Advisory Opinion #94

Parties: Mark Seiter and City of Lehi

Issued: December 23, 2010

TOPIC CATEGORIES:
D: Exactions on Development
J: Requirements imposed upon Development

Exactions must satisfy rough proportionality analysis. A local agency is obligated to share the cost of an exaction that does not satisfy rough proportionality analysis. Paving a small portion of the street adjoining the development satisfies rough proportionality analysis, because the development is responsible for the traffic impact. On the other hand, requiring a developer to construct a storm water retention basin that will handle runoff from a public street does not satisfy rough proportionality analysis, because the public should be responsible for that impact.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Mark Seiter
Local Government Entity:	City of Lehi
Applicant for the Land Use Approval:	Consact, LLC
Type of Property:	Commercial Office
Date of this Advisory Opinion:	December 23, 2010
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

I. May a local government require a developer to pave a portion of a street which serves the development?

II. May a local government require construction of a retention basin to control runoff from a public street in addition to the runoff caused by a new development?

Summary of Advisory Opinion

Local governments may require developers to construct or improve public facilities such as roads and storm drains. These requirements are exactions, and are subject to rough proportionality analysis. If an exaction satisfied this analysis, the local government may impose it without any compensation to the developer. However, the local agency is obligated to share the cost of an exaction that does not satisfy rough proportionality analysis.

The requirement that a small portion of the street serving the development be paved in all likelihood satisfies rough proportionality analysis, especially because the new development is responsible for a large portion of the traffic impact on the street. On the other hand, requiring a developer to construct a storm water retention basin that will handle runoff from a public street in addition to the runoff caused by the new development probably does not satisfy rough proportionality analysis because the developer is being asked to bear a burden that ought to be borne by the public. The City should be responsible for a share of the cost of constructing the basin.

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 Mark Seiter on July 8, 2010. A copy of that request was sent via certified mail to Connie Ashton, City Recorder for Lehi City. The City received the request on July 9, 2010. The City submitted a response to the Office of the Property Rights Ombudsman, which was received on September 13, 2010. Mr. Seiter submitted a reply, which was received on September 28, 2010.

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, including attachments, filed July 8, 2010 with the Office of the Property Rights Ombudsman by Mark Seiter, Managing Partner of Consact, LLC.
2. Response from Lehi City, submitted by Kenneth A. Rushton, City Attorney, received on September 13, 2010, with attachments.
3. Reply from the Mr. Seiter, received September 28, 2010.

Background

Mark Seiter is the managing partner of Consact, LLC, which is developing commercial property in Lehi. In March of 2004, Mr. Seiter purchased a portion of the property from the City, and constructed a dental laboratory at the intersection of 1200 North and 500 West. At that time, the City agreed to install pavement along 1200 North Street, which is the southern boundary of the property.[1]

[1] The "Contract to Purchase Vacant Land" states that "Lehi city has begun improvements for a turnaround on 1200 North Street (Ron's Lane). Lehi city has agreed that curb and gutter only will need to be in place on the North side of 1200 North street and they will participate in completing the development in exchange for the dead-end street." "Contract to Purchase Vacant Land" ¶ 4. 1200 North dead ends at State Street. The property purchased by Mr. Seiter was bordered by 1200 North.

In June of 2004, the City and Mr. Seiter entered a "Statement of Mutual Understanding and Agreement" which allowed Mr. Seiter to locate the dental laboratory at the intersection of 500 West and 1200 North, and provided that the property could be subdivided. The Statement also provided that the City would be responsible for "[e]xtending the pavement (including excavation, cut, fill, import fill, etc.) to the curb and gutter."[2] The City installed paving along 1200 North in 2004-05, as the dental laboratory building was finished.

In 2008, Mr. Seiter subdivided the property into three lots—one where the dental laboratory building was already located and two new commercial lots. The property is bordered 1200 North and 500 West, with State Street forming the eastern boundary. The northern end of the property shares a boundary with a privately-owned lot.

Lot number 2 of the new subdivision includes a circular "cul-de-sac," or turnaround at the eastern end of 1200 North, where it dead-ends. This street plan was anticipated before the dental laboratory building was approved in 2004.[3] It appears that the turnaround is paved, but the paving will need to be replaced.[4] The additional paving installed by the City extends about 260 feet along 1200 North, from the intersection with 500 West, to the edge of the proposed circular turnaround.

The dental laboratory parcel has storm drains, using drains in the parking area for the building. Existing storm drain lines cross the property towards 500 West, to carry water away from the parcel. The City's conditions on the subdivision require increased capacity to retain stormwater. Mr Seiter designed a retention basin on Lot 3 capable of holding about 3,350 cubic feet of water.[5] The proposed basin would consume approximately one third of Lot 3. This basin would be connected to the existing storm drain system.

According to Mr. Seiter, the City required the basin on Lot 3 to retain stormwater draining from State Street, in addition to the water draining from the subdivision. The subdivision plat indicates drainage from State Street onto Lot 3, in the form of a two foot wide swale, which leads to the proposed retention basin. The swale and the retention pond limit the area available for a building and parking.[6] The City states that this drainage has been in place for some time, and must be continued to handle runoff from the roadway. The City notes that Mr. Seiter could

[2] The language of the Statement stated that Mr. Seiter's company would be responsible for all development costs, except three specific items, one of which was extending the pavement to the curb and gutter.

[3] A site plan for the dental laboratory, dated in May of 2004, shows an 84-foot wide circular turnaround or cul-de-sac extending from 1200 North Street. There would be no parking allowed in the turnaround, but it could serve as the access to Lot 2. It appears that 1200 North was designed to dead-end at State Street before Mr. Seiter began development.

[4] The plat map for the subdivision includes a note that the asphalt in the cul-de-sac will need to be replaced.

[5] In materials submitted for this Opinion, Mr. Seiter states that the City required a 32,000 cubic foot retention basin. However, the plans for the subdivision indicate that the basin will be approximately 3,348 cubic feet. The subdivision plat also includes a note that "detention will be required" for Lot 2, but there is no retention basin indicated for that lot. It is not known if an additional basin will be required, or if the basin on Lot 3 is sufficient for both lots. Lot 2 is nearly double the size of Lot 3, but has a slightly higher elevation.

[6] According to the plat map, the swale is close to the northern boundary of Lot 3. It appears that the swale could be piped or relocated, because the City states that the retention pond could be located on Lot 2. The proposed retention pond would be about three feet deep, creating a steep slope for a parking area.

locate the retention pond on Lot 2, which is much larger, so the pond would not impact development as much. The City also notes that it has "participated in 50% of all costs associated" with storm drain improvements from Mr. Seiter's property to Tinnaman Lane.[7]

Mr. Seiter objects to being responsible for the runoff from State Street. He states that such a requirement constitutes an impermissible exaction, because the cost of constructing and maintaining a drainage system for off-site runoff water exceeds the impact created by his development.

In addition, Mr. Seiter claims the City is responsible for repaving the circular turnaround located the end of 1200 North. He argues that the Statement of Mutual Understanding and Agreement he entered with the City in 2004 requires repaving of the turnaround along with the paving installed along 1200 North. The City counters that it has fulfilled its obligation to pave the street, and that it is not responsible for paving the turnaround.

Mr. Seiter requested this Advisory Opinion to address the two issues discussed above: (1) Whether the Agreement includes paving of the turnaround; and (2) May the City require Mr. Seiter to accept and detain stormwater from a public roadway.

Analysis

I. This Opinion Cannot Determine Whether the 2004 Agreement Obligates the City to Pave the Turnaround.

The Office of the Property Rights Ombudsman does not have the statutory authority to determine whether the 2004 Agreement requires that the City pave the turnaround. The authority of the Ombudsman Office is restricted to matters involving regulation of land use, eminent domain, and takings.[8] Contract interpretation is not part of the Office's duties, even if the contract concerns development of land. The question centers on the first paragraph of the Statement of Mutual Understanding and Agreement signed in June of 2004, which states that Alpine Dental Laboratory would be responsible for all development costs, except for the following:

a. Moving two power poles and placing the electrical utility underground.

b. Extending the pavement (including excavation, cut, fill, import fill etc.) to the curb and gutter.

c. Participating 50% in all costs associated with the storm drain, boxes, asphalt replacement/repair, engineering, etc. from the property to Trinnaman Lane.

Statement of Mutual Understanding and Agreement (June 9, 2004), ¶ 1 (provided with materials submitted for this Opinion). The Mr. Seiter claims that subparagraph "b" obligates the City to pave the turnaround, which is an extension of 1200 North, the same road that was paved by the

[7] Presumably, this means that the City has shared the cost of storm drain improvements equally or fairly.
[8] *See* UTAH CODE ANN. §§ 13-43-101 through -206 ('Property Rights Ombudsman Act"). The Ombudsman Office's general duties are explained in § 13-43-203(1).

City under the Agreement. The City, however, argues that it fulfilled its obligation when the dental laboratory was completed on Lot 1. Resolving this dispute will require analysis of the contract, which is beyond the authority of the Ombudsman Office. Therefore, this Opinion will not take a position on whether the Agreement obligates the City to pave the turnaround.

II. Both of the City's Requirements are Exactions, Which Must Satisfy Rough Proportionality Analysis.

A. The Requirements are Exactions, Because They Involve Installation of Specific Improvements.

The City has imposed two requirements upon Mr. Seiter's development: Paving the 1200 North turnaround and constructing a retention basin to control runoff from State Street along with storm water from the development itself. Both of these requirements are types of exactions, which must satisfy rough proportionality analysis in order to be valid. Governmental entities may impose exactions on new development, but the exaction must satisfy the "rough proportionality" test expressed by the U.S. and Utah Supreme Courts. "Exactions are conditions imposed by governmental entities on developers for the issuance of a building permit or subdivision plat approval." *B.A.M. Development, LLC v. Salt Lake County,* 2006 UT 2, ¶ 34, 128 P.3d 1161, 1169 ("*B.A.M. I*").[9] The term "exaction" includes any condition on development, including not only dedication of property, but also payment of money, installation of specific public improvements, or other requirements imposed by a public entity.[10] Furthermore, the term "exaction" includes conditions imposed by a general legislative enactment as well as those imposed by decisions or negotiations on specific proposals. *Id.*, 2006 UT 2, ¶ 46, 128 P.3d at 1170.

The City has required that Mr. Seiter pave a portion of 1200 North and install improvements to detain or control stormwater entering Mr. Seiter's property from a public roadway. These requirements involve installation of specific improvements, and have been imposed by the City as conditions on development approval. They are therefore exactions, and they must satisfy rough proportionality analysis in order to be valid.

B. In Order to be Valid, Both Requirements Must Satisfy Rough Proportionality Analysis.

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

> (1) A municipality may impose an exaction or exactions on development proposed in a land use application provided that:
> (a) an essential link exists between a legitimate governmental interest and each exaction; and

[9] *See also Salt Lake County v. Board of Education, Granite School District*, 808 P.2d 1056, 1058 (Utah 1991) (*holding* that "development exactions" are "contributions to a governmental entity imposed as a condition precedent to approving the developer's project.")

[10] *Id.* "Development exactions may take the form of (1) mandatory dedications 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." (internal quotations omitted).

> (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).

The Utah Supreme Court observed that the "rough proportionality" test 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.[11] This has come to be known as the *Nollan/Dolan* "rough proportionality" test, which has been codified in § 10-9a-508.

The first aspect of the analysis focuses on the connection between the exaction and the governmental interest. The exaction must have an "essential link" to a legitimate interest. In other words, an exaction must promote or satisfy a legitimate public interest.

The Utah Supreme Court further honed the "rough proportionality" analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 ("*B.A.M. II*"), which was a second appeal stemming from the same development project at issue in the earlier decision.[12] This opinion 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 agreed 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." In addition to the other aspects of rough

[11] *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.")

[12] 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).

proportionality discussed above, in order for an exaction to be valid the cost of compliance must be roughly equivalent to the cost that a governmental entity would incur to address (or "assuage") the impact attributable to new development.

C. Paving the Turnaround May be an Acceptable Exaction, Depending Upon the Costs.

The City's requirement that the turnaround be paved with curb and gutter may be an acceptable exaction, depending upon the costs involved. As an exaction, the requirement appears to satisfy the rough proportionality analysis explained above. In the first place, there is an essential link between the required paving and the City's legitimate interest in promoting an efficient road system.[13] Paving the turnaround area and installing a curb and gutter on the perimeter is a reasonable means to promote that interest.[14] Thus, the first component of the rough proportionality test is met.

The focus shifts to determining whether the exaction is roughly proportionate in nature and extent to the impact created by the new development. The paving requirement appears to be roughly proportionate in nature, because it "solves" the "problem" attributed to development of the property. Traffic on 1200 North should increase because of Mr. Seiter's development. In fact, because the street is a dead-end at the property, it stands to reason that the development will create a large portion of the traffic on that portion of 1200 North.[15] The turnaround already exists, and is necessary for traffic flow on the dead end street.[16] The paving requirement, then, seems to be roughly proportionate in nature to the impact of the development.

Finally, there remains the question of whether the expense of the paving requirement is roughly equivalent to the cost of addressing the impact of the new development. Neither party submitted information related to the cost of paving the turnaround and installing a curb and gutter. The turnaround area is relatively small, but it is not known exactly how much paving would be required.[17] The ultimate answer depends upon the costs necessary to improve the road (including the turnaround) sufficiently to handle the traffic increase attributable to Mr. Seiter's development. Because the development will probably generate most, if not all, of the new traffic on that portion of 1200 North, it is likely that the expense of paving will be roughly equivalent to the cost necessary to address the traffic impact.

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[13] Roadways are a legitimate governmental interest. *See Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117 ("In order for a government to be effective, it needs the power to establish or relocate public throughways . . . for the convenience and safety of the general public.") *also* UTAH CODE ANN. § 10-8-8.

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

[15] Lot Number 2 will be accessed from 1200 North. It is not clear if that access will be through the turnaround or not.

[16] Mr. Seiter will not be required to dedicate the turnaround to the City, but must pave it and install a curb and gutter.

[17] The subdivision plat indicates that the turnaround area would need to be "repaved," indicating that it is currently paved.

It must be noted, however, that this Opinion addresses the paving requirement as an exaction only. The 2004 Agreement may obligate the City to install all paving along 1200 North, even if the paving requirement is an acceptable exaction. As stated above, this Opinion does not take a position on how the 2004 Agreement should be interpreted.

D. While the Storm Water Retention Requirement is an Exaction, the City May Have Retained the Right to Drain Water Onto the Property.

While the requirement that Mr. Seiter construct a storm water retention basin and piping to the City's storm water system constitutes an exaction, the City may have the right to drain storm water onto the property. If so, the City's right to use the property for storm water retention must be factored into the rough proportionality analysis. The subdivision plat and other materials submitted for this Opinion indicate that the City detained storm water from State Street on the property before it was sold to Mr. Seiter. In addition, the City stated that it has contributed to the costs for storm drain improvements. The City's contribution must also be factored into the exaction analysis.

As an exaction, the City's requirement to build a retention basin and storm drain system is subject to the rough proportionality analysis found in § 10-9a-508. To begin with, there is an essential link between the required improvements and the City's legitimate interest in controlling storm waters.[18]

Requiring a retention basin and storm drain system "solves" the "problem" of storm water drainage due to the new development, so the requirement is proportionate in nature to the impact of the development. However, the City's requirement includes retention and control of water draining from State Street, which is not an impact attributable to Mr. Seiter's development. The additional burden of accepting and controlling water from a public street is an additional "problem" not tied to the new development. In other words, Mr. Seiter must increase the capacity of the retention basin and storm drains to accommodate water being drained from a public street. Mr. Seiter may be expected to bear his fair share of the responsibility for the change in storm water caused by his new development.[19] However, that fair share does not include bearing the additional burden of storm water from a public street. Thus, as an exaction, the overall storm drainage requirement does not appear to satisfy rough proportionality analysis.[20]

Failing to meet rough proportionality analysis, however, does not mean that the City cannot impose the storm drainage requirement. It may do so and contribute the costs that exceed what is needed to address the impact.[21] The City may already be doing so, because it states that it has contributed to the costs of the engineering, storm drain boxes, asphalt replacement, etc. The

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[18] *See e.g., Call v. City of West Jordan*, 606 P.2d 217, 219 (Utah 1980) ("As undeveloped land is improved, it is also important that some provision for flood control be made."); *see also* UTAH CODE ANN. § 10-8-38 (cities may require connection to storm drain systems).

[19] The change in storm water drainage is the impact caused by the development.

[20] Of course, a full analysis would include an assessment of costs. Again, the relevant inquiry is whether the expense of satisfying the requirement is equivalent to the costs that would be incurred by the City to address the impact of Mr. Seiter's development.

[21] The City could also drop the requirement, or modify it so that it satisfies rough proportionality analysis.

materials submitted for this Opinion do not provide enough information to determine if the costs are allocated fairly between the City and Mr. Seiter.

The cost of compliance should include the burden caused by the placement and design of the improvements. Mr. Seiter objects to the retention basin on Lot 3, because its size impacts the development of that lot.[22] This impact can be expressed as a cost to the developer, and it ought to be included as part of the cost of compliance borne by the developer.[23] If the total cost is roughly equivalent to the expense necessary to assuage the impact, the exaction satisfies rough proportionality analysis, and the City may impose it without incurring an obligation to compensate the developer.

The City used the property to retain storm water from State Street before Mr. Seiter purchased it. The materials submitted for this Opinion indicate that Mr. Seiter was aware of this and accepted it at the time of purchase.[24] It may be possible that the City has an easement to deposit storm water onto the property. If so, the property was subject to the easement when Mr. Seiter purchased it, and development of the property is also subject to the City's easement rights. In addition, if this is true, providing an easement would not be an exaction of that easement, because the City already has the right to use the property.[25] The mere presence of a pre-existing easement or similar right belonging to a public entity should not constitute an exaction. Moreover, any improvements necessary to accommodate the easement because of new development should be the responsibility of the easement owner, not the developer.

To sum up, determining whether the storm water requirement is an acceptable exaction must include consideration of the City's actions and possible easement rights. The requirement is a type of exaction, but the City has stated that it is contributing to the storm drain improvements. The City's contribution is a factor in rough proportionality analysis. The City's rights to use the property to control storm water draining from State Street must also be considered. A pre-existing easement for storm drainage should not be considered an exaction, but is simply an aspect of the property, and development must accommodate the easement in some way. Any improvements to the existing easement necessitated by new development should be the responsibility of the public agency. This is consistent with the concepts of fairness and justice embodied by the U.S. and Utah Constitutions.[26]

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[22] The City points out that the basin could be located on Lot 2, which is larger thus able to accommodate the large basin. This indicates that the City is willing to consider alternatives, including allocating the extra State Street storm water among the three lots, which would minimize the impact on any particular lot.

[23] Not every exaction would create this type of impact. For example, the requirement that Mr. Seiter pave a portion of 1200 North does not affect development on the property.

[24] The was nothing submitted indicating that the City specifically reserved an easement for the storm water, but it appears that Mr. Seiter was aware of the storm drain.

[25] It could also be argued that Mr. Seiter was "compensated" for the easement if the purchase price for the property was lower than it would have been without an easement.

[26] "The [Fifth Amendment to the U.S. Constitution] . . . 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Utah Constitution also protects private property interests. *See* Note 11, *supra*.

Finally, the placement and design of the improvements should be considered along with the cost. Mr. Seiter objects to the retention basin on Lot 3, because its size impacts the development of that lot. The City points out that the basin could also be located on Lot 2, which is larger and thus more able to accommodate the burden of the required basin. Although the *B.A.M. II* decision seemed to reduce rough proportionality analysis to a comparison of costs, the nature aspect of the analysis ought to include consideration of the design and placement of required improvements. With this in mind, the burden of retaining the State Street storm water perhaps could be allocated amongst all three lots in the subdivision, thus minimizing the impact on any particular lot. As discussed above, the City is responsible for any costs above that necessary to manage the storm water attributable to the new development.

Conclusion

Requiring the developer to install paving on the 1200 North turnaround and construct facilities to manage storm water are both exactions which must satisfy rough proportionality analysis. They are valid if the cost to the developer is roughly equal to the expense that would be incurred by the City to address the impact caused by the new development. This Opinion does not address whether a contract provision obligates the City to install the additional paving in the turnaround. That matter is left to the parties to resolve.

The City may have an easement to deposit storm water from State Street onto the property being developed by Mr. Seiter. The City used this property to retain the storm water before Mr. Seiter purchased it, and so the property may be subject to the City's easement right. The mere existence of the easement does not constitute an exaction, but any additional improvements to accommodate the easement should be the City's responsibility. Mr. Seiter is responsible for the storm water attributable to his new development, and any additional capacity due to the State Street storm water is the responsibility of the City.

The City may still impose the requirements, even if it is partially responsible for the storm water facilities. If an exaction satisfies rough proportionality analysis, it may be imposed without any compensation. However, an exaction may impose an additional burden on a development, if the property owner is compensated for the additional burden. The burden on a developer due to an exaction should include how the design and placement of the required facilities impacts development of the property. This burden may be expressed as part of the cost of compliance. A required facility may severely impact development, and so local governments should consider alternatives that lessen the burden on an individual lot.

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

NOTE:

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

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

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

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

MAILING CERTIFICATE

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

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

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

Connie J. Ashton, City Recorder
Lehi City
153 North 100 East
Lehi, Utah 84043

On this _____ Day of December, 2010, 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