

# Advisory Opinion #144

Parties: Fieldstone Homes and American Fork

Issued: September 8, 2014

## TOPIC CATEGORIES:

### Exactions on Development

An exaction is a dedication of property or payment of money imposed as a condition of development approval. Valid exactions must satisfy rough proportionality analysis. If an exaction does not alleviate a public burden caused by a development's impact, it does not satisfy rough proportionality analysis, and cannot be valid.

#### DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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### ADVISORY OPINION

Advisory Opinion Requested by:	Fieldstone Homes By: Andy Flamm
Local Government Entity:	American Fork City
Property Owner:	Vintaro Land, LLC
Type of Property:	Residential Subdivision
Date of this Advisory Opinion:	September 8, 2014
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

### Issues

May a local government require a developer to construct a road and install utility facilities which will not serve the development?

### Summary of Advisory Opinion

Any requirement that qualifies as an exaction must satisfy rough proportionality analysis to be valid. An exaction is a dedication of property or money imposed as a condition of development approval. Requirements imposed by ordinance are no different than those imposed through the development approval process, including conditions on zone changes needed for the development. If an exaction does not alleviate a public burden created by the development's impact, it does not satisfy the "nature" aspect of rough proportionality analysis, and is impermissible.

### 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 Andy Flamm, of Fieldstone Homes on June 16, 2014. A copy of that request was sent via certified mail to Richard M. Colborn, City Recorder of American Fork, at 51 East Main, American Fork, Utah. According to the return receipt, the City received the Request on June 18, 2014.

## **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 Andy Flamm, received by the Office of the Property Rights Ombudsman on June 16, 2014
2. Response submitted on behalf of the City of American Fork, including attachments, submitted by Melissa K. Mellor, of Hansen Wright Eddy & Haws, PC, received on July 30, 2014.
3. Email correspondence from June, 2014, included with the Request for Advisory Opinion.
4. Email dated August 13, 2014, from Melissa Mellor, submitted to the Office on August 14, 2014.

## **Background**

Fieldstone Homes applied for subdivision approval to develop “Harrington Hollow,” located at 620 S. Utah Valley Drive in American Fork.<sup>1</sup> In May of 2014, the City approved a preliminary plat with 30 lots, to be accessed from Utah Valley Drive.<sup>2</sup> Although the zoning for the area is R1-12,000, indicating a minimum lot size of 12,000 square feet, the City agreed to consider

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<sup>1</sup> The parcel is owned by Vintaro Land LLC, and was originally intended to be part of a larger development. For the purpose of convenience, this Opinion will refer to Fieldstone Homes as the owner.

<sup>2</sup> The plat has 31 lots. One lot is reserved as a storm water retention basin and park. Two corner lots are just over 9,000 s.f., four lots are over 5,000 s.f., 13 lots are between 4,000 and 5,000 s.f., and the remaining 11 are between 3,000 and 4,000 s.f. The plat was prepared for Fieldstone, but evidently reflects the City’s requirements expressed by the planning staff.

Harrington Hollow under its “Planned Community” (PC) zone.<sup>3</sup> The lots in Harrington Hollow are all smaller than 10,000 s.f.<sup>4</sup>

About 100 feet of the northern end of the Harrington Hollow is proposed to be dedicated as part of the 620 South right-of-way.<sup>5</sup> Because the new subdivision would not use 620 South as a primary access, Fieldstone proposed paving only one-half of the new portion (instead of the full width) along the subdivision parcel. When new development to the east of Harrington Hollow necessitated it, the road could be completed.

The preliminary plat maps submitted by Fieldstone show water, sewer, drainage, and secondary water for Harrington Hollow all connecting to existing utility lines located in Utah Valley Drive (along the western boundary of the development).<sup>6</sup> These maps, however, also show installation of new water, sewer, drainage, and secondary water lines beneath the new portion of 620 South, but that the subdivision itself would not be directly served by the new lines.<sup>7</sup> The City maintains that installation of these new utility lines is required for subdivision approval, and is a valid exercise of the City’s authority to approve an overlay zone. Fieldstone, on the other hand, argues that the lines are an impermissible exaction, because the new lines have no relationship to the impact of the new subdivision.

## **Analysis**

### **I. Dedication of 620 South and Requiring Installation of the Utility Lines are Exactions that Must Satisfy Rough Proportionality Analysis.**

#### *A. The Road Construction and Utility Line Installation Requirements are Exactions*

The road dedication and installation of the utility lines are exactions that must satisfy rough proportionality analysis. “A development exaction is a government-mandated contribution of property imposed as a condition of approving a developer’s project.” *B.A.M. Development, LLC v. Salt Lake County*, 2012 UT 26, ¶ 16, 282 P.3d 41, 45 (“*BAM III*”). “Development exactions may take the form of (1) mandatory dedications of land . . . , (2) fees-in-lieu of mandatory

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<sup>3</sup> The PC zone is a type of “overlay” zone, in which the zoning and development guidelines for a specific project are adopted, instead of general zoning regulations. Using this mechanism, the City and Fieldstone developed a plan for the Harrington Hollow parcel, and adopted zoning guidelines specific to that property only.

<sup>4</sup> The development plan proposed for Harrington Hollow thus allowed more units than the R1-12,000 zone.

<sup>5</sup> The roadway would be an extension of 620 South. The total length would be 405.33 feet (for a total of 40,533 square feet, or .9 acres). A narrow strip of the western edge of the parcel, along Utah Valley Drive, is also proposed to be dedicated.

<sup>6</sup> The utilities would be placed within the interior roads of the subdivision. The plan indicates that a small portion of an interior road will be “stubbed” at the subdivision boundary for connection to future development on the property to the east. The utility lines would also be “stubbed” within that street portion.

<sup>7</sup> The map indicates that the new lines would connect to the existing lines within the intersection of 620 South and Utah Valley Drive, and that they would be capped at the eastern end of 620 South, where the Harrington Hollow Subdivision ends. The preliminary plat maps were prepared for Fieldstone Homes by H&H Engineering, and are dated April 21, 2014.

dedication, (3) water or sewage connection fees and (4) impact fees.” *Salt Lake County v. Board of Education*, 808 P.2d 1056, 1058 (Utah 1991)(citation omitted).<sup>8</sup> The City is requiring that Fieldstone dedicate land for 620 South, that the roadway be at least partially constructed, and that utility lines be installed within the roadway. These are all exactions, which are governed by the “rough proportionality” analysis required by the Utah Code, as well as the State and Federal Takings Clauses.

Local governments may require dedication of property or construction of public improvements, provided the exactions are roughly proportional to the impacts created by new development. *See* UTAH CODE ANN. § 10-9a-508(1). An “exaction must alleviate the burdens imposed on infrastructure by the development.” *B.A.M. III*, 2012 UT 26, ¶ 26, 282 P.3d at 47. The interior roads, utility lines, and other improvements for the Harrington Hollow Subdivision are also technically exactions, because they are also required by the City in order to obtain approval of the project. However, as is discussed below, these exactions are permissible because they alleviate the burdens imposed on the public infrastructure.

### *B. The Requirements Are Exactions Even if They Were the Result of a Specific Legislative Action*

Any contribution of money or property mandated in order to obtain development approval is an exaction, regardless of whether the requirement is imposed through an administrative approval process, or if it is mandated by an ordinance. The City argues that the requirements imposed as part of its approval of the Harrington Hollow plat were not exactions, because they were enacted as part of a “legislative zone change action,” and that Fieldstone agreed to the requirements in order to obtain approval for the PC overlay zone.<sup>9</sup> Since the requirements were included in the City’s legislative approval of the new zone (effectively, a new zoning ordinance), Fieldstone must comply.

The Utah Supreme Court addressed that very question in the first “*BAM*” decision. In that series of cases, the exaction in question was required by a local ordinance. The Court observed that a question had arisen over whether requirements imposed by ordinance should be treated the same as those imposed through the development approval process.<sup>10</sup> The justices also noted that while the case was pending, the Utah Legislature adopted § 10-9a-508(1), which codified the rough proportionality analysis required by the U.S. Supreme Court.<sup>11</sup>

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<sup>8</sup> *See also Koontz v. St. Johns River Water Management Dist.*, 133 S.Ct. 2586, 186 L.Ed.2d 697 (2013) (Demand for a conservation easement and money for construction of an off-site public improvement were both exactions subject to rough proportionality analysis.)

<sup>9</sup> Response Letter, submitted by Melissa K. Mellor, dated July 30, 2014 at 2. The letter points out that the zoning for the parcel was R1-12,000, and that the PC overlay zone was a new zoning designation proposed by Fieldstone.

<sup>10</sup> The two types of requirements were termed “legislative” for those imposed by ordinance, and “administrative,” for those imposed through the approval process.

<sup>11</sup> *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 46, 128 P.2d 1161, 1170 (“*BAM I*”). The rough proportionality test was codified by the Utah Legislature in 2005.

The Utah Supreme Court concluded that the rough proportionality test should apply to all exactions, regardless of whether they are imposed by legislative act or through the approval process.

Knowing as we do that the legislature intended to apply the rough proportionality test to all exactions, irrespective of their source, commencing on the effective date of *section 17-27a-507*, we are hard pressed to find a reason to assume that the legislative view of the proper scope of the rough proportionality test would have been different before *section 17-27a-507* went into effect.

*B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 46, 128 P.3d 1161, 1170.<sup>12</sup> Thus, any requirement that qualifies as an exaction, irrespective of its source, is subject to rough proportionality analysis. It makes no difference if the exaction derived from an ordinance, a specific zone change proposal, or was imposed as part of the administrative approval process. Since the road construction and utility line requirements imposed by the City qualify as exactions, they must satisfy rough proportionality analysis.

### *C. In Order to be Valid, Exactions Must Satisfy Rough Proportionality Analysis*

The Utah Code allows local governments to charge exactions, but there are limits to that authority:

- (1) A municipality may impose an exaction or exactions on development proposed in a land use application, including, subject to Subsection (3), an exaction for a water interest, 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).<sup>13</sup> This “rough proportionality” test derived from the U.S. Supreme Court’s decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).<sup>14</sup> In those two landmark cases, the Supreme Court established rules to determine when an exaction may validly be imposed under the Takings

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<sup>12</sup> The *BAM* series of decisions concerned actions by Salt Lake County, so the reference was to § 17-27a-507, rather than § 10-9a-508. The two sections are nearly identical.

<sup>13</sup> See also UTAH CODE ANN. § 17-27a-507(1) (applicable to counties).

<sup>14</sup> See *BAM I*. 2006 UT 2, ¶ 41, 128 P.3d at 1170.

Clause of the Federal Constitution.<sup>15</sup> The government entity imposing the exaction has the burden of proving that the requirement meets the rough proportionality test.<sup>16</sup>

The first component of rough proportionality analysis requires a close connection, or essential link, between the exaction and a governmental interest. In other words, the exaction must be designed to promote a legitimate public interest that is impacted by the development. In the *Nollan* case, for example, the exaction in question was an access easement across the rear of the Nollan's property. The easement was required because the California Coastal Commission felt that a new home would block the public's view of the beach from the front of the property. The Court held that there was no link between public's interest in viewing the beach from the *front* of the property and access across the *rear* of the lot.<sup>17</sup>

The Utah Supreme Court further elaborated on the second component of the analysis in *B.A.M. Development LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 ("*BAM II*"), the second of three decisions arising from the same development project. The *BAM II* 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." *Id.*, 2008 UT 74, ¶ 9, 196 P.3d at 603. The "nature" aspect focuses on the relationship between the impact on public infrastructure attributed to the development and the exaction. The court held that the relationship should be expressed in terms of a problem and a solution. "[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.

In the final *BAM* decision, the Utah Supreme Court reemphasized that a valid exaction must be tied to the impacts attributable to the development.

[N]ot only must the *nature* of an exaction relate to government purpose or need (in that the exaction must alleviate the burdens imposed on infrastructure by the development), but the *extent* of the exaction must also be roughly proportional to the government's need for infrastructure improvements created by the development.

*BAM III*, 2012 UT 26, ¶ 26, 282 P.3d at 47 (emphasis in original).

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<sup>15</sup> 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 a limiting governmental authority to impose conditions on development. Furthermore, "[t]he Utah Constitution reinforces the protection of private property against uncompensated government takings . . ." *BAM 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.").

<sup>16</sup> *Dolan*, 512 U.S. at 391, n. 8.

<sup>17</sup> See *Town of Flower Mound v. Stafford Estates, LTD*, 135 S.W.2d 620, 632 (Tex. 2004) (explaining *Nollan*).

The “extent” may be measured as the cost of the exaction compared to the expense needed to address the development’s impact:

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.

*BAM II*, 2008 UT 74, ¶ 11, 196 P.3d at 604. The court explained that “roughly proportionate” meant “roughly equivalent.” Thus, if the cost to comply with the exaction requirement is roughly equal to the expense that would be incurred to address (or assuage) the development’s impact, the “extent” component of the rough proportionality test is satisfied.

The costs to assuage the impact are those costs needed for each type of impact. “A proper rough-proportionality analysis must . . . consider the exaction’s purpose to define the scope of the relevant governmental costs.” *BAM III*, 2012 UT 26, ¶ 27, 282 P.3d at 47. For example, if the required exaction was dedication of a roadway, the cost of compliance would be compared to the expense needed to address the traffic impacts caused by the development. Impacts on other governmental infrastructure would not be included in that analysis.<sup>18</sup> It is also permissible to include contributions from other government agencies as part of the overall costs to address the impact.<sup>19</sup>

*D. The Exactions do not Fully Alleviate Burdens Created by the Development, so They do not Satisfy Rough Proportionality Analysis.*

The exactions imposed by the City do not fully satisfy the “nature” aspect of the rough proportionality test, because they do not alleviate a burden created by the Harrington Hollow subdivision. The exactions required of Fieldstone for the Harrington Hollow meet the first component of the analysis required by § 10-9a-508(1). There is an essential link between the road and utility installation and the City’s legitimate interests in traffic and utility services.<sup>20</sup> In general, the proposed exactions promote those important interests, and so the first component of rough proportionality is satisfied.

No information was submitted regarding the cost of the exactions, or the expense to address the development’s impacts, so this Opinion cannot assess whether the proposed exactions comply

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<sup>18</sup> In like manner, the expenses due to other types of impacts would be compared to the costs of the exactions required to address those impacts.

<sup>19</sup> *BAM III*, 2012 UT 26, ¶¶ 22-25, 282 P.3d at 46-47 (Contribution from local, state, and federal agencies may be included in calculation of costs to address impact).

<sup>20</sup> Roads and efficient traffic flow are legitimate government interests. *See Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117. Water, sewer, and stormwater control are also important public interests. *See UTAH CODE ANN.* §§ 10-9a-14, -15, and -38.

with the “extent” aspect of the analysis. However, this assessment may not be necessary, because the exactions do not appear to satisfy the “nature” aspect. The proposed exactions are not “solutions” to the “problems” attributed to the impacts of Harrington Hollow.

The additional utility lines to be installed in 620 South do not alleviate a burden imposed on the City’s utility systems caused by the Harrington Hollow development.<sup>21</sup> The new subdivision will connect to existing utility lines (located within Utah Valley Drive). The utility lines required to be installed beneath 620 South are not necessary to provide service to Harrington Hollow, and will apparently only be used to serve future development on other properties. Since the utility lines are not necessary to alleviate the impact attributed to the Harrington Hollow development, the requirement does not satisfy the “nature” aspect of rough proportionality analysis, and the City cannot require Fieldstone to install the lines without compensation.

Construction and dedication of the 620 South roadway may be necessary, in part, to alleviate the burden on the City’s traffic system caused by the new homes in Harrington Hollow. No information regarding the traffic impact from the new development was submitted for this Opinion. It stands to reason, however, that the residents of the 30 homes in the new subdivision will use 620 South in the future, when it is connected to the City’s road system.<sup>22</sup> (For the present, the City is only requiring that about 400 feet of that road be built by Fieldstone.) Although there may be some impact related to traffic use that justifies construction of 620 South, it does not appear likely that the traffic impact from Harrington Hollow alone justifies constructing and dedicating even that 400-foot portion.<sup>23</sup> Since the road construction and utility line installation fail the “nature” aspect of the rough proportionality test, they are not valid exactions.<sup>24</sup>

## Conclusion

The City’s requirements that Fieldstone dedicate and construct a portion of 620 South, and install utility lines within the new portion of that road, are exactions. Development exactions are government-mandated contributions of property or money imposed in exchange for approval of a project. As a condition of approval for the overlay zone and preliminary plat, the City required the road and utility improvements. They are therefore exactions, and subject to the rough proportionality test. If the exactions do not satisfy rough proportionality analysis, then they are invalid.

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<sup>21</sup> See *BAM III*, 2012 UT 26, ¶ 26, 282 P.3d at 47 (In order satisfy rough proportionality’s nature aspect, “the exaction must alleviate the burdens imposed on infrastructure by the development.”)

<sup>22</sup> There is no direct access from 620 South to Harrington Hollow. However, when 620 South is completed, the residents of the subdivision may use 620 South routinely.

<sup>23</sup> The interior roads and utility lines do satisfy a burden created by the development, and the cost for these improvements would seem to be equivalent to the cost the City would incur to install them, so they are valid requirements, even though they will be dedicated to the City after construction and installation.

<sup>24</sup> This conclusion does not eliminate the possibility that Fieldstone could voluntarily agree to install the additional infrastructure, on terms satisfactory to Fieldstone and the City.

Any requirement that qualifies as an exaction must satisfy rough proportionality analysis, regardless of how it was imposed. An exaction required by an ordinance is no different than one imposed through the development approval process. A requirement imposed as a condition of a zoning change in favor of a new development is also not treated any differently, and must also satisfy rough proportionality analysis.

Exactions must satisfy the “nature” aspect of rough proportionality analysis, which means that the proposed exaction must be designed to alleviate a burden on infrastructure created by the impact of the development. The exaction must “solve” a “problem” created by the development. Exactions not related to a development’s impact are not valid.

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

**NOTE:**

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

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

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

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

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

## MAILING CERTIFICATE

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

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

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

Richard M. Colborn  
City Recorder/Risk Manager  
City of American Fork  
51 East Main  
American Fork, Utah 84003

On this \_\_\_\_\_ Day of September, 2014, 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.

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Office of the Property Rights Ombudsman