Advisory Opinion #229

Parties: Matthew V. Hess, Mussentuchit Holdings, LLC; Lehi City
Issued: September 1, 2020

TOPIC CATEGORIES:

Exactions on Development

Government-mandated contributions of property as a condition of development approval are exactions. To be legal, an exaction must provide a solution to a problem that particular development creates, and must be roughly proportionate to the actual impact of the development.

In conjunction with the development of a residential subdivision, the city required a developer to widen a creek channel to increase its water-carrying capacity to serve the greater community flood-control needs and to construct a pedestrian trail to enhance regional recreation improvements. The city acknowledged that these are system improvements rather than project improvements, and as such has reimbursed the actual construction costs to the developer, and purchased that portion of property required for the improvements. However, the city has declined to reimburse the developer for the engineering review and design fees, as well as the permitting fees associated with their construction. This constitutes and exaction, and as the improvements are system improvements that serve community-wide needs, they do not provide a solution to a problem the development creates and are therefore unlawful. Accordingly, the City must reimburse the developer for the disputed costs and fees to avoid imposing an illegal exaction.

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ADVISORY OPINION

Advisory Opinion Requested By:	Matthew V. Hess, Mussentuchit Holdings, LLC
Local Government Entity:	Lehi City
Applicant for Land Use Approval:	Matthew V. Hess, Mussentuchit Holdings, LLC
Type of Property:	Residential
Date of this Advisory Opinion:	September 1, 2020
Opinion Authored By:	Marcie M. Jones, Attorney Office of the Property Rights Ombudsman

ISSUE

Does the city's failure to reimburse the developer for the engineering design and review fees and other soft costs associated with the construction of system improvements, including a regional trail and regional flood control measures, constitute an illegal exaction?

SUMMARY OF ADVISORY OPINION

Government-mandated contributions of property as a condition of development approval are exactions. To be legal, an exaction must provide a solution to a problem that particular development creates, and must be roughly proportionate to the actual impact of the development.

In conjunction with the development of a residential subdivision, the city required a developer to widen a creek channel to increase its water-carrying capacity to serve the greater community flood-control needs and to construct a pedestrian trail to enhance regional recreation improvements. The city acknowledged that these are system improvements rather than project improvements, and as such has reimbursed the actual construction costs to the developer, and purchased that portion of property required for the improvements. However, the city has declined to reimburse the developer for the engineering review and design fees, as well as the permitting fees associated with their construction. This constitutes and exaction, and as the improvements are system improvements that serve community-wide needs, they do not provide a solution to a problem the development creates and are therefore unlawful. Accordingly, the City

must reimburse the developer for the disputed costs and fees to avoid imposing an illegal exaction.

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 Matthew V. Hess of Mussentuchit Holdings, LLC on June 4, 2019. A copy of that request was sent via certified mail to Marilyn Banasky, City Recorder, City of Lehi, 153 North 100 East, Lehi, Utah 84043.

EVIDENCE

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

1. Letter Requesting an Advisory Opinion submitted by Matthew V. Hess of Mussentuchit Holdings, LLC dated June 4, 2019.
2. Reply submitted by Douglas J. Ahlstrom, Assistant Lehi City Attorney, dated July 16, 2019.

BACKGROUND

Mussentuchit Holdings, LLC owns a 5.65 acre parcel of vacant land located at 925 West 700 South in Lehi, Utah which is bisected by a stream known as Dry Creek (the "Property"). Several years ago, Mussentuchit subdivided the Property to create a nineteen-lot residential subdivision known as Creekside Farm Residential Subdivision. One of Lehi City's conditions to final plat approval was that Mussentuchit widen the Dry Creek channel to increase its water-carrying capacity, and construct a pedestrian trail adjacent to the creek, including a pedestrian bridge crossing Dry Creek (collectively, the "Improvements").[1]

After extensive negotiations, the parties entered into a Reimbursement Agreement which details the specific Improvement-related expenses Lehi agreed to compensate Mussentuchit for (the "Reimbursement Agreement"). Because the Improvements serve the community at large rather

[1] Lehi also required Mussentuchit to install a storm drain pipe and pave additional width within existing right-of-way along that portion of 700 South adjacent to the property. As Mussentuchit was reimbursed for all costs associated with these improvements, and none of the related fees are disputed, these will not be discussed in this advisory opinion.

than just the immediate subdivision, Lehi agreed to purchase that portion of property needed for the trail and to reimburse all Improvement construction costs. However, the city refused to reimburse Mussentuchit for the "soft costs" related to the Dry Creek Improvements, including:

- $5,100 engineering design fees: for civil engineering fees to design the creek widening (to increase its capacity and flow rate), and to design the pedestrian trail;

- $2,000 stream alteration permit fee: for an application fee to Utah Division of Water Rights to obtain a stream alteration permit to allow widening of the Dry Creek channel;

- $9,406.20 environmental engineering fees related to stream alteration permit: for environmental engineer's fees to prepare an application to the U.S. Army Corps of Engineers in support of issuance of the stream alteration permit (note that $9,406.20 represents 80% of the engineer's total fee, the remaining 20% being allocable to wetland analysis for an adjacent irrigation ditch);

- $3,000 hydraulic analysis of stream bed improvements: for hydraulic engineering fees to conduct analysis of Dry Creek's flow to verify whether engineered improvements to the Creek will yield the flow capacity the City required,

(collectively, the "Improvement Soft Costs").

The Improvement Soft Costs are specifically detailed in the Reimbursement Agreement and labeled as "Disputed Reimbursement Amount by City". The Reimbursement Agreement further states that "City and Landowner disagree about whether those costs are properly reimbursable to Landowner by City. As an alternative to resolution of this dispute by the courts, City and Landowner agree to submit the dispute to the Office of the Property Rights Ombudsman for an advisory opinion....."

Accordingly, Mussentuchit has requested this advisory opinion to determine whether Lehi's refusal to reimburse the Improvement Soft Costs constitutes an unlawful exaction.

In addition, Mussentuchit has requested that this opinion address Lehi's failure to reimburse a separate, unanticipated construction expense. During construction of the subdivision improvements, the construction contractor identified an existing city water blow off stand pipe that sat squarely in the path of the planned off-site sidewalk. The relevant portion of sidewalk is just north of the Mussentuchit property, and was not required to be constructed as a condition of development. However, as a practical matter, the adjacent existing sidewalk did not extend all the way to the Mussentuchit boundary, and if the contractor had completed only what was required, there would have been an unimproved gap of several feet between the old and new sidewalk sections. As a matter of expediency, the contractor decided to connect the old and new sidewalk sections to avoid leaving an unsafe gap. The blow off stand pipe originally lay in the direct path of the proposed sidewalk. The contractor moved the stand pipe to a point a few feet south to a spot within the park strip. The contractor charged Mussentuchit an additional $4,398 for that work. Lehi has refused to reimburse Mussentuchit for the cost to relocate the blow off pipe because it is a development-related cost and was not approved ahead of time.

ANALYSIS

I. Disputed Reimbursement Amount is an exaction which must satisfy the Rough Proportionality Test to be Lawful

Mussentuchit claims that Lehi's refusal to reimburse the Improvement Soft Costs is an unlawful development exaction. A development exaction "is a government-mandated contribution of property imposed as a condition" of development approval.[2] The term "exaction" may include any condition on development, including the payment of money, installation of specific improvements, donation of property, and/or providing public improvements.[3]

Development exactions are legal and appropriate only if they are "roughly proportionate" to the impact the development creates. For instance, the municipality may require the construction of public improvements such as roadways, sidewalks, and flood control measures to offset the impacts on the community made by the new development. An excessive exaction requires a property owner to pay for impacts beyond its own.[4] A municipality must not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[5]

Exactions implicate the Takings Clause of the U.S. Constitution and Article I Section 22 of the Utah Constitution, which protect private property from governmental taking without just compensation.

The principles governing exactions are outlined in the U.S. Supreme Court's landmark decisions in *Nollan v. California Coastal Comm'n*[6] and *Dolan v. City of Tigard*[7] which the Utah Legislature has distilled and codified in Utah Code § 10-9a-508(1). The analysis has been termed the "rough proportionality test," and provides:

> 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.[8]

If a proposed exaction satisfies this test, and is otherwise legal, it is valid. If the exaction fails the test, it violates protections guaranteed by the Takings Clauses of the Utah and U.S. Constitutions and is illegal.[9]

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[2] *B.A.M. Dev., L.L.C. v. Salt Lake County,* (BAM III), 2012 UT 26, ¶16.
[3] *Koontz v. St. Johns River Water*, 133 S. Ct. 2586 (2013).
[4] *Banberry Development Corporation v. South Jordan City,* 631 P.2d 899, 903 (Utah 1981).
[5] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[6] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).
[7] *Dolan v. City of Tigard*, 512 U.S 374 (1994).
[8] UTAH CODE § 10-9a-508(1).

The Utah Supreme Court has provided further guidance on how to analyze rough proportionality. In *B.A.M. II*, the Court explained that rough proportionality analysis articulated above "has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent."[10] The "nature" aspect focuses on the relationship between the anticipated impact and proposed exaction. The court described the approach "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."[11]

The "extent" aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost.[12] The court explained that "roughly proportional" means "roughly equivalent."[13] Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the cost that a local government would incur to mitigate impacts attributable to development.

Accordingly, Lehi's requirement that Mussentuchit incur the Improvement Soft Costs, imposed as a condition to final plat approval, is an exaction that must satisfy the rough proportionality test. Lehi may impose the exaction "so long as there is a 'nexus' [or link] and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal."[14] Lehi's exaction must solve a problem that development of Creekside Farm Subdivision creates. Further, the cost to Mussentuchit must be proportionate to the impacts the development imposes upon the community.

The City has the burden to show the proposed exactions are proportionate, or equivalent, to the development's impacts and therefore valid. Note that "*[n]o precise mathematical calculation is required*, but the 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."[15]

Mussentuchit argues that the required Improvements serve the community as a whole, far exceed the impact of the Creekside Farm Subdivision, and the Improvement Soft Costs are integral to their construction. Mussentuchit therefore argues that but for the need to construct the community-benefitting flood, drainage, and trail Improvements, Mussentuchit would not have incurred Improvement Soft Costs, and they should be reimbursed.

As an example, Mussentuchit argues that development of Creekside Farm Subdivision did not create any hydrologic need to widen Dry Creek to increase its water-carrying capacity. Rather, for purposes of area-wide flood control and storm drain capacity, Lehi desired that Dry Creek's flow capacity be increased in this area. Had the improvements to Dry Creek not been required, Mussentuchit would have left the creek bed in its natural condition, and installed a simple concrete box culvert bridge crossing.

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[9] *Call v. West Jordan*, 614 P.2d 1257, 1259 (Utah 1980).
[10] *B.A.M. Development, LLC v. Salt Lake* County (BAM II), 2008 UT 74, at ¶9.
[11] *Id.* at ¶10.
[12] *Id.* at ¶11.
[13] *Id.* at ¶8.
[14] *Koontz*, 133 S.Ct. 2586, 2595 (2013).
[15] *See Dolan*, 512 U.S. at 391-92.

Further, Mussentuchit argues that the $5,100 in civil engineering fees to design the widened and improved creek including the community pedestrian trail, and the $3,000 for the hydraulic engineer's analysis, were only required because of Lehi's desire to achieve an increased water-carrying capacity for Dry Creek and construct a community-serving trail, not due to the impact of developing the Creekside Farm Subdivision.

Additionally, Mussentuchit argues that the $9,406.20 fee for the environmental engineer was necessitated solely by construction of Improvements within Dry Creek. They claim that had the impact to Dry Creek been limited to the concrete box culvert, as required to provide a road crossing by the new subdivision, a much less rigorous jurisdictional threshold would have been achieved vis-à-vis the U.S. Army Corps of Engineers. Instead, the improvements to Dry Creek exceeded 500 linear feet, and Mussentuchit was required to conduct a more thorough environmental site assessment to obtain the necessary permit from the Corps. Neither party specifies what, if any, the engineering fees would have been for the minimal concrete box culvert option.

Mussentuchit further argues that the stream alteration permit from the Utah Division of Water Rights was $2,000. As above, neither party specifies whether this fee would have been required for the concrete box culvert.

Conversely, Lehi argues that the Improvement Soft Costs were not approved before they were incurred, would be incurred even if the concrete box culvert option had been constructed, and the city has adopted a Sharing Cost of Improvements Plan which does not include reimbursement for Improvement Soft Costs.

Lehi calls out the $9,406.20 in particular for environmental engineer review as excessive, not needed, and inconsistent with requirements for similar permits in similar situations it is familiar with.

Lehi also points out that it has adopted Section 2.19, Sharing Cost of Improvements in its Lehi City Design Standards and Public Improvement Specifications (2016) (hereinafter "Cost Sharing Plan"). The Cost Sharing Plan specifies that the developer shall be 100% responsible for flood channel improvements and all other required improvements, and that the cost of parks and trails will be individually decided based on a recommendation of the City Engineer and approved by City Council.

Lehi argues that inasmuch as Mussentuchit chose to design its subdivision with a bridge through Dry Creek and to use the channel for storm water outfall, Mussentuchit is responsible for the engineering fees to verify stream flow would not be hindered by its box culvert and road bridge improvements and for the application fees for the stream alteration permit. Lehi claims they did not request an upsize to the project Improvements; therefore, no reimbursement is required for increased size of project Improvements. Nevertheless, Lehi states that they are reimbursing Mussentuchit $84,000 for the system improvements to Dry Creek.

Lehi states generally that Mussentuchit would have been required to obtain a stream alteration permit from the Utah Division of Water Rights and U.S. Army Corps of Engineers even had they

just been installing the box culvert over Dry Creek and used Dry Creek as a storm drain outfall, as required by the design of the project. Lehi claims that these items constitute project improvements and the costs associated therewith are not eligible for reimbursement. However, Lehi does not substantiate these claims, nor do they give cost estimates or details to rebut Mussentuchit's claim that the complexity of the extended improvements necessitated these expenses.

A. Essential link between exaction and governmental interest

The first part of Utah Code section 10-9a-508(1) requires an essential link between a legitimate governmental interest and the exaction(s) imposed. Lehi's legitimate government interests in this case are effective flood control measures which are adequate to meet the needs of the community and in providing opportunities for public recreation.

Cities have broad discretion to enact regulations intended to promote the health, safety, and welfare of the public.

> The municipal legislative body may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by [Chapter 10-8], and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, convenience of the city and its inhabitants, and for the protection of property in the city.

UTAH CODE ANN. § 10-8-84(1). This section grants two distinct types of authority: (1) Power to implement and carry out mandates specifically granted by the Utah Legislature, and (2) The power to act for the general welfare of the public.[16] Protecting property from flood damage is clearly within a city's authority to "provide for the safety" of its inhabitants and "protect property." Similarly, providing opportunities for public recreation falls within the authority granted for the "general welfare of the public." [17]

Accordingly, the *essential link* portion of the rough proportionality test is satisfied.

B. Improvement Soft Costs do not satisfy the nature aspect of the analysis

A court engaging in a rough proportionality analysis must next determine whether the nature of the exaction and impact are related. To determine this relationship, Utah courts have adopted the method of looking at the exaction and impact in terms of a solution and problem, respectively.[18] The impact is the problem, or the burden *that the community will bear* because of the development. If the exaction addresses the problem, the nature component is satisfied.[19]

[16] *See* State v. Hutchinson, 624 P.2d 1116, 1122 (Utah 1980) (evaluating language nearly identical to § 10-8-84).
[17] *See, e.g.* UTAH CODE § 10-9a-401 listing "recreational" as a specified purpose to include in general plans.
[18] *BAM II*, 2008 UT 74 at ¶10.
[19] *Id.*

Lehi has stated that the required flood control and regional trail Improvements are system improvements, and by their nature serve the needs of the greater community, rather than off-set any impact imposed by the proposed subdivision. Therefore, the Improvements do not "solve" any "problem" created by the development.

The Improvement Soft Costs are directly related to and an inseparable part of Mussentuchit's construction of the Improvements. The Improvements could not have been constructed without first engaging engineers to design them and secure the necessary permits and approvals for their installation.[20]

As both parties agree that the Improvements do not solve a problem created by the development, and Improvement Soft Costs are part of the cost of providing the Improvements, the *nature* component of the proportionality test is not satisfied, and the exaction is unlawful.

As the *nature* portion of the test has not been satisfied, analysis of the *extent portion* is unnecessary. If the proposed exaction fails to pass any part of the rough proportionality test, the exaction is unlawful.

II. Blow off pipe relocation expense not analyzed

This office does not have authority to issue an Advisory Opinions on topics outside those listed in UTAH CODE § 13-43-205. The City did not require Mussentuchit to construct the off-site section of sidewalk which necessitated moving the stand pipe. As this improvement was not a condition to development approval, and this question does not appear to fall within any other category this office has authority to consider, whether Lehi is required to repay this expense was not evaluated.[21]

CONCLUSION

Government-mandated contributions of property as a condition of development approval are exactions. To be legal, an exaction must provide a solution to a problem that particular development creates, and must be roughly proportionate to the actual impact of the development.

In conjunction with the development of a residential subdivision, Lehi required Mussentuchit to widen the Dry Creek channel to increase its water-carrying capacity to serve the greater

[20] Lehi argues that Mussentuchit would have incurred some permitting and design costs for the box culvert bridge crossing required to serve the project, therefore, Mussentuchit should pay ALL the Improvement Soft Costs for the extended system Improvements. This is not the case. It may be that Lehi is only responsible for the costs to "upsize" from the box culvert to the full extent of the required Improvements. However, Lehi has the burden to make "some sort of individualized determination that the required expenditure is related in both nature and extent to the impact of the proposed development." B.A.M., 2006 UT 2. As Lehi has not provided cost estimates or other evidence of what the cost difference between the box culvert and the required Improvements would have been, this office cannot make this estimation.

[21] Nonetheless, in an effort to assist in resolving the dispute, and based on the limited information available, the author will posit that the contractor appears to have provided a beneficial service to Lehi in moving the stand pipe and connecting the two sections of sidewalk. If the cost charged is reasonable, and Lehi would have otherwise needed to do the work themselves, it seems appropriate to reimburse the developer in this instance.

community flood-control needs and to construct a pedestrian trail to enhance regional recreation improvements. Lehi acknowledged that these are system improvements rather than project improvements, and as such has reimbursed the developer for the construction cost and purchased that portion of property required for the improvements. However, Lehi has declined to reimburse the developer for the engineering and permitting fees associated with their construction. This constitutes and exaction, and as the improvements are system improvements, and serve community-wide needs, they do not provide a solution to a problem the development creates, and are therefore unlawful.

Jordan Cullimore, 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:

Teisha Wilson, City Recorder
City of Lehi
153 North 100 East
Lehi, Utah 84043

On this 2nd day of September, 2020, 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