context of the ordinance, the term "alter" means a substantive change to the sign itself, and not merely a cosmetic revision of the sign's message.

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 Nick Paras on August 17, 2011. A copy of that request was sent via certified mail to Sheri McKendrick, West Valley City Recorder, at 3600 Constitution Blvd., West Valley City, Utah 84119. The return receipt was signed and delivered on August 23, 2011, indicating it had been received by the County.

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 Nick Paras, on behalf of John Paras Furniture, received by the Office of the Property Rights Ombudsman, August 17, 2011.
2. Response submitted on behalf of the City by Claire Gillmor, Deputy City Attorney, received September 13, 2011.
3. Reply submitted by Wade R. Budge, attorney for John Paras Furniture, received September 30, 2011.
4. Reply submitted by the City, received October 21, 2011.
5. Letter from Nick Paras, received October 28, 2011
6. Reply submitted by Wade R. Budge, received November 2, 2011
7. Reply submitted by the City, received November 10, 2011
8. Reply submitted by Wade R. Budge, received November 18, 2011
9. Sections of the West Valley City Municipal Code.

Background

John Paras Furniture (“John Paras”) operates a retail furniture store located at 3565 South Redwood Road in West Valley City. It has operated at that location for many years, leasing a building and a five acre parcel owned by Gus Paras. According to John Paras, the company proposes to improve the exterior of the store, but it will not make any structural changes to the building.¹ In addition to the changes to the building façade, John Paras also hopes to change the appearance of a pole sign located in front of the building. The changes to the sign will be consistent with the new façade. The company states that it began discussions with the City about the proposed changes in 2006.

According to the City, the scale of improvements sought by John Paras triggers landscaping requirements established by Chapter 7-13 of the West Valley City Code, “Standards for Landscaping Along High-Image Arterial Streets.” (*hereafter* “Landscaping Requirement”). That chapter requires landscaping to “enhance the aesthetic perception of West Valley City by improving the visual image of those streets which serve as primary access into and through the City.” WEST VALLEY CITY MUNICIPAL CODE, § 7-13-101. Redwood Road and 3500 South are both identified as High Image Arterial Streets.² The requirements are imposed when building permits are issued not only on new development but also on “substantial modification to an existing site or structure in which the estimated construction costs exceeds \$50,000.” *Id.* § 7-13-103(1)(c). The improvements proposed by John Paras exceed \$150,000.

The City’s standards require a 30-foot wide strip with landscaping, a paved right-of-way for pedestrians and bicycles, and street lights.³ The landscaping includes trees spaced an average of 30 feet apart. The strip would remain privately owned, but the right-of-way would be dedicated to the City as an easement. *See Id.*, § 7-13-204(4). The property owner would be responsible for maintaining the landscaping, and the City would assume responsibility for the street lighting. *Id.*, § 7-13-205.⁴ Finally, the City Code provides that the landscaping standards may be adjusted if “a full 30’ width is not available.” *Id.*, § 7-13-204(1). Because the John Paras parcel has unique circumstances, the City proposed reducing the required width down to 20 feet.⁵

In the course of their discussions, the City also proposed to reduce the amount of required landscaping to the area along the street in front of the building, rather than the entire parcel. John Paras maintains that the reduced requirements would still cost over \$100,000. The company also feels that it should not be required to install the landscaping and dedicate a pedestrian right-of-way to the City, because it is only installing a new building façade, not remodeling or altering the building itself. Furthermore, John Paras contends that the new façade will not create any new impacts on vehicular or pedestrian traffic, so the City cannot justify requiring new landscaping and

¹ The company proposes to remove old awnings, and install a façade with stucco and new signage. John Paras has made similar changes to its other stores.

² John Paras Furniture is located near the intersection of Redwood Road and 3500 South.

³ *See* WEST VALLEY CITY MUNICIPAL CODE, §§ 7-13-201 to -206 (Landscape standards for 3500 South and Redwood Road). The City states that the John Paras parcel currently has a five-foot-wide landscaping strip.

⁴ The City Code does not specifically state that the City would have responsibility for the right-of-way, but it would be dedicated to the City after it is installed by the property owner.

⁵ The City noted that the John Paras building represents about 35% of the total street frontage of the property. The remainder is parking and driveway access. Also, similarly-situated businesses have 20-foot landscaping strips.

the right-of-way dedication. As of the date of this Opinion, the City and John Paras have not reached any agreement on the landscaping.

Both parties agree that the City's Landscaping Requirement is an exaction, which must satisfy § 10-9a-508(1) of the Utah Code. The City states that it because John Paras has not formally applied for approval of any landscaping plan, it has not calculated whether the required improvements would satisfy the state code. John Paras counters that until the City shows that the proposed changes to the building façade create a new impact on City services, the landscaping requirements cannot be imposed at all.

The City also requires that the pole sign located on the property be removed and replaced with a "monument" sign.⁶ Section 11-5-106 of the City Code allows pole signs, but only on parcels of 10 acres or more. *Id.*, § 11-5-106(10). The John Paras property is less than 10 acres, so the pole sign is not allowed by the current ordinance.⁷ The City's ordinance requires compliance with its current sign standards if a noncomplying sign is changed. "A nonconforming sign shall not be altered, reconstructed, raised, moved, placed, extended, or enlarged, unless said sign is changed so as to conform to all provisions of [Title 11 of the West Valley City Municipal Code]. All alterations shall require conformance to the provisions of this Ordinance including any physical changes to the sign panel or the sign cabinet itself." *Id.*, § 11-7-101.

John Paras argues that since the pole sign is entitled to nonconforming status, state law requires that the City allow the sign to remain standing. The City counters that it is not prohibiting John Paras from installing a sign, but that it is entitled to prohibit the expansion of the sign as a nonconforming use. John Paras states that it is not increasing the size or height of the sign, only changing its appearance to match the new building façade. The company objects to a monument sign because of the increased building cost, and because it would be less visible. John Paras also feels that language in § 11-7-101 distinguishing between single-tenant and multi-tenant signs is impermissible under the Free Speech protections afforded by the Federal and State Constitutions.

⁶ A monument sign is a freestanding sign with its base on the ground, with no visible support structure. *See id.*, § 11-1-104(31). Monument signs may not be taller than six feet for a single tenant, or seven feet for multiple tenants on a parcel. *See id.*, § 11-5-103 (regulations for height, area, and setback of monument signs).

⁷ Apparently, the pole sign was installed before the limitation listed in § 11-5-106(10) was enacted, otherwise it would be illegal. John Paras believes that the sign is nonconforming. The City notes that the sign has not officially been determined to be nonconforming, but it "would likely be considered a non-conforming structure." Letter from Claire Gillmor, Deputy City Attorney for West Valley City (September 9, 2011) at 2. For the purposes of this Opinion, the sign will be considered to be a nonconforming use subject to § 11-7-101 of the West Valley City Code.

Analysis

I. The Landscaping Requirement is an Exaction, Which Must Satisfy Rough Proportionality Analysis in Order to be Valid.

A. *The Landscaping Requirement is an Exaction.*

There does not appear to be much disagreement that the Landscaping Requirement is a type of development exaction, which is analyzed according to the rough proportionality analysis found in § 10-9a-508 of the Utah Code. Local governments may require exactions from development, provided the requirements comply with established standards. “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. P*”). 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.

Usually, exactions are imposed prior to the issuance of a building permit or zoning/subdivision approval. . . . Development exactions may take the form of: (1) mandatory dedication of land . . . as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees and (4) impact fees.

Salt Lake County v. Board of Education of the Granite School District, 808 P.2d 1056, 1058 (Utah 1991) (citation omitted). The Landscaping Requirement is an exaction, because it is imposed by the City as a condition of approval for John Paras’s proposed improvements. Moreover, the Requirement includes an easement dedicated to the City, as well as installation of street lighting. In order to be valid, the Landscaping Requirement must satisfy the rough proportionality analysis of § 10-9a-508.

B. *The City Bears the Burden of Proving That the Exaction is Valid.*

The City must show that the Landscaping Requirement satisfies rough proportionality analysis, and is permissible under § 10-9a-508. “[T]he city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Dolan*, 512 U.S. at 391. The Supreme Court acknowledged that usually “in evaluating most generally applicable zoning regulations, the burden properly rests upon the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights.” *Id.*, 512 U.S. at 391, n.8. However, in exactions analysis, the Court held that it was appropriate to shift the burden to the government. *Id.*⁸

Therefore, the City must show that the Landscaping Requirement satisfies § 10-9a-508 before it can be imposed as a condition on John Paras’s proposed façade improvement. It is not absolutely necessary for the City to conduct a separate analysis anytime new development is proposed, although individualized proof may be appropriate in some circumstances. As long as the City has

⁸ The Utah Supreme Court adopted the same rule. *B.A.M. I*, 2006 UT 2, ¶¶ 39-40, 128 P.2d at 1170.

some rational basis showing that its exaction is roughly proportional to the impact created by the new development, its burden of proof should be satisfied.⁹

C. The Landscaping Requirement Must Satisfy Rough Proportionality Analysis.

There is no question that the City must show that the Landscaping Requirements satisfy the “rough proportionality” test. In 2005, the Utah Legislature enacted § 10-9a-508 of the Utah Code, which authorizes cities to impose exactions on development, within established limits:

(1) A municipality may impose an exaction or exactions on development proposed in a land use application . . . if:

(a) an essential link exists between a legitimate governmental interest and each exaction; and

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

UTAH CODE ANN. § 10-9a-508(1).¹⁰ Exactions analysis is required to implement constitutional protections for property owners.¹¹

1. An Exaction May Only be Imposed When Development Creates Additional Demand on Public Facilities or Services

The definition of “development” is a threshold matter that is particularly applicable to this Opinion. If the change to the building façade proposed by John Paras is not “development,” the City cannot impose an exaction at all. Exactions are warranted because of the impacts created by new development. The Utah Code defines “development activity” as “any construction or expansion of a building, structure, or use that creates additional demand and need for public facilities;” UTAH CODE ANN. 10-9a-103(8). Thus, construction or expansion of a building that does *not* create additional demand on public services is not “development.”

There has been no evidence that installing a new façade on the John Paras building will create any additional demands on public services. It has not been shown that the improvement itself will lead to any more demands on public facilities or services. John Paras notes that a similar installation

⁹ This Opinion recognizes that individual analysis of every proposed development is costly and impractical. Impact fee studies may provide a basis to support an exaction, even though they are not “individualized determinations.” Analysis of exactions should follow the factors established in *Banberry v. South Jordan*, 631 P.2d 899 (Utah 1981). (The *Banberry* factors were codified in the Impact Fees Act. See UTAH CODE ANN. §§ 11-36a-101 to -705.) *Banberry* also places the burden of proving the reasonableness of a required exaction on the local government. See *Banberry*, 631 P.2d at 903.

¹⁰ There is a corresponding statute applicable to counties found at § 17-27a-507 of the Utah Code.

¹¹ “[The] basic understanding of the [Takings Clause] makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. Thus, government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation.” *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987) (citation omitted).

at another store in its chain did not increase sales.¹² Without proof that the new façade will create additional need or demand for public facilities, the City cannot require an exaction.

2. Rough Proportionality Analysis Consists of Two Parts

The Utah Supreme Court observed that the “rough proportionality” analysis adopted in the Utah Code derives from the U.S. Supreme Court analyses in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). (See *B.A.M I*, 2006 UT 2, ¶ 41, 128 P.3d at 1170.) In those 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.¹³ This has come to be known as the *Nollan/Dolan* “rough proportionality” test, and that two-part analysis was codified in § 10-9a-508.

The Utah Supreme Court further honed the second prong of “rough proportionality” analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 (“*B.A.M. IP*”), which was a second appeal stemming from the same development project at issue in the earlier decision.¹⁴ The decision explained that rough proportionality analysis “has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent.” *B.A.M. II*, 2008 UT 74, ¶ 9, 196 P.3d at 603. The “nature” aspect focuses on the relationship between the purported impact and proposed exaction. The court stated that the approach should be expressed “in terms of a solution and a problem [T]he impact is the problem, or the burden which the community will bear because of the development. The exaction should address the problem. If it does, then the nature component has been satisfied.” *Id.*, 2008 UT 74, ¶ 10, 196 P.3d at 603-04.

The “extent” aspect measures the impact against the proposed exaction in terms of cost:

The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively. The impact of the development can be measured as the cost to the municipality of assuaging the impact. Likewise, the exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction.

Id., 2008 UT 74, ¶ 11, 196 P.3d at 604. The court continued by holding that “roughly proportional” means “roughly equivalent.” Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the expense that a governmental entity would incur to address (or “assuage”) the impact attributable to a new development.

¹² It is recognized that there may have been increased traffic to the store, but no increase in actual sales. Moreover, store traffic is the result of factors in addition to the appearance of a building, such as advertising.

¹³ 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.”)

¹⁴ The final “B.A.M.” decision was an amendment to an opinion issued a few months earlier. (See *B.A.M. Dev. LLC v. Salt Lake County*, 2008 UT 45).

D. The Landscaping Requirement Does Not Survive Rough Proportionality Analysis.

1. There is a Legitimate Interest in Improving the Appearance of Streets.

There is an essential link between the Landscaping Requirement and the City's legitimate interest in improving the appearance of its streets. An exaction must be linked to a legitimate government interest. The City enacted "Standards for Landscaping Along High-Image Arterial Streets" as a means of enhancing "the aesthetic perception of West Valley City by improving the visual image of those streets which serve as primary access into and through the City." WEST VALLEY CITY MUNICIPAL CODE, § 7-13-101. Aesthetic improvement is a legitimate government interest. See UTAH CODE ANN. § 10-9a-102(1); see also *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Skaggs Drug Centers, Inc. v. Ashley*, 26 Utah 2d 38, 41, 484 P.2d 723, 725 (1971). The Landscaping Requirement promotes that interest by requiring landscaping, sidewalks, and street lighting. In short, there is a sufficient link between the Landscape Requirement and the City's legitimate interest in improving its major streets.

2. The City has Not Shown That the Landscaping Requirement is Roughly Proportionate in Nature to the Impact of the Proposed Façade.

The City has not established that the Landscape Requirement satisfies the second part of the Rough Proportionality test. As has been discussed, the "nature" component of the analysis focuses on the relationship between the exaction and the needs created by the proposed development. In *B.A.M. II*, the Utah Supreme Court explained that the analysis should be approached "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." *B.A.M. II*, 2008 UT 74, ¶ 10, 196 P.3d at 603-04. The City has not met its burden of proving that the proposed façade causes a "problem" of aesthetics that requires the "solution" of new landscaping, sidewalks, and street lighting.¹⁵

Both the City and John Paras allude to increased vehicular and pedestrian traffic as justifying the exaction, but the City's stated objective is aesthetics, not safety.¹⁶ The City explains that "[c]ommercial development has many impacts on a city, including increased vehicle traffic, additional burdens upon public services, more pedestrian traffic, and more activity along City roadways, all of which create safety and public order concerns" Letter from Claire Gillmor, October 18 2011. In the first place, this is simply a generalized statement about commercial development, and not the type of individualized determination required to justify an exaction. Secondly, it raises concerns for "safety and public order," not aesthetics. Finally, it does not focus on the proposed development, which is an improvement to the exterior of the building, not an

¹⁵ Note that this aspect is different than the threshold question of whether a proposed development creates a need for public facilities or services. The "nature" analysis focuses more acutely on a specific need, and whether the exaction satisfies that need.

¹⁶ Admittedly, pedestrian safety would probably be enhanced in a small way by improving the sidewalks, but the stated goal of the Landscaping Requirement is to improve the visual image of the City's major streets. See WEST VALLEY CITY MUNICIPAL CODE, § 7-13-101.

expansion of the store. The exaction must be justified by the impacts of the proposed development, not those attributed to the existing store operation.

For its part, John Paras also does not provide a detailed analysis of the impacts from its proposed building façade, only an aspiration that the improved building appearance will encourage more customers and more purchases. Every business hopes for improved sales. John Paras’s statement should not be taken as an admission that the façade will have measureable impacts on the City’s services or aesthetics. To conclude, then, the City has not shown that the proposed façade causes an impact on the City’s aesthetics that is solved by the Landscape Requirement. The requirement does not meet the “nature” aspect of rough proportionality analysis, and cannot be a valid exaction.¹⁷

II. Regulation of the Pole Sign is Subject to First Amendment Scrutiny.

Any regulation of a sign incurs scrutiny under the First Amendment’s protections of free speech. The U.S. Supreme Court has recognized that “signs are a form of expression protected by the Free Speech Clause” *City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994). The Court has held that signs pose “distinctive problems that are subject to municipalities’ police powers.” *Id.* The physical characteristics and placement of signs may be regulated to promote a local government’s “interest in traffic safety and its esthetic interest in preventing ‘visual clutter’” *Id.*, 512 U.S. at 49 (discussing *Metromedia v. San Diego*, 453 U.S. 490 (1981)).

While local governments may regulate the physical characteristics and placement of billboards and on-premise signs, restrictions which depend upon or regulate the content of the sign’s message are invalid unless a compelling public interest justifies the regulation.¹⁸ “[W]hether a statute is content neutral or content based is something that can be determined on the face it; if the statute describes speech by content then it is content based.” *Bushco v. Utah State Tax Commission*, 2009 UT 73, ¶ 12, n.22, 225 P.3d 153, 160, n. 22 (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002)(Kennedy, J., concurring)). If an exemption to regulation depends upon the content of the sign, the regulation is content-based and therefore subject to stricter scrutiny under the First Amendment. *See Metromedia*, 453 U.S. at 515.¹⁹ Even a distinction that is benign and not overtly intended at restricting speech must be justified by a compelling public interest.

The City’s ordinances require owners of noncomplying signs to conform to City standards if the sign is altered. However, the ordinance exempts signs that identify multiple tenants on one property. In other words, the regulation applies to a sign that identifies a single business, but does not apply if the sign identifies two or more businesses on the property. Exempting a sign from the

¹⁷ In addition, the City has not shown that the cost to comply with the Landscape Requirement is roughly equivalent to the expense the City would incur to assuage the impact attributed to the new façade. Thus, the requirement also does not satisfy the “extent” aspect.

¹⁸ *See Perry Education Association v. Perry Local Educator’s Association*, 460 U.S. 37, 45 (1983) (content-based restriction invalid unless it is necessary to serve a compelling state interest, and is narrowly tailored to serve that end).

¹⁹ *See also Mesa v. White*, 197 F.3d 1041, 1046 (10th Cir. 2000); *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996). John Paras cites an Oregon case, *Outdoor Media Dimensions, Inc. v. Department of Transportation*, 132 P.3d 5 (Ore. 2006). That case invalidated a regulation which required off-site billboards to obtain a state permit, but exempted on-site advertising from the permit requirement.

ordinance because it advertises more than one tenant is a content-based distinction. The City has not established that the required change to John Paras's sign serves a compelling public interest, and that the ordinance is narrowly tailored to promote that interest.

III. The City's May Require Compliance with its Sign Ordinance, if There is a Substantive Alteration to the Sign.

Even if the City's ordinance is determined to be valid under the First Amendment, the City must determine whether the changes to the sign are sufficient to require compliance with current sign regulations. The John Paras pole sign is most likely a noncomplying structure, and state law allows the City to regulate the expansion or alteration of the use. A noncomplying structure is

a structure that:

- (a) legally existed before its current land use designation; and
- (b) because of one or more subsequent land use ordinance changes, does not conform to the setback, height restrictions, or other regulations, which govern the use of land.

UTAH CODE ANN. § 10-9a-103(31). The pole sign is not a "use" and should be classified as a structure.²⁰

Although nonconforming status affords property owners the right to continue a use or structure, local governments have authority to enact ordinances governing "the establishment, restoration, reconstruction, extension, alteration, expansion, or substitution of nonconforming uses upon the terms and conditions set forth in the land use ordinance." *Id.* § 10-9a-511(2)(a). Pursuant to that authority, the City enacted § 11-7-101 of the City Code, which states that "[a] nonconforming sign shall not be altered, reconstructed, raised, moved, placed, extended, or enlarged, unless said sign is changed so as to conform to all provisions of [Title 11]." WEST VALLEY CITY MUNICIPAL CODE, § 11-7-101.

The question then becomes whether the changes to the John Paras pole sign constitute an alteration, reconstruction, extension, or enlargement to the extent that it must be removed and replaced with a monument sign. The term "alteration," as it is used in the City's ordinance, must be interpreted according to the context of the entire statute, not standing alone.

When faced with a question of statutory interpretation, [the] primary goal is to evince the true intent and purpose of the [statute] . . . [This is done] by looking at

²⁰ A noncomplying structure is similar to but distinct from a nonconforming use. A use is an activity that is carried out on property, while a structure is a permanent building or other installation on property (such as the pole sign). A structure may be noncomplying, even though the use associated with the structure is allowed. The City notes that John Paras may construct a monument sign, but not a pole sign. In other words, the use is allowed, but the structure does not conform to the City's current ordinances. Section 10-9a-511 governs both nonconforming uses and noncomplying structures. Although the sign has not received an "official" designation as a noncomplying structure, both sides seem to agree that it should be treated as such. This Opinion will assume, without deciding, that the pole sign is a noncomplying structure.

the best evidence of legislative intent, namely, the plain language of the statute itself. As part of this well-worn canon of statutory construction . . . the plain language of the statute [must be read] as a whole. Under this whole statute interpretation, [the] provisions [of the statute are read] in harmony with other provisions in the same statute and with other statutes under the same and related chapters. [This is] because a statute is passed as a whole and not in parts or section and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with the every other part of section so as to produce a harmonious whole.

Archuleta v. St. Mark's Hospital, 2010 UT 36, ¶ 8, 238 P.3d 1044, 1046-47 (quotations and citations omitted); *see also Marion Energy, Inc. v. KFJ Ranch Partnership*, 2011 UT 50, ¶ 18 (interpretation of words and phrases must be based on the context in which they are used).

Futhermore, restrictions on nonconforming uses and structures must respect an owner's right to the lawful use of property. *Rock Manor Trust v. State Road Commission*, 550 P.2d 205, 206²¹ "Morevoer, because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should be strictly construed in favor of the property owner." *Hugoe v. Woods Cross City*, 1999 UT App 281, ¶ 8, 988 P.2d 456, 458 (citations and alterations omitted).²²

The purpose of Chapter 11-7 of the City Code is to encourage owners to replace noncomplying pole signs with monument-style signs. To accomplish that goal, the City requires compliance if a sign is abandoned or unused, or if it substantially destroyed by fire, natural disaster, or other damage. *See WEST VALLEY CITY MUNICIPAL CODE*, §§ 11-7-102; 11-7-104. As stated above, the City also requires compliance when a noncomplying sign is altered, reconstructed, raised, moved, extended, or enlarged. *See id.*, § 11-7-101.

The word "alter" means to change, modify, revise, adjust, transform, amend, or vary. *See Oxford Dictionary and Thesaurus* 41 (Oxford University Press, 1996). However, the word must be construed in the context of the statute. The term is used as part of a list that includes "reconstructed, raised, moved, placed, extended, or enlarged," which implies more substantive changes to the sign. "Alter" must therefore be read as meaning a significant change to the sign, and not merely a cosmetic revision of the sign's message.

John Paras proposes changes to its pole sign, so that the sign will match the updated building façade. This apparently will consist of a new color scheme and company logo, and John Paras states that the size and height of the sign will not change. If that is true, and the sign's dimensions will not be changed, then the alteration does not rise to the level of "reconstruction, extension, or

²¹ Nonconforming use status merely allows a use or structure to continue, even though it no longer complies with zoning ordinances. The use or structure is still subject to health and safety regulations, such as nuisance abatement, building safety, etc.

²²*Hugoe* dealt with a nonconforming use issue. The rule that zoning ordinances should be construed in favor of the property owner applies to nonconforming uses and noncomplying structures.

enlargement” anticipated by the statute. However, a change to the sign’s dimensions or height probably should trigger the ordinance, requiring compliance.

As a final note, the Utah Code provides that the City may establish a reasonable time period to amortize the the pole sign, allowing John Paras to recover its investment in the noncomplying aspects of the structure before it is required to install a conforming sign.²³

Conclusion

The City’s requirement of landscaping improvements and dedication of a public easement as a condition of approval for the proposed building façade is an exaction, which must comply with § 10-9a-508 of the Utah Code. Since the justification for an exaction is the impact attributed to new development, the City must show that the façade itself, and not the existing store, causes a sufficient impact to warrant new landscaping. The burden is upon the City to demonstrate that the requirements are roughly proportional, both in nature and extent to the impacts caused by the new façade. While the City has a legitimate interest in the visual appearance of its streets, it has not shown that the façade creates a sufficient impact to require new landscaping as a condition of approval. The City may undertake the improvements using public funding, but it has not demonstrated that John Paras should provide the improvements without compensation.

The pole sign identifying the John Paras Store is protected by the First Amendment. The City may regulate the physical characteristics and location of any sign within its jurisdiction, but the regulation cannot depend upon the content of the sign. Since the City’s ordinance requiring noncomplying signs to conform to current City standards exempts signs that identify multiple tenants on one property, the ordinance distinguishes based on the content of different signs. A content-based regulation is valid only if it is justified by a compelling public interest, and is narrowly tailored to promote that interest.

The John Paras pole sign is most likely a noncomplying structure, which is allowed to continue as a type of vested right. The City is authorized to regulate remodeling, reconstruction, or alteration of a noncomplying structure, but the City’s authority must respect the property owner’s right to continue the noncomplying structure. The City ordinance requiring compliance if a noncomplying sign is altered must be interpreted in context with the entire statute. Therefore, consistent with the terms used, “alter” must mean a substantive change, and not a mere cosmetic revision to the sign’s message.

²³ UTAH CODE ANN. § 10-9a-511(2)(b). This Opinion only mentions the possibility of amortization, but does not attempt any further analysis.

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.