

# Advisory Opinion #24

Parties: Rory Ukena and South Weber City

Issued: November 1, 2007

## TOPIC CATEGORIES:

D: Exactions on Development

Cities can impose exactions upon issuance of building permits or subdivision plat approvals, if the exactions satisfy rough proportionality analysis. The exaction must be justified by the impact caused by the development only, and not on need anticipated by future development.

## 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

## ADVISORY OPINION

### Water Line Upgrade as a Condition of Subdivision Approval

Advisory Opinion Requested by: Rory Ukena  
Local Government Entity: South Weber City  
Project: Subdivision Plat Approval  
Opinion Authored By: Elliot R. Lawrence, Attorney  
Office of the Property Rights Ombudsman  
Date of this Advisory Opinion: November 1, 2007

### Issue

May South Weber City validly require the developer of a three-lot subdivision to replace a 6-inch water line with a new 8-inch line?

### Summary of Advisory Opinion

The City's requirement that the developer replace an existing water line with a larger line is an exaction which must meet the "*Nollan/Dolan*" rough proportionality analysis. The City does have a legitimate interest in maintaining adequate water service, and installing a larger-capacity water line is a reasonable means of accomplishing that objective. However, the impact of a three-lot subdivision is not proportional to costs and burden of installing the larger line. There is no finding that two additional homes will create the need for a larger water line in that area. For this reason, the City may not impose the full burden of installing the new water line on the property owner.

### Review

A request for an advisory opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of Utah Code Ann. § 13-43-205. An advisory opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use

application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

The request for this Advisory Opinion was received from Rory Ukena on October 8, 2007. As provided in statute, a letter with the request attached was sent via certified mail, return receipt requested, to Joseph E. Gertge, Mayor of South Weber City, at 1600 East South Weber Drive, South Weber, Utah 84405. The return receipt was signed and was received on October 15, 2007, indicating that it had been received by the City.

### **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, submitted by Rory Ukena, and received by the Office of the Property Rights Ombudsman, October 9, 2007.
2. In a telephone conversation, the attorney for South Weber City, Stephen Noel, indicated that the City had no issue with the characterization of the issue as presented in the Request, and that no formal response would be needed.
3. Title 11 of the South Weber City Code, governing subdivisions.

### **Assumed Facts**

1. It is assumed that the existing water line which crosses the property also serves the home located on that property.
2. It is assumed that the easements identified on the subdivision plats may be relocated or terminated.

### **Background**

In 2007, Rory Ukena proposed a minor subdivision, located at approximately 1750 East and 7600 South in South Weber, Utah. The proposal divided an existing 1.25 acre parcel into three lots. The plat included dedication of property for a portion of 7600 South, which was proposed to be aligned with lots 1 and 2 on one side, with lot 3 on the other side. The proposed road would be mostly straight, and would curve slightly northward at the eastern end of the parcel. An existing home straddles the boundary line of lots 1 and 2. According to the plat submitted by the property owners, lots 1 and 2 would “remain consolidated” until the home is demolished. Lot 3 shows a small shed, but no other structures.

Existing water and sewer lines run beneath the parcel, and are located approximately where the proposed road would be located. The City appears to own a waterline easement across the

parcel. This easement enters the parcel at about the middle of the western edge. About one-fourth of the way through the parcel, the easement veers to the north. While most of the easement is located within the proposed roadway, the eastern portion is not.

An existing water line, 6 inches in diameter, is located entirely within the proposed roadway. A sewer line runs parallel to the water line. The City informed the property owners that the subdivision would require that an 8 inch water main be installed beneath the center of the road. The waterline easement does not follow the existing water line, nor would it follow the new line if it were installed beneath the proposed roadway. The Request for Advisory Opinion did not state whether the City had proposed any requirements for sewer or any other utility.

In a telephone conversation, the City Attorney for South Weber City informed the Office of the Property Rights Ombudsman that the Request submitted by the property owners accurately stated the factual background of the proposed subdivision. The attorney further stated that the legal issues were simple and straightforward, and that the City felt that a formal response from the City was unnecessary.

## Analysis

### **The City's Requirement that the Property Owners Install a Larger Water Line is an Improper Exaction, Because the Extent of the Requirement is not Proportional to the Impact of the Proposed Subdivision.**

#### *A. The Water Line Requirement is an Exaction, which is Subject to the Rough Proportionality Analysis Required by § 10-9a-508 of the Utah Code.*

The City's requirement that the property owners replace the existing 6-inch water line with an 8-inch line is an improper exaction, because the impact of the proposed subdivision is not proportionate to the costs of replacing the water lines. "Exactions are conditions imposed by governmental entities on developers for the issuance of a building permit or subdivision plat approval." *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 34, 128 P.3d 1161, 1169. The term "exaction" includes any condition on development, including not only dedication of property, but also payment of money, installation of specific improvements, or other requirements imposed by a public entity. Furthermore, the term "exaction" includes conditions imposed by a general legislative enactment as well as those imposed by decisions or negotiations on specific proposals. *Id.*, 2006 UT 2, ¶ 46, 128 P.3d at 1170.<sup>1</sup>

Jurisdictions across the United States have struggled with the scope of the rough proportionality analysis, and whether it should be applied to conditions which do not require an actual dedication of property. The Texas Court of Appeals discussed the applicability the "*Nollan/Dolan*" proportionality analysis to those types of conditions. The court noted that several jurisdictions

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<sup>1</sup> There has been a great deal of debate over whether the proportionality test applies to conditions imposed by general enactments ("legislative") as well as specific development decisions ("adjudicative"). The Utah Supreme Court held that the test should apply to all exactions, and noted that the Legislature also requires analysis for all exactions. *B.A.M.*, 2006 UT 2, ¶ 46, 128 P.3d at 1170 (citing the enactment of § 10-9a-508).

had expanded applicability of the “*Nollan/Dolan*” test to include nondedicator conditions. The Texas court concluded that federal law requires applying the proportionality test to “non-dedicator” conditions.

It is the imposition of land use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the . . . standard of scrutiny formulated by the court in *Nollan* and *Dolan*.

*Town of Flower Mound v. Stafford Estates, L.P.*, 71 S.W.3d 18, 36 (Tex. App. 2002) (quotation omitted). The Utah Supreme Court also held that the proportionality analysis should apply to exactions and conditions in which a developer is required to provide some sort of public improvement. *B.A.M.*, 2006 UT 2, ¶ 46, 128 P.3d at 1170.

Requiring a developer to install a new water line is thus an “exaction,” because it is a condition imposed by the County that must be agreed to by the developer to gain approval of the proposed subdivision.<sup>2</sup>

In 2005, the Utah Legislature enacted Section 10-9a-508 of the Utah Code, which authorizes cities to impose exactions on new development, and also prescribes limits on that authority:

A county may impose an exaction or exactions on development proposed in a land use application provided that:

- (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.

UTAH CODE ANN. § 10-9a-508(1).<sup>3</sup> The Utah Supreme Court noted that the language of this statute was borrowed directly from the U.S. Supreme Court analyses in *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 107 S.Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). See *B.A.M.*, 2006 UT 2, ¶ 41, 128 P.2d at 1170. In those two cases, the Supreme Court promulgated rules for determining when an exaction is valid under the federal constitution’s Takings Clause.<sup>4</sup> This has come to be known as the *Nollan/Dolan* “rough proportionality” test, and that two-part analysis is reflected in § 10-9a-508. In order to be valid,

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<sup>2</sup> “It is in this paradigmatic permit context—where the individual property owner-developer seeks to negotiate approval of a planned development—that the combined *Nollan* and *Dolan* test quintessentially applies.” *Flower Mound*, 71 S.W.3d at 34. The *Flower Mound* case concerned a city’s requirement that the developer of a new subdivision construct improvements on an arterial road near the subdivision. The developer was not required to dedicate any property for the road, but was required to install the improvements.

<sup>3</sup> There is a corresponding statute applicable to counties found at § 17-27a-507 of the Utah Code.

<sup>4</sup> See U.S. Const., amend V. The Supreme Court has interpreted the Takings Clause as limiting a government’s ability to impose conditions on development. Furthermore, “[t]he Utah Constitution reinforces the protection of private property against uncompensated governmental takings . . .” *B.A.M.*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. See also Utah Const. art. I, § 22.

then, the City's requirement that the property owner install a new 8-inch water line must satisfy the rough proportionality test.

*B. There is an Essential Link Between the Water Line Requirement and the Legitimate Government Objective that New Development Receive Adequate Water Service.*

There is an essential link between the City's condition that the developer install a larger water line and the City's legitimate interest in maintaining adequate water service. Providing public utilities, such as culinary water, enhances the public health, which is a legitimate government interest. *See Rupp v. Grantsville City*, 610 P.2d 338, 339-40 (Utah 1980); *see also Summit Water Distribution Co. v. Mountain Regional Water Special Serv. Dist.*, 2005 UT App. 66, ¶¶ 11-14, 108 P.3d 119, 121-22. Requiring developers to install water mains that serve new development is a reasonable means to promote that interest. *See Rupp*, 610 P.2d at 339-40. Thus, there is an essential link between the county's legitimate interest of providing adequate water service and the requirement that the new subdivision install a new water line.

*C. The City has not Shown that the Proposed Subdivision Will Require a Larger Water Line*

The City's condition proposed does not pass the second part of the analysis required by § 10-9a-508, however. The City has not shown that installing a larger water line is proportionate to the impact caused by the proposed subdivision. There has been no finding that two additional homes on the subdivided parcel require increasing the size of the water line from six inches to eight.<sup>5</sup> It is particularly noteworthy that there is already a 6-inch line crossing the parcel. In order to validly require installation of the new line, the City would need to demonstrate why the two additional homes—and only those two homes—cause the need to increase the size of the water line.<sup>6</sup>

The City may foresee a need to upgrade its water system in this area (which appears to be developing), and may therefore may decide that a larger water line is necessary for future service. The City may charge impact fees on new construction, to help pay for water system improvements, but it cannot impose the full cost and burden of an upgrade upon this property owner. The City has not shown that the impact of the three-lot subdivision justifies making Mr. Ukena pay for enlarging the capacity of the City's water system. For this reason, the City's requirement that a larger water line be installed at Mr. Ukena's is an invalid exaction.

## **Conclusion**

The City cannot validly require the property owner to bear the full cost of installing a larger water line. The requirement is a form of exaction, which satisfy the "Nollan/Dolan" takings analysis. The City has a legitimate interest in maintaining and improving its culinary water system, and installing lines with larger capacities is a reasonable means of promoting that

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<sup>5</sup> The subdivision proposes three lots, but there is already a home on the parcel. Thus, the subdivision will result in two additional homes.

<sup>6</sup> Note that the same analysis would apply if the City only required replacement of the 6-inch line. The City has not shown that the impact caused by the new homes would require replacement of the existing water line.

interest. However, the impact of the proposed three-lot subdivision is not proportional to the costs and burden of replacing an existing water line with a larger line. While the City may have a legitimate need to increase the capacity of its water system, it cannot impose the full burden of that upgrade upon this proposed subdivision.

Brent N. Bateman, 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 based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.**

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

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

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

## MAILING CERTIFICATE

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

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

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

Mayor Joseph E. Gertge  
South Weber City  
1600 E. South Weber Drive  
South Weber, UT 84405

On this \_\_\_\_\_ Day of November, 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.

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Office of the Property Rights Ombudsman