Advisory Opinion #12

Parties: Jordan School District and City of West Jordan

Issued: March 1, 2007

TOPIC CATEGORIES:
D: Exactions on Development
P: Application Review Fees

The City can require a school district to connect to the City's water utility for a new school site, as long as the charges are reasonable. The City cannot require the District to connect to the City's sewer system if the property is more than 300 feet from the sewer line.

The City can require street improvements if: 1) The improvements are the minimum necessary to protect public safety; 2) the burdens are not disproportionate; and 3) the improvements are reasonably related to school safety.

The City may charge building inspection fees and reasonable impact fees. All other land use fees are prohibited.

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Advisory Opinion

Advisory Opinion Requested by:	Jordan School District
Local Government Entity:	City of West Jordan
Applicant for the Land Use Approval:	Jordan School District
Project:	Proposed Elementary School Approx 6000 West 7000 South West Jordan
Date of this Advisory Opinion:	March 1, 2007

Issues

1. Can West Jordan City require the Jordan School District to connect a proposed elementary school site to city water and sewer utilities where those services can also be provided by a local improvement district?

2. Can the City require the full improvement of 7000 South across the front of the proposed school site at 6000 West and continuing East to Montova Way at 5830 West?

3. Can the City require the full improvement of 6200 West along the Western boundary of the proposed school site?

4. Must the District pay a subdivision or site plan review fee when it submits an application to the City for such a land use approval?

Summary of Advisory Opinion

1. West Jordan City can require the Jordan School District to arrange for the provision of water utilities for the new school site through the City. The resulting charges to the District must, however, be reasonable. The City cannot require the District to connect to the City's sewer system if the nearest part of the sewer system is physically located more than 300 feet from the school site.

2 and 3. While the City can impose street improvement requirements on the District, those conditions and exactions must meet three tests: 1) The requirements may provide for the

minimum improvements necessary to provide adequate public facilities to protect public safety as outlined in the fire code and other relevant codes; 2) the City must not impose disproportionate burdens on the District when considered in light of the burdens which are reasonably expected to be borne by the City as a result of the proposed school development, standing alone; and 3) any required street improvements must be reasonably related to the safety of school children.

4. The only land use fees that can be charged a school district are building inspection fees (if the district uses city inspectors) and reasonable impact fees. All other land use fees are proscribed.

Commentary

I appreciate the professional, thorough and competent manner in which the City and the District and their respective counsel have assisted in the preparation of this opinion. The bottom line for the most significant issues reviewed is that both the City and the District play an essential role in protecting the safety and welfare of not only school children but members of the public at large.

I am confident that those I have dealt with in the preparation of this opinion will be able to make decisions related to this matter that will reach an appropriate and sustainable compromise with regard to these issues and the myriad of others that they must grapple with. They are individuals characterized by competence, concern and good will.

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 Annotated Section 13-43-205. The 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.

The request for an advisory opinion in this matter was received from Jordan School District (the District) by the Office of the Property Rights Ombudsman on November 13, 2006. A letter with the request attached was sent by certified mail, return receipt requested, to Ann Dowdle, Risk/Real Property Manager of West Jordan City (the City), on November 22, 2006. Ms. Dowdle is the individual whose name is listed as the designated agent on the records of the Division of for the receipt of notice under the Utah Governmental Immunity Act A receipt for delivery of the certified letter was dated November 27, 2006.

In telephone conversations the parties requested that the Office of the Property Rights Ombudsman proceed to prepare the opinion. I visited on several occasions with John Taylor,

Auxiliary Services Executive for the District and Bruce Findlay, Attorney for the District. At a meeting held on December 21, 2006 at the District offices, Barry Newbold, the Superintendent of the District was present. I also visited on January 10, 2007 in a meeting with with Tom Steele, Paul Coates, Wendell Rigby, and Darien Alcorn of the City and on that occasion and extensively on other occasions with Roger Cutler, the City Attorney. We have exchanged several items of correspondence as listed below. I also spoke with Jody Burnett, outside legal counsel for the City.

On Thursday, February 22, 2007 I visited the location of the proposed school and observed the current condition of the street improvements there. I was alone during that visit.

Evidence

The following documents were reviewed prior to completing this advisory opinion:

Correspondence

1. Letter from Randal Haslam, AIA, to Carl Eriksson, PE and General Manager of the Kearns Improvement District dated August 23, 2006.
2. Letter to Gary Lubers, City Manager of West Jordan City from Barry Newbold dated September 6, 2006.
3. Letter to John Taylor from Paul Coates dated September 18, 2006.
4. Letter to Paul Coates from John Taylor dated September 20, 2006.
5. Email to John Taylor from Paul Coates dated September 25, 2006.
6. Letter to John Taylor from Paul Coates dated October 2, 2006.
7. Email to John Taylor from Paul Coates dated October 6, 2006.
8. Letter to Board of Trustees, Kearns Improvement District, from Lyle C. Summers, Mayor Pro-tem of West Jordan City, dated October 10, 2006.
9. Letter to Paul Coates from John Taylor dated October 16, 2006.
10. Request for an Advisory Opinion from Jordan School District dated November 2, 2006 and received by the Office of the Property Rights Ombudsman on November 13, 2006.
11. Letter to Paul Coates from John Taylor dated November 8, 2006.
12. Transmittal letter and West Jordan Planning Commission Application dated November 15, 2006 addressed to Paul Coates from John Taylor.
13. Letter to John Taylor from Paul Coates dated November 20, 2006
14. Email from Craig Call to Paul Coates dated January 4, 2007.
15. Letter to Craig Call from Tom Steele dated January 10, 2007.
16. Letter to Craig Call from Roger Cutler dated January 24, 2007.
17. Memorandum from Craig Call to Roger Cutler, John Taylor, and Bruce Findlay dated January 21, 2007
18. Memorandum to Craig Call, John Taylor, and Roger Cutler from Bruce Findlay dated February 6, 2007.

19. Letter to Craig Call from Roger Cutler dated February 6, 2007 (Corrected version).
20. Revised version of the February 6, 2007 letter to Craig Call from Roger Cutler, with comments from Bruce Findlay inserted into the text of Roger's letter. The revisions are dated February 12, 2007.
21. Letter to Craig Call from Roger Cutler dated February 15, 2007.
22. Email to Craig Call from Roger Cutler dated February 26, 2007.

Statutes and Ordinances

23. Utah Code Annotated, Section 10-9a-305.
24. West Jordan City Ordinances, Section 89-5-201 through 204 (Part 2 Adequate Public Facilities)
25. West Jordan City Ordinances, Section 87-1-101 through 87-8-106 (Subdivision Ordinance).
26. West Jordan City Ordinances, Section 89-6-401 through 413 (Development Construction Standards).
27. West Jordan City Ordinances, Section 89-5-501 through 502 (Residential Construction Not in a Recorded Subdivision).

Documents and Exhibits

28. Undated site plan prepared by VCBO Architecture for a proposed school.
29. Abstract of Uniform Real Estate Contract dated December 28, 1959.
30. Abstract of Warranty Deed from Elmer Jensen and Lois Jensen to Board of Education of the Jordan School District dated February 10, 1961.
31. Abstract of Surveyor's Plat dated February 1, 1961.
32. Certificate of Abstract dated March 15, 1961.
33. Undated and unattributed summary of "additional costs that the District believes will be incurred" and titled "New West Jordan Elementary".
34. Aerial Photograph of vicinity of proposed school site – scale approx. 1" equals 400 yards.
35. Aerial Photograph of vicinity of proposed school site – scale approx. 1" equals 200 yards.

Assumed Facts

1. The District owns property at approximately 6000 West 7000 South in West Jordan that it acquired in 1961.

2. The District intends to build an elementary school on the property, which is on the South side of 7000 South Street.

3. 7000 South Street is not fully improved. On the North side of the proposed school site, and continuing to the East to approximately Mantova Way at 5830 West (for a

distance of approximately 1500 feet) the improvements to 7000 South consist of as little as 21 feet of paved surface, with curb, gutter and sidewalk along the North side of the right-of-way.

4. From Mantova Way and continuing to the East, 7000 South is fully improved with curb, gutter and sidewalk on both sides of the street with pavement covering the street area between the curbs. The total width of the right-of-way in this area of 7000 South Street is approximately 80 feet including sidewalks, any park strips or planted area that may exist between the street and sidewalk, the curb and gutter, and the paved parking and travel lanes portions of the roadway.

5. Along the approximately 1500 foot section between the proposed school site and the closest part of 7000 South that is fully improved, there is no curb, gutter or sidewalk on the South side of 7000 South. The existing pavement in this area may be only 21 feet wide.

6. The District does not own the property on the South side of 7000 South which has approximately 1500 lineal feet of frontage on 7000 South Street between the proposed school site and the point where 7000 South Street is fully improved at Mantova Way.

Analysis

Generally – Applicability of Local Ordinances to School Sites

Under statute, municipalities have been vested with broad police powers.

> 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 this chapter, 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, and convenience of the city and its inhabitants, and for the protection of property in the city.

Utah Code Annotated Section 10-8-84 (1). In construing these powers, the Utah Supreme Court has stated that these powers are to be read broadly. *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980). City ordinances, like state statutes, are presumed valid and constitutional. Any reasonable doubts are to be resolved in favor of ruling that a local ordinance is valid and constitutional. *Salt Lake City v. Savage*, 541 P.2d 1035 (Utah 1975); *State v. Morrison*, 2001 UT 73, 31 P.3d 547.

The code also provides, however: "Each school district shall be controlled by its board of education and shall be independent of municipal and county governments. . . The local school board shall have direction and control of all school property in the district."

U.C.A. Section 53A-2-108. Land use restrictions as applied to schools are given specific standards for review as well. Local governments operate under state statute, and are limited by state statute where the statutes specifically apply to the use of the police power by local governments. Limitations in the state land use statutes act to narrow the scope of local power. The legislature has specifically discussed the regulation of school districts and school siting by municipalities in the Land Use Development and Management Act, most particularly in U.C.A. Section 10-9a-305 and in other parts of the Utah Code, such as in Sections 17A-3-315 and 53-20-108 (for the full text of these statutes, see Appendix). The state land use statutes also provide specifically that "a municipality may not impose stricter requirements or higher standards than are required by . . . Section 10-9a-305 . . ." U.C.A. Section 10-9a-104.

These provisions of statute provide that school districts must conform to applicable land use ordinances when "installing, constructing, operating, or otherwise using any area, land, or building situated within that municipality." U.C.A. 10-9a-305(1). This same section of the Code also provides that municipalities are limited in some respects in how schools are to be regulated under the land use laws. It states specifically that a municipality may not:

> . . . require a school district or charter school to participate in the cost of any roadway or sidewalk, or a study on the impact of a school on a roadway or sidewalk, that is not reasonably necessary for the safety of school children and not located on or contiguous to school property, unless the roadway or sidewalk is required to connect an otherwise isolated school site to an existing roadway;

U.C.A. 10-9a-305(3)(b). That section of the code also provides that:

> . . . a school district or charter school shall coordinate the siting of a new school with the municipality in which the school is to be located, to: (a) avoid or mitigate existing and potential traffic hazards, including consideration of the impacts between the new school and future highways; and (b) to maximize school, student, and site safety.

Utah Code Annotated, Section 10-9a-305(4). The state code also imposes a requirement that a school district and a municipality must meet to "discuss concerns that each may have, including potential community impacts and site safety" and "assess the availability of infrastructure for the site." U.C.A. Section 53A-20-108. This provision does not alter the ability of a municipality to regulate a school, but clearly intends that issues of safety and infrastructure are to be considered by both the school district and municipality prior to the finalization of a school site plan.

This is not to say that school districts are not "persons" under the law with their own specific property rights. There is no indication that a school district does not have the protection that other property owners have under the case law or the land use statutes. For example, the Utah Court of Appeals has held:

> Because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting property uses should

be strictly construed, and provisions permitting property uses should be liberally construed in favor of the property owner.

Patterson v. Utah County Bd. of Adjustment, 893 P.2d 602, 606 (Utah Ct. App. 1995).

Requirement to Connect to Municipal Utilities

Issue: Can West Jordan City require the Jordan School District to connect a proposed elementary school to city water and sewer utilities where those services can also be provided by a local improvement district?

In this matter, the District asks if the City has the legal ability to require that the District connect to city water and sewer systems. The issue appears to arise in light of the relative cost of these services when comparing the cost of city services to those of the Kearns Improvement District (KID). The KID, according to the material submitted by the District, is willing and able to provide water and sewer services to the District at a cost that is estimated to be lower than the District would have to pay if the City required a connection to city water and sewer utilities. The City appears willing to allow the new school to receive sewer and water services from the KID, but only through a "transparent" arrangement where the District pays the City's normal water connection fees and the City bills for water and sewer services provided by the KID.

An alternative is for the District to connect to the existing city water and sewer systems by running new pipelines from the proposed school site to existing water and sewer mains within the city system. This, according to the material submitted by the District, would be significantly more expensive than the KID option. There is some indication in the correspondence between the City and the District over the proposed school site that the City may intend to require the installation of these sewer and water lines whether they are needed immediately or not so that new street pavement does not need to be torn up later to install utility lines.

According to U.C.A. 10-9a-305(1)(a), "each . . . school district . . . shall conform to any applicable land use ordinance for any municipality when installing, constructing, operating, or otherwise using any area, land or building situated within that municipality." The Utah Supreme Court has recognized that a state statute specifically authorizing cities to require connection to their sanitary sewer systems is "merely an express recognition of power implied in the police powers previously held by municipalities, and is not . . . a legislative grant of a new power not previously held by the cities." *Rupp v. Grantsville City*, 610 P.2d 338, 342 n.4 (Utah 1980). In light of these provisions in law, it is clear that the District is subject to local utility ordinances under normal circumstances, and absent specific exceptions.

The City indicates that the District, for purposes of its land use ordinances, is a "developer". In the City's ordinances at Section 89-1-203, the word "developer" as used in the land use ordinances is a person who develops property or who causes property to be developed. "Development" for purposes of the land use ordinances is defined to include any man-made change to improved or unimproved real estate. By these definitions, the District is a developer.

Under WJCO Section 89-6-406(1), "The developer shall, at his expense, install all off-site culinary water lines to connect his development within existing City systems." There does not appear to be a similar provision in the development code related to a requirement to connect to the City sewer system, though WJCO Section 89-6-409 requires that the developer is to install a sewer system that complies with the City's construction standards and manuals that extends across the frontage of all existing streets to the boundary of the development. There are provisions requiring the installation of sewer utility lines in the City's Subdivision Ordinance at WJCO Section 87-5-111(g)(3), though these provisions may not be applicable if the school project does not involve the subdivision of land.

With regard to the cost of public utilities charged to public entities, including school districts, the Utah Supreme Court has recently commented on a relevant statute. In commenting about U.C.A. 17A-3-315, the court said that this provision of statute "specifically authorizes municipalities to charge public agencies for services." It provides:

> Nothing in this section shall prevent a municipality from imposing or a public agency from paying reasonable charges for any services or materials actually rendered or supplied by the municipality to the public agency, including, by way of example and not in limitation, charges for water, lighting, or sewer services.

Board of Education of Jordan School District v. Sandy City Corporation, 2004 UT 37, par. 18. In provisions of this legal decision, which is also cited later in this opinion, the Court also acknowledges that local governments will enjoy deferential treatment by the courts when their decisions about appropriate infrastructure are challenged, especially where those decisions are made in light of "accelerated urban growth". *Id.* At par. 31.

School districts do enjoy some specific protections in state statute, however. As the *Board of Educ. v. Sandy* case noted, a municipality can only impose ". . . reasonable charges for any services or materials actually rendered or supplied. . ." This phrase may have been taken out of context by the Court when it applied the provision directly to whether utility service charges are appropriately made. The phrase requiring that charges be reasonable is not included in a statute dealing with ongoing service charges, but comes from a statute dealing with assessments made to offset the cost of permanent utility improvements. I have relied upon it because, in the *Board of Educ. v. Sandy* case, the Court also applied this statute in support of a requirement that ongoing service charges for school utilities must be reasonable. *Id.* at par. 18-22.

Specific provisions of state statutes may also limit the powers of cities more generally with regard to utilities. For example, U.C.A. Section 10-8-38 provides:

> Any city or town may, for the purpose of defraying the cost of construction, reconstruction, maintenance or operation of any sewer system or sewage treatment plant, provide for mandatory hookup where the sewer is available and within 300 feet of any

> property line with any building used for human occupancy and make a reasonable charge for the use thereof.

This provision has been held to prohibit a municipality from requiring a developer or property owner to hook up to sewer if the city sewer is more than 300 feet from the school site. This does not violate the principles expressed in *Hutchinson*. In *Harding v. Alpine City*, 656 P.2d 985 (Utah 1982), the Utah Supreme Court held that cities could not require sewer hookups beyond that distance and quoted *Hutchinson* to support the decision:

> There are ample safeguards against any abuse of power at the local level. Local governments, as subdivisions of the State, exercise those powers granted to them by the State Legislature, and the exercise of a delegated power is subject to the limitations imposed by state statutes and state and federal constitutions.

Hutchinson, at p. 1121, cited in *Harding* at p. 986. Therefore, the City cannot require the District to connect to the City's sewer system if the nearest part of the sewer system is physically located more than 300 feet from the school site. If the District can obtain services elsewhere to meet its sewer needs, it may do so, understanding that whatever means it uses to handling its sanitary sewer needs must comply with applicable rules, codes, and ordinances.

Since there does not appear to be a statute related to water utilities that is similar to U.C.A. 10-8-38, relating to sewer, the City ordinances do operate to require the District obtain its water utilities for the new school site through the City. If water services can be provided efficiently through the KID, there does not appear to be any reason not to do so, but the City's ordinances allow the City to make that call. The resulting charges to the District must, however, be reasonable.

Requirement to Provide Street Improvements

Issues: Can the City require the full improvement of 7000 South across the front of the proposed school site at 6000 West and continuing East to Montova Way at 5830 West?

Can the City require the full improvement of 6200 West along the Western boundary of the proposed school site?

The City has provided in its ordinances for adequate public facilities to accommodate development at WJCO Section 89-5-201 through 204. "Adequate Public Facilities" ordinances setting minimum sizing and "concurrency" of infrastructure will be upheld, so long as they provide for reasonable minimal standards for public utilities, roads and other infrastructure as needed to serve the interests of health, safety and public welfare. A requirement that streets be wide enough to accommodate emergency vehicles and that water lines provide adequate fire flows are clearly not only legal and appropriate but wise.

The City Ordinances, at Section 87-5-106(d) provide "as a condition of subdivision approval, the subdivider shall install street extensions and widening as recommended by the City's Master Transportation Plan." Similar wording related to development in general is found at WJCO 89-6-403(a)(1). Section 87-5-106(g) provides that "streets along a proposed subdivision boundary shall be constructed to City standards and according to the City's Master Transportation Plan." Section 87-5-106(h) provides that "half streets along subdivision boundaries or within any part of a subdivision are not permitted unless specifically approved by the City Council." Section 89-6-406(a) provides that "If the City's General Plan for water shows a water line larger than that required for the proposed development, the developer shall install the line of proper dimension." Section 87-5-111(g)(2) provides that "If the City Sanitary Sewer Master Plan shows a sewer line larger than that required for the proposed development, the developer will install the line of proper dimension." Section 87-5-111(h)(2) provides that "If the City Storm Drainage Master Plan shows a pipe line larger than that required for the proposed development, the developer will install the line of proper dimension."

Section 87-5-203 of the City's ordinances also provides:

> (a) As a condition of development approval, a developer shall be required to install public improvements which are reasonably necessary to serve the proposed development at adopted level of service standards. Where required by the City Engineer to connect to existing public improvements with adequate capacity, accommodate future development, or accommodate the CFP (Capital Facilities Plan), the developer shall also be required to install off-site or oversized public improvements reasonably necessary to extend, expand, or improve the City's infrastructure beyond that which is necessary to serve or benefit the particular development.
>
> (b) All construction costs, installation costs, and the cost of acquiring property or easements shall be paid initially by the developer, at developer's sole expense.

Sections 89-6-413 and 87-5-204 and 205 also provide for developer reimbursement agreements which are also known as "pioneering agreements". Under such an agreement, a developer may request that the city make arrangements for the repayment to a developer of the qualifying costs of public improvements sized to accommodate future needs by some future developer whose project benefits from the improvements. The agreements are not guarantees of future payments, and the sums to be repaid are limited in amount. The period of time during which reimbursement may be made to the first developer is also limited to ten years (WJCO 87-5-207). No interest is to be paid on any amounts due under the reimbursement agreement. (WJCO 87-5-205(c)(10).

These three separate parts of the City's ordinances are closely related. The adequate public facilities provisions cited set a floor for development and ensure that adequate capacity is available to provide for the base requirements of the most modest development. It is not uncommon, for example, for municipalities to require a minimum 8 inch water line for any development including small ones, since experience has shown that to be a reasonable minimum

size needed for fire flows. The provisions in the code requiring developers to build oversized public improvements to accommodate the eventual projected capacities to meet the needs of long-term growth and eventual "build out" of all the lands surrounding a proposed project go beyond adequate public facilities, and provide for orderly and efficient expansion of the city infrastructure. The third set of ordinances, providing for eventual reimbursement of the costs of oversizing public improvements, allows a developer and the city to work out an arrangement that will likely provide compensation later for added requirements imposed on the developer today. These three different provisions of the ordinances are designed to protect the public health, safety and welfare while attempting to balance the burdens placed on municipalities by exponential growth with the burdens placed on private developers, who are of course benefited and enabled by adequate infrastructure.

The system of burdens and benefits created by ordinances such as these seem to be quite logical and practical in a larger view, but the individual project proposed by a specific property owner who applies for land use approval can be starkly disadvantaged by such a regulatory scheme. In order to avoid the placement of undue burdens on a given land use applicant, the courts and the legislature have provided specific limitations on the imposing of development conditions and exactions.

Conditions and exactions imposed in the process of reviewing land use applications are held to specific standards of review. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994), related to conditions that required the dedication of land for flood control and a bike path; and *Nollan v. California Coastal Comm.* 483 U.S. 825 (1987), which related to a requirement for the dedication of an easement for public access across beach property to the state in order to obtain a building permit for a residence. A recent Utah case heard by both the Utah Court of Appeals and the Utah Supreme Court, *BAM Development v. Salt Lake County,* 2004 UT App. 34 and 2006 UT 2, reemphasized the need for individualized determinations of fairness in a situation where county government demanded land and street improvements from a subdivider to accommodate future county road needs without an individualized determination that the conditions imposed were both related to burdens created by a subdivision and proportionate to those burdens.

These cases provide that a property owner can refuse to dedicate private land to public use and refuse to provide substantial public improvements unless there is an individualized determination by the municipality involved demonstrating that the exactions imposed are both appropriate and proportionate. The relevant state statute provides:

> A municipality may impose an exaction or exactions on development proposed in a land use application if:
> (1) an essential link exists between a legitimate governmental interest and each exaction; and
> (2) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

U.C.A. 10-9a-508. If a land use approval requires oversized public improvements without proof of uniformity and proportionality, such exactions may be ruled as unconstitutional.

The provisions of the West Jordan City ordinances which require oversizing will be held to be unconstitutionally applied if they are imposed without an individualized determination of relevance and proportionality in each case where they are challenged. In the current matter, City officials have come to conclusions about the nature and extent of the street requirements which will be imposed on the proposed school project and expressed those conclusions in written communications to the District. This was inappropriate at this stage of the discussions about the project. The City has argued that since no complete application for approval has been provided to the City by the District, it is too early for this advisory opinion to opine on what conditions and exactions would be appropriate for the project. I agree.

By the same token, it is also too early for officials of the City to state with certainty that 7000 South must be fully improved to a full 80 foot width across the entire frontage of the proposed school site and continuing East to Mantova Way or that a 70 foot right of way must be provided and all street improvements completed along the entire Western boundary of the proposed school site. While the City ordinances allow for, indeed mandate, such conclusions before an application is filed, these provisions are simply unconstitutional if applied without compensation for the cost of oversizing or, in the alternative, without an individualized determination, supported by substantial evidence in the record, that these street requirements are "roughly proportionate, both in nature and extent, to the impact of the proposed development." *Id.* As provided in *Dolan* and *BAM*, to impose disproportionate exactions as part of a land use approval constitutes a regulatory "taking" of private property for a public purpose without the payment of just compensation.

The Utah Supreme Court and the Utah Court of Appeals have each held in the *BAM* case that disproportionate exactions violate Article I, Section 22 of the Utah Constitution. Such a violation is often referred to as a "regulatory taking."

The remedy for a regulatory taking is just compensation. At U.C.A. 63-30d-302 (Governmental Immunity Act) the state law provides that "In any action brought under the authority of Article I, Section 22, of the Utah Constitution for the recovery of compensation from the governmental entity when the governmental entity has taken or damaged private property for public uses without just compensation, compensation and damages shall be assessed according to the requirements of Title 78, Chapter 34, Eminent Domain."

The compensation and damages referred to in the Governmental Immunity Act are provided for in U.C.A. 78-34-10. In interpreting the predecessors to this provision of Utah statute, the Utah Supreme Court has held that compensation within meaning of this section contemplates money:

> In the exercise of the right of eminent domain, no just compensation can be made for the property taken, except in money. Money is a common standard, by comparison with which the value of anything may be ascertained. Compensation is a recompense in value,

> a quid pro quo, and must be in money. Land or anything else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him; and an act of the Legislature which provides that land may be taken and paid for with other lands belonging to the state does not provide a constitutional compensation."

Oregon Short Line R.R. v. Fox, 28 Utah 311, 78 P. 800 (1904). The City's reimbursement agreement options are thus not an acceptable substitute for just compensation, though they may be entered into voluntarily by developers and in many cases will allow a good and fair resolution of issues between the City and its development community. I am confident that many developers are advantaged by the convenience and efficiency of the City's protocols for the provision of public improvements, as has the City. There would normally be nothing inappropriate in the voluntary use of such options in arms-length transactions between land use applicants and municipalities. If challenged, however, development conditions and exactions over and above reasonable "adequate public facilities" minimums must be justified by individualized determinations in each instance. If they cannot be, then the exactions must either be lifted or the City must pay "cash money" for the portion of the cost of public improvements which is disproportionate.

What does this mean as far as our current situation with the District and the proposed school? Again referring back to U.C.A. 10-9a-305, it is clear (when adjusting the language to accommodate the legislative propensity for double negatives) that the municipality may require a school district to participate in the cost of a roadway or sidewalk, or a study on the impact of a school on a roadway or sidewalk, if the roadway or sidewalk is reasonably necessary for the safety of school children. Such a roadway or sidewalk may even be mandated on property that is not contiguous to school property if it is required to connect an otherwise isolated school site to an existing roadway.

In such matters, a City's determination of reasonableness is to be given deference by the courts. The Supreme Court of Utah has clearly stated as much.

> We hold that Sandy City's decisions regarding the structure, operation, and funding of its storm sewer system are entitled to deference. We generally give latitude to local governments in creating solutions to problems, especially in meeting the challenges and needs caused by accelerated urban growth. See *Price Dev. Co. v. Orem City*, 2000 UT 26, P 19, 995 P.2d 1237; *State v. Hutchinson*, 624 P.2d 1116, 1126 (Utah 1980). Accordingly, we decline to substitute our judgment for that of the Sandy City Council in the resolution of this municipal problem.

Board of Educ. v. Sandy, at Par. 31. This common and predictable paradigm of judicial review is consistent with the provisions of U.C.A. 53A-20-108, which is cited elsewhere in this opinion (see Appendix) and mandates early and thorough discussion of the relative burdens related to new schools that are to be borne by the school district proposing a school and the municipality.

Any requirements imposed by the City upon the District for vehicular and pedestrian access to the new school site, both from the East and from the South, must be the subject of an individualized determination of rough proportionality with regard to the burdens placed on the transportation systems of the City by the school and the burdens placed back on the school by the City. The test is "rough" proportionality.

> In adjudicating the validity of any individual application of this standard of reasonableness, the courts must concede municipalities the flexibility necessary to deal realistically with questions not susceptible of exact measurement. Precise mathematical equality "is neither feasible nor constitutionally vital."

Banberry Development Corp. v. South Jordan City, Utah, 631 P.2d 899 (1981). The *Banberry* case also provides that "insofar as such equality can reasonably be achieved, this must be done."

Again, quoting the Utah Supreme Court: ". . . none of the subsections surrounding subsection (c) in paragraph 2 of section 10-9-106 expresses an intent to excuse a school district from paying for services or improvements that are directly connected to a need created by the school district. *Board of Educ. v. Sandy*, par. 17. (citing 10-9-106, the predecessor statute to 10-9a-305, which in relevant language was identical to the current statute).

The City can require the District to make improvements to 7000 South Street if those improvements are shown, by substantial evidence in the record, as being reasonably necessary for the safety of school children. The City has expressed concern that the provision by the District of street improvements without providing for the full eventual transportation needs of the community would create gross inefficiencies. For example, it is predictable that the building of a road of modest capacity, perhaps 50 feet wide, including two travel lanes with full curb, gutter and sidewalk improvements might occur one year to meet the needs of a smaller development. These may be the only street improvements justified by the demands created by the small development. It might also be easily predictable that another larger development might be proposed the next year on the same roadway, and that the larger development mandates a wider street. In such a case the newly installed curb, gutter and sidewalk improvements on the 50 foot right-of-way would of necessity be removed to accommodate more travel lanes. This might occur even though it was clearly foreseeable that the wider street was going to be needed for full build-out, albeit not for the minimum needs of the first development proposal. Not just the City, but also the neighbors who endure two cycles of street improvements, the landowners whose land must be acquired for street widening purposes, and even the second developer who bears additional costs are all disadvantaged by a short-sighted decision to install infrastructure that is smaller than necessary in order to protect both property rights and municipal funds.

I do not have a quick answer for this dilemma, except that if among the options to address the issue is one that is illegal under the Constitution, we must use another option. Voluntary incentives, impact fees, special improvement districts, less expensive interim options (such as a footpath located some distance from the pavement for safe passage of students walking to and from the school in lieu of full curb, gutter, and sidewalk improvements), other sources of interim

funding through revolving funds, the controlled phasing of development through annexation and zoning decisions, and other options may be available in such a situation. The type of municipal cooperation envisioned by U.C.A. 53A-3-409 may also be of assistance:

> (1) Local governmental entities and school districts may contract and cooperate with one another in matters affecting the health, welfare, and convenience of the inhabitants within their respective territorial limits.
>
> (2) A local governmental entity may disburse public funds in aid of a school district located wholly or partially within the limits of its jurisdiction.

I am not saying it is appropriate or even desirable for the City to participate in the funding of school improvements, but only submit that there are options in dealing with school districts that would not be available in resolving land development concerns with private developers.

The current controversy about the specific application of narrow rules and statutes to a given case would give rise to the impression that the City and the District are miles apart on these issues. Both sides to the discussion appropriately insist they are not. I am convinced that the first concern for all involved is the safety of school children and the public. Indeed, the District is obligated under state statute to make evaluations to "coordinate the siting of a new school with the municipality in which the school is to be located, to: (a) avoid or mitigate existing and potential traffic hazards, including consideration of the impacts between the new school and future highways; and (b) to maximize school, student, and site safety." U.C.A. 10-9a-305(4).

While the City can impose street improvement requirements on the District, those conditions and exactions must meet three tests: 1) The requirements may provide for the minimum improvements necessary to provide adequate public facilities to protect public safety as outlined in the fire code and other relevant codes; 2) the City must not impose disproportionate burdens on the District when considered in light of the burdens which are reasonably expected to be borne by the City as a result of the proposed school development, standing alone; and 3) any required street improvements must be reasonably necessary for the safety of school children.

Requirement to Pay Land Use Fees

Issue: Must the District pay a subdivision or site plan review fee when it submits an application to the City for such a land use approval?

The District also asks if the City may charge fees for the review of a subdivision application and/or a site plan. In support of the premise that no such fees can be charged, the District again cites U.C.A. 10-9a-305, where in subsection (3)(c) it provides that a municipality may not "require a district or charter school to pay fees not authorized by this section." The specific fees authorized by this section of the code include building inspection fees that might be charged if a school district wishes to utilize municipal building inspectors (subsection (3)(d)) and reasonable impact fees related to the burdens created by the proposed school project (subsection (3)(e)). See *Board of Educ. v. Sandy*, par. 22.

In response the City cites U.C.A. 53A-20-108(2) which provides that when a school site is to be selected and building plans made the municipality and the school district must " . . . negotiate any fees that might be charged by the local government entity in conjunction with a building project."

When attempting to interpret the meaning of statutes, they are to be construed to harmonize all laws on related subjects and avoid conflicts. "We read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Miller v. Weaver*, 2003 UT 12. These two statutes do not conflict if the provisions of 53A-20-108(2) are interpreted to mean that when a school site is being considered, the municipality and district involved are to meet and negotiate the land use related building inspection fees and/or impact fees associated with the building project, which are allowed under U.C.A. 10-9a-305(3)(c). These are not the only fees that school districts must pay. Under the recent holding of the Utah Supreme Court in *Board of Educ. v. Sandy*, storm drain fees may also be assessed and other charges made, so the provisions of 53A-20-108(2) might also apply to such fees, which are not land use fees. (*Board of Educ. v. Sandy* at par. 22). There are no doubt other utility related fees which are not land use fees.

If these two statutes are considered in this manner, they do not conflict and each can be given its clear meaning. The only land use fees that can be charged a school district are building inspection fees (if the district uses city inspectors) and reasonable impact fees. *"All other land use fees are proscribed*."(emphasis added) - a specific statement related to this specific statute made by the Court in *Board of Educ. v. Sandy* at par. 22. A municipality can charge some utility fees and perhaps other fees, but it cannot charge a school district a subdivision approval fee, a site plan review fee, or any other fee arising from a land use regulation except as authorized by U.C.A. Section 10-9a-305.

Conclusion

1. West Jordan City can require the Jordan School District to arrange for the provision of water utilities for the new school site through the City. The resulting charges to the District must, however, be reasonable. The City cannot require the District to connect to the City's sewer system if the nearest part of the sewer system is physically located more than 300 feet from the school site.

2 and 3. While the City can impose street improvement requirements on the District, those conditions and exactions must meet three tests: 1) The requirements may provide for the minimum improvements necessary to provide adequate public facilities to protect public safety as outlined in the fire code and other relevant codes; 2) the City must not impose disproportionate burdens on the District when considered in light of the burdens which are reasonably expected to be borne by the City as a result of the proposed school development, standing alone; and 3) any required street improvements must be reasonably related to the safety of school children.

4. The only land use fees that can be charged a school district are building inspection fees (if the district uses city inspectors) and reasonable impact fees. All other land use fees are proscribed.

I appreciate the professional, thorough and competent manner in which the City and the District and their respective counsel have assisted in the preparation of this opinion. The bottom line for the most significant issues reviewed is that both the City and the District play an essential role in protecting the safety and welfare of not only school children but members of the public at large. I am confident that those I have dealt with in the preparation of this opinion will be able to make decisions related to this matter that will reach an appropriate and sustainable compromise with regard to these issues and the myriad of others that they must grapple with. They are individuals characterized by competence, concern and good will.

Craig M. Call, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Utah Code Annotated, 13-42-205. 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

Utah Code Annotated Section 13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. Section 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:

Ann Dowdle
Risk/Real Property Manager
West Jordan City
8000 South Redwood Raod
West Jordan, UT 84088

On this _____ Day of March, 2007, 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

Appendix

Some Relevant State Statutes

10-9a-305. Other entities required to conform to municipality's land use ordinances - Exceptions - School districts and charter schools.

(1) (a) Each county, municipality, school district, charter school, special district, and political subdivision of the state shall conform to any applicable land use ordinance of any municipality when installing, constructing, operating, or otherwise using any area, land, or building situated within that municipality.

(b) In addition to any other remedies provided by law, when a municipality's land use ordinances is violated or about to be violated by another political subdivision, that municipality may institute an injunction, mandamus, abatement, or other appropriate action or proceeding to prevent, enjoin, abate, or remove the improper installation, improvement, or use.

(2) (a) Except as provided in Subsection (3), a school district or charter school is subject to a municipality's land use ordinances.

(b) (i) Notwithstanding Subsection (3), a municipality may subject a charter school to standards within each zone pertaining to setback, height, bulk and massing regulations, off-site parking, curb cut, traffic circulation, and construction staging.

(ii) The standards to which a municipality may subject a charter school under Subsection (2)(b)(i) shall be objective standards only and may not be subjective.

(iii) Except as provided in Subsection (7)(d), the only basis upon which a municipality may deny or withhold approval of a charter school's land use application is the charter school's failure to comply with a standard imposed under Subsection (2)(b)(i).

(iv) Nothing in Subsection (2)(b)(iii) may be construed to relieve a charter school of an obligation to comply with a requirement of an applicable building or safety code to which it is otherwise obligated to comply.

(3) A municipality may not:

(a) impose requirements for landscaping, fencing, aesthetic considerations, construction methods or materials, building codes, building use for educational purposes, or the placement or use of temporary classroom facilities on school property;

(b) except as otherwise provided in this section, require a school district or charter school to participate in the cost of any roadway or sidewalk, or a study on the impact of a school on a roadway or sidewalk, that is not reasonably necessary for the safety of school children and not

located on or contiguous to school property, unless the roadway or sidewalk is required to connect an otherwise isolated school site to an existing roadway;

(c) require a district or charter school to pay fees not authorized by this section;

(d) provide for inspection of school construction or assess a fee or other charges for inspection, unless the school district or charter school is unable to provide for inspection by an inspector, other than the project architect or contractor, who is qualified under criteria established by the state superintendent;

(e) require a school district or charter school to pay any impact fee for an improvement project that is not reasonably related to the impact of the project upon the need that the improvement is to address; or

(f) impose regulations upon the location of a project except as necessary to avoid unreasonable risks to health or safety.

(4) Subject to Section 53A-20-108, a school district or charter school shall coordinate the siting of a new school with the municipality in which the school is to be located, to:

(a) avoid or mitigate existing and potential traffic hazards, including consideration of the impacts between the new school and future highways; and

(b) to maximize school, student, and site safety.

(5) Notwithstanding Subsection (3)(d), a municipality may, at its discretion:

(a) provide a walk-through of school construction at no cost and at a time convenient to the district or charter school; and

(b) provide recommendations based upon the walk-through.

(6) (a) Notwithstanding Subsection (3)(d), a school district or charter school shall use:

(i) a municipal building inspector;

(ii) a school district building inspector; or

(iii) an independent, certified building inspector who is:

(A) not an employee of the contractor;

(B) approved by a municipal building inspector or a school district building inspector; and

(C) licensed to perform the inspection that the inspector is requested to perform.

(b) The approval under Subsection (6)(a)(iii)(B) may not be unreasonably withheld.

(c) If a school district or charter school uses an independent building inspector under Subsection (6)(a)(iii), the school district or charter school shall submit to the state superintendent of public instruction, on a monthly basis during construction of the school building, a copy of each inspection certificate regarding the school building.

(7) (a) A charter school shall be considered a permitted use in all zoning districts within a municipality.

(b) Each land use application for any approval required for a charter school, including an application for a building permit, shall be processed on a first priority basis.

(c) Parking requirements for a charter school may not exceed the minimum parking requirements for schools or other institutional public uses throughout the municipality.

(d) If a municipality has designated zones for a sexually oriented business, or a business which sells alcohol, a charter school may be prohibited from a location which would otherwise defeat the purpose for the zone unless the charter school provides a waiver.

(e) (i) A school district or a charter school may seek a certificate authorizing permanent occupancy of a school building from:

(A) the state superintendent of public instruction, as provided in Subsection 53A-20-104(3), if the school district or charter school used an independent building inspector for inspection of the school building; or

(B) a municipal official with authority to issue the certificate, if the school district or charter school used a municipal building inspector for inspection of the school building.

(ii) A school district may issue its own certificate authorizing permanent occupancy of a school building if it used its own building inspector for inspection of the school building, subject to the notification requirement of Subsection 53A-20-104(3)(a)(ii).

(iii) A charter school may seek a certificate authorizing permanent occupancy of a school building from a school district official with authority to issue the certificate, if the charter school used a school district building inspector for inspection of the school building.

(iv) A certificate authorizing permanent occupancy issued by the state superintendent of public instruction under Subsection 53A-20-104(3) or a school district official with authority to issue the certificate shall be considered to satisfy any municipal requirement for an inspection or a certificate of occupancy.

17A-3-315. Property of public agencies not assessable - Charges for services or materials permitted - Property acquired after creation of district.

(1) Except as provided in Subsection (2), a municipality may not levy an assessment against property owned by the federal government, the state of Utah, any county, school district, municipality or other political subdivision of the state of Utah or by any department or division of any such public agency even though such property is benefited by improvements made, but each such public agency is authorized to contract with the municipality for the making of such improvement and for the payment of the cost thereof to the municipality. Nothing in this section shall prevent a municipality from imposing or a public agency from paying reasonable charges for any services or materials actually rendered or supplied by the municipality to the public agency, including, by way of example and not in limitation, charges for water, lighting, or sewer services.

(2) An assessment may be levied and enforced against property acquired by a public agency which is within a special improvement district created prior to the acquisition. Property acquired by a public agency which is subject to the lien of an assessment at the time of acquisition shall continue to be subject to such lien and to enforcement of the same against the property if the assessment and interest accruing thereon is not paid when due.

53A-20-108. Notification to local government of intent to purchase school site or construction of school building - Negotiation of fees - Confidentiality.

(1) (a) A school district or charter school shall notify the affected local governmental entity without delay prior to the purchase of a school site or construction of a school building of its intent to purchase or construct.

(b) Representatives of the local governmental entity and the school district or charter school shall meet as soon as possible after delivery of the notice under Subsection (1)(a) to:

(i) discuss concerns that each may have, including potential community impacts and site safety;

(ii) assess the availability of infrastructure for the site; and

(iii) discuss any fees that might be charged by the local governmental entity in connection with a building project.

(2) Representatives of the local governmental entity and the school district or charter school shall meet as soon as possible after the purchase of a school site to discuss concerns that each may have, including potential community impacts, and to negotiate any fees that might be charged by the local governmental entity in connection with a building project.

(3) A local governmental entity may not increase a previously agreed-upon fee after the district or charter school has signed contracts to begin construction.

(4) Prior to the filing of a formal application by the affected school district or charter school, a local governmental entity may not disclose information obtained from a school district or charter school regarding the district's or charter school's consideration of, or intent to, purchase a school site or construct a school building, without first obtaining the consent of the district or charter school.