

Advisory Opinion 294

Parties: Brian Buchanan / Hooper City

Issued: September 26, 2024

TOPIC CATEGORIES:

Compliance with Land Use Regulations Exactions on Development

The City may require the Property Owner to install infrastructure improvements along the frontage of his building lot, and it may also require him to pay a fee in lieu that the City may use to construct the improvements, if needed, within the next 10 years. However, if the City does not construct the improvements within 10 years, it must return the fee to Owner, and the City may not then obligate the Owner, in perpetuity, to pay for the improvements if and when the City ever determines the improvements become necessary. In such a case, the City would need to then find a different funding source for the improvements.

The amount the City charges for a fee in lieu, if the Owner elects this option, must reflect no more than the actual cost of constructing the improvements, according to current and accurate estimates.

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ADVISORY OPINION

Advisory Opinion Requested By: Brian Buchanan

Local Government Entity: Hooper City

Applicant for Land Use Approval: Brian Buchanan

Type of Property: Residential

Date of this Advisory Opinion: September 26, 2024

Opinion Authored By: Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

ISSUE

1. May Hooper City enforce an ordinance that requires an applicant for a building permit to either install street improvements along the lot frontage or pay a fee in lieu to have the improvements installed within the next 10 years, and that returns funds not used within 10 years but then also obligates the applicant to install the improvements at any point in the future, if the city determines the improvements are needed?
2. May Hooper City charge a fee in lieu that is a significant increase over similar fees recently charged to other applicants?

SUMMARY OF ADVISORY OPINION

Hooper City may require Mr. Buchanan to install infrastructure improvements along the frontage of his building lot, and it may also require him to pay a fee in lieu that the City may use to construct the improvements, if needed, within the next 10 years. However, if the City does not construct the improvements within 10 years, it must return the fee to Mr. Buchanan, and the City may not then obligate Mr. Buchanan, in perpetuity, to pay for the improvements if and when the City ever determines the improvements become necessary. In such a case, the City would need to then find a different funding source for the improvements.

The amount the City charges for a fee in lieu, if Mr. Buchanan elects this option, must reflect no more than the actual cost of constructing the improvements, according to current and accurate estimates.

EVIDENCE

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Request for Advisory Opinion submitted by Brian Buchanan, received March 31, 2023, and supporting documentation;
2. Response submitted by Mayor Dale Fowers on behalf of Hooper City, received May 1, 2023.
3. Reply submitted by Brian Buchanan, received July 2, 2024.

BACKGROUND

Mr. Buchanan own property in Hooper City ("City") located at approximately 7453 West 5100 South. The property has been subdivided as a one-lot subdivision for residential development. Relatively recently, Mr. Buchanan approached the City seeking a building permit to construct a single-family residence. The City informed Mr. Buchanan of the requirements he would need to meet to obtain a permit and construct his home. Since the lot is part of a Minor Subdivision under the Hooper City Code, the City imposed the requirement that Mr. Buchanan must construct street improvements, including curb, gutter, and sidewalk, along the frontage of his lot to obtain a building permit. *See* HOOPER CITY CODE §10-4A-28.¹

Since lot frontages in this area of town and around Mr. Buchanan's lot are largely unimproved, the City Code also provides the following:

If circumstances exist where these improvements are not deemed immediately necessary, the City Council may, upon recommendation from the Planning Commission, elect to require cash escrow in an amount determined by the City Staff equal to an estimate of the current cost of constructing the improvements. This amount of the cash escrow is fixed at the time of the agreement and will never change. The escrow will be held for a pre-determined time for the use by the City for its intended purpose at the City's discretion. If no project is completed within the designate time frame, the escrowed funds may be released to the developer or owner who signed the escrow agreement. As an alternative to the release of cash escrow at the end of the escrow agreement term, a signed Deferred Improvement Agreement will be required which will include a commitment to participate financially in future street improvements at whatever time the City may need to implement a project, and for the full cost of the improvements at the time of future construction.

¹ "Minor subdivisions...shall be responsible for street improvements along the frontage of the entire development, including all frontage on streets immediately adjacent to the development (corner lots). Street improvements may include, but may not be limited to, engineering, storm drainage facilities, rough grading, imported sub-grade material, imported aggregate base material, fine grading, curb and gutter, sidewalk, drive approaches, "curb match" asphalt, storm water pollution prevention BMP's, and long-term storm water quality facilities."

HOOPER CITY CODE § 10-4A-28.

After meetings between Mr. Buchanan and the City and some additional back and forth via email to discuss options, the City ultimately took the position that, in consideration of the options presented above and the fact that the frontages of the lots immediately surrounding Mr. Buchanan's lot are unimproved, Mr. Buchanan could do one of three things as it relates to installing the required improvements along the frontage of his building lot:

1. Install the improvements. The City Engineer, Briant Jacobs, indicated in an email to Mr. Buchanan on March 2, 2023 that the City is confident that "at your location when the street improvements occur, it will be easy to match (or incorporate) your installed improvements."
2. Pay an escrow amount as allowed in the Code provision above and as determined by the City's estimates.
3. Get three bids for the needed improvements that the City would then evaluate to determine whether the escrowed amount could be adjusted.

See Email from Briant Jacobs, Hooper City Engineer, dated March 2, 2023.

This third option was offered because of the circumstances that led Mr. Buchanan to request this advisory opinion. While exploring his options, Mr. Buchanan asked the City how much it would require in escrow for the improvements. Nearby owners with similarly sized lots had recently pursued this option and had entered into agreements with the City that included escrow amounts of \$7,000 and \$8,750. Mr. Buchanan, just a few months later, was told he would need to escrow \$26,983,² a significant increase from the prior, similarly situated scenarios. The City, in justifying this number explained that it had recently updated its cost estimate numbers to reflect increased development costs in the market.

As a result, Mr. Buchanan submitted an advisory opinion request to this office asking us to provide an opinion about whether the City may even enforce the improvement requirement since the improvements are not "immediately necessary," and, if it may, whether it is then lawful for the City to impose such a large increase once the application is already in process and over a short period of time.

ANALYSIS

- I. The City may require an applicant to install street improvements, or pay a fee in lieu to have the improvements installed within a reasonable period of time, but it may not obligate the applicant to install the improvements at some future and undetermined date, when there are no plans to ever install the improvements**

Mr. Buchanan's first question asks whether the City may lawfully require the developer to install the improvements, or escrow the money to pay for the improvements if the City elects to install them within 10 years and, if not, enter into a deferral agreement that the owner will construct the improvements at some future and undetermined date decided by the City.

² The City originally quoted the escrow amount at \$35,653, but later adjusted the number based upon a miscalculation.

A. *The Rough Proportionality Test*

The options to install the improvements immediately, pay a fee that the City may use to install the improvements within the next 10 years, or enter into a deferral agreement to install the improvements at some undetermined time in the future as identified in Hooper City Code section 10-4A-28, are all forms of a development exaction. Utah law defines development exactions as “conditions imposed by governmental entities on developers for the issuance of [development approval]” that “typically require the permanent surrender of private property for public use.” *B.A.M. Dev., LLC v. Salt Lake County* (BAM I), 2006 UT 2, ¶ 34.

For an exaction to be a lawful exercise of the City’s regulatory authority, it must pass a test to determine the exaction’s reasonableness. *See Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981). The test the US and Utah Supreme Courts have developed, and that has subsequently been codified in Utah Statute at Utah Code section 10-9a-508, is referred to as the “rough proportionality” test.

This test walks through an involved legal analysis intended to ensure the development pays for its own impacts, but no more. The test, in short, requires that for an exaction to be valid, the imposed condition or requirement must (1) serve a legitimate government function (2) provide a solution to a problem the proposed development creates³, and (3) cost the developer about the same as it would cost the City to address the impact itself.⁴ *See Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *B.A.M. Development, LLC v. Salt Lake County* (BAM II), 2008 UT 74.

B. *The Requirement to Install the Improvements Immediately*

The City’s requirement to immediately install improvements, including curb, gutter, and sidewalk, along the lot’s frontage satisfies this test. Providing needed infrastructure to residential lots is a legitimate government function. The City Code establishes the improvements needed to serve residential development in this part of Hooper, and this is what the City is requiring here. By having the lot owner construct these improvements, it will solve the problem of providing the needed infrastructure and services to the lot. Finally, the lot owner is contributing his fair share because he is only constructing the improvements immediately adjacent to his lot.

Since the requirement is in pursuit of a lawful government function, solves the problem of providing needed services required by City Code, and is imposed in a manner that requires the owner to only address the impacts of the proposed development, the condition is a lawful exaction.

The analysis, however, becomes more interesting as we look at the two other options outlined in Hooper City Code section 10-4A-28—the requirements to pay an in-lieu fee for the development and the requirement to enter into a deferral agreement, referred to in City Code as a “Deferred Improvement Agreement”.

³ This aspect of the rough proportionality test is referred to as the “nature aspect” of the test.

⁴ This is referred to as “rough equivalency” or the “extent aspect” of the test.

C. The In Lieu Fee

Regarding the in-lieu fee, the City Code states:

If circumstances exist where these improvements are not deemed *immediately necessary*, the City Council may, upon recommendation from the Planning Commission, elect to require cash escrow in an amount determined by the City Staff equal to an estimate of the current cost of constructing the improvements. This amount of the cash escrow is fixed at the time of the agreement and will never change. The escrow will be held for a pre-determined time for the use by the City for its intended purpose at the City's discretion. If no project is completed within the designate time frame, the escrowed funds may be released to the developer or owner who signed the escrow agreement.

HOOPER CITY CODE § 10-4A-28 (emphasis added).

This approach is lawful, as long as the City implements it timely and responsibly. If the City, for instance, determines the improvements are not “immediately necessary” because, while the improvements are necessary to provide vehicle and pedestrian transportation, storm drainage, etc., the City is nonetheless waiting for development to “fill in” around the lot, and it therefore doesn't necessarily make sense to construct all the improvements *right now*, until the City has a better view of how surrounding development plays out. In such a case, it is appropriate for the City to take a fee in lieu and install the needed facilities when adjacent development “catches up” if the surrounding development catches up within a reasonable period of time. The approach also ensures development occurs in an efficient and orderly manner, without having to tear up sections of previously installed infrastructure to match something new.

It has been this Office's experience that holding a fee in lieu for 5-10 years after the development occurs to allow surrounding development to catch up is a commonly accepted industry practice. This industry practice of 5-10 years is an appropriate time frame.⁵ In this case, the practice is reflected in the agreement Hooper City has proposed to Mr. Buchanan, which states that “[if] the city determines within the next ten (10) years that the improvements are necessary on the Developer's frontage, the Developer authorizes the City to utilize the money escrowed by the Developer to construct the improvements.”

Putting a definite time limit on the waiting period supports a conclusion that the frontage improvements are *necessary* to serve the development, because it sets a reasonable timeframe within which the improvements must be installed, or the fee is returned to the applicant. If the City collects and then uses the money to install the improvements within the set timeframe, the requirement to pay the fee remains lawful and appropriate for the same reasons the requirement to immediately install the improvements is lawful.

⁵ Relatedly, and of note, State Code sets the timeframe for using or returning an impact fee at 6 years. UTAH CODE § 11-36a-602(2).

D. The Deferred Improvement Agreement

However, the more time that passes without a need to install the improvements, the more tenuous the proposition becomes that the City's decision to require the developer to pay for the improvements is reasonable and necessary to offset the impact of the proposed development, as required by the rough proportionality test. If the City does not have plans to construct the improvements within a reasonable timeframe, it follows that the City does not in fact need the infrastructure required by the Code to solve a problem the development creates. And if the requirement does not solve a problem the development creates, then it fails the rough proportionality test and becomes an unlawful exaction.

Stated another way, it is unreasonable and unlawful for a City to require payments for future infrastructure that are not needed to serve the proposed development now or any time in the foreseeable future.

This implicates the next part of Hooper City Code, section 10-4A-28:

As an alternative to the release of cash escrow at the end of the escrow agreement term, a signed Deferred Improvement Agreement will be *required* which will include a commitment to participate financially in future street improvements at whatever time the City may need to implement a project, and for the full cost of the improvements at the time of future construction.

This provision attempts to obligate the property owner, in perpetuity, to pay for frontage improvements if the City ever determines they are needed at some future date. Such a requirement categorically violates the rough proportionality test and may not be enforced. The City has an obligation to "make some sort of individualized determination" assessing the impact of the proposed development." *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). When the City allows an extended period to pass and does not have any plans to install the improvements required by City Code, the City functionally acknowledges the required improvements will not solve a problem, or address an impact, the proposed development creates. The "nature" aspect of the rough proportionality test requires that an exaction must solve a problem the development creates.

Consequently, since the requirement fails the rough proportionality test, it becomes an unlawful exaction. If the City decides the improvements are eventually needed at some undetermined future point in time, it will need to find another means to fund those improvements.

II. To the extent the fee in lieu reflects the approximate actual cost of installing the needed improvements and is used or returned within a reasonable timeframe, it constitutes a lawful exaction

Regarding the amount that the City may charge for a fee in lieu that will be spent within 10 years of approving the current development proposal, the City Code states that the City may "require cash escrow in an amount determined by the City Staff equal to an estimate of the current cost of

constructing the improvements.” HOOPER CITY CODE § 10-4A-28. Accordingly, the amount the City charges for the in-lieu fee must reflect only the amount the City would itself need to pay to install the improvements. This ensures the fee satisfies the “extent” aspect of the rough proportionality analysis that requires “rough equivalence” in cost.

Here, the City asserts the amount it has charged in the past to nearby properties did not reflect current costs in the market. The City has provided updated cost estimates reflecting what it understands to be current costs.

While the timing here is certainly unfortunate, so long as the amount the City is charging Mr. Buchanan reflects actual costs, supported by good evidence such as contractor estimates, etc., the amount is lawful. The City has given Mr. Buchanan the opportunity to obtain his own estimates to show the amount charged is excessive in light of his development proposal. If Mr. Buchanan can produce estimates that reveal the amount the City is charging exceeds the actual and reasonable cost to construct the improvements, then the City will need to lower the fee to avoid imposing an unlawful exaction.

CONCLUSION

Hooper City may require Mr. Buchanan to install infrastructure improvements along the frontage of his building lot, and it may also require him to pay a fee in lieu that the City may use to construct the improvements, if needed, within the next 10 years. However, if the City does not construct the improvements within 10 years, it must return the fee to Mr. Buchanan, and the City may not then obligate Mr. Buchanan, in perpetuity, to pay for the improvements if and when the City ever determines the improvements become necessary.

The amount the City charges for a fee in lieu, if Mr. Buchanan elects this option, must reflect no more than the actual cost of constructing the improvements, according to current and accurate estimates.

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Office of the Property Rights Ombudsman

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