

# Advisory Opinion #30

Parties: Greek Orthodox Church of Greater Salt Lake and City of Holladay

Issued: February 13, 2008

## TOPIC CATEGORIES:

D: Exactions on Development

A dedication of land as a condition for a building permit is a development exaction, which must satisfy rough proportionality analysis. City did not show how the impact of the new construction created a need for a larger road.

## 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.



The Office of the Property Rights Ombudsman  
Utah Department of Commerce  
PO Box 146702  
160 E. 300 South, 2<sup>nd</sup> Floor  
Salt Lake City, Utah 84114

(801) 530-6391  
1-877-882-4662  
Fax: (801) 530-6338  
[www.propertyrights.utah.gov](http://www.propertyrights.utah.gov)  
[propertyrights@utah.gov](mailto:propertyrights@utah.gov)



JON M. HUNTSMAN, JR.  
*Governor*

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# State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

## ADVISORY OPINION

Advisory Opinion Requested by: Greek Orthodox Church of Greater Salt Lake  
By and through Kevin Anderson, Attorney

Local Government Entity: City of Holladay

Applicant for the Land Use Approval: The Greek Orthodox Church of Greater Salt Lake

Project: Outdoor Pavilion

Date of this Advisory Opinion: February 13, 2008

Opinion Authored By: Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

### Issues

May the City require dedication of land underlying a roadway as a condition imposed on the granting of a building permit to construct a pavilion?

### Summary of Advisory Opinion

The City's requirement that the Church dedicate a portion of its property for a roadway, as a condition to gain approval for a new pavilion, is an improper exaction under § 10-9a-508 of the Utah Code. Exactions are conditions imposed by government entities for issuance of building permits. An exaction must satisfy the two elements of § 10-9a-508, or the "Nollan/Dolan rough proportionality" test: There must be an essential link between the exaction and a legitimate government interest; and the exaction must be roughly proportionate to the impact caused by the proposed development. Since there has not been the sort of individualized analysis required showing how the City's requirement is roughly proportionate to the impact of the pavilion, the requirement is an improper exaction, and is not allowed under the Utah Code.

## **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 §13-43-205 of the Utah Code. 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 this Advisory Opinion was received from the Greek Orthodox Church of Greater Salt Lake on January 14, 2008. A letter with the request attached was sent via certified mail, return receipt requested, to Stephanie Carlson, City Recorder for the City of Holladay, at 4580 South 2300 East, Holladay, Utah 84117. The return receipt was signed and was received on January 15, 2008, indicating that the City had received it. Representatives from the Church and the City met with the Office of the Property Rights Ombudsman on January 29, 2008, where this Request and the underlying issue were discussed. The City indicated that it would not submit a written response to the Request.

## **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 received January 14, 2008 by the Office of the Property Rights Ombudsman by Kevin Anderson, attorney for The Greek Orthodox Church of Greater Salt Lake, including exhibits.

## **Statutes and Ordinances**

1. Sections 10-9a-507 and -508 of the Utah Code.

## **Background**

The Greek Orthodox Church owns property located at 5335 S. Highland Drive in Holladay, Utah. The property consists of about 7.9 acres, and includes a church, a school, gymnasium, and a parking lot, along with a landscaped area with a softball diamond. Development of the property originally started in the 1960s, with approval from Salt Lake County (the area was unincorporated at the time). The property has about 655 feet of frontage along Highland Drive.

It appears that part of the Highland Drive right-of-way takes is included in the property, and that the City does not own all of the land that makes up the right-of-way.

When the Church first sought approval for construction in 1968, Salt Lake County originally requested dedication of a seven-foot strip of the Church's property along the roadway. For unknown reasons, that dedication never occurred, but nevertheless the curb was set back seven feet, and the roadway was eventually widened. In 1998 the Church sought approval to expand its parking lot. The Salt Lake County Planning Commission granted approval for the expansion, provided the Church dedicate property located "40 feet from the centerline of Highland Drive." This dedication would have included the seven feet requested in 1968. However, that condition was not enforced, and the parking lot was expanded.

In 2006, the Church applied for a conditional use permit to construct a pavilion on its property. The City of Holladay (which had been incorporated in 1999 and assumed jurisdiction for the area) granted approval, with ten conditions. One of those conditions was again "dedication of 40 feet from the center line of Highland Drive."<sup>1</sup>

## Analysis

### A. *Exactions under Section 10-9a-508 of the Utah Code.*

Requiring the Church to dedicate the portion of its property encumbered by Highland Drive as a condition of approval to construct the pavilion is an improper exaction that is not allowed under the Utah Code. The amount of property required by the City is not roughly proportional to the nature and extent of the impact of the pavilion. "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. Since approval of the new pavilion was conditioned upon a dedication of the roadway, the City has proposed an exaction of the Church's property.

Section 10-9a-508 of the Utah Code authorizes cities to impose exactions on new development, but 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.

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<sup>1</sup> In its Request, the Church did not object to the other conditions.

UTAH CODE ANN. § 10-9a-508.<sup>2</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.3d 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>3</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. The county's requirement that the Church dedicate the roadway must meet both elements of § 10-9a-508.

*B. There is an Essential Link Between the City's Legitimate Interest and the Proposed Roadway Dedication.*

The City's requirement that the Church dedicate a portion of its property meets the first test of § 10-9a-508, which requires an essential link, or "nexus" between the governmental interest and the proposed exaction. See *Nollan*, 483 U.S. at 837; see also *B.A.M.*, 2006 UT 2, ¶ 36, 128 P.3d at 1169. Building and maintaining adequate roadways is a legitimate government interest. See *Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117.<sup>4</sup> Widening roads is a reasonable means to promote that interest. *Id.* Thus, requiring the dedication of property to use as a roadway meets the first prong of § 10-9a-508.<sup>5</sup>

*C. The Required Dedication is not Roughly Proportionate to the Impact of the Proposed Pavilion.*

The required dedication exceeds the City's authority to impose an exaction because the dedication's is not roughly proportionate to the impact of the proposed pavilion. The City has not demonstrated that construction of the pavilion causes a need for the dedication of the roadway property. There has been no individualized analysis of the impact caused by the pavilion, and how that impact would be addressed by the Church dedicating a portion of its property. See *Dolan*, 512 U.S. at 386, 391; see also *B.A.M.*, 2006 UT 2, ¶¶ 39-40, 128 P.3d at

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<sup>2</sup> There is a corresponding statute applicable to counties found at § 17-27a-507 of the Utah Code.

<sup>3</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.

<sup>4</sup> "In order for a government to be effective, it needs the power to establish or relocate public thoroughways, even at the expense of some individual citizens, for the convenience and safety of the general public. . . . In fact, cities are vested with the statutory power to 'lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, . . . and may vacate the same . . . by ordinance'. Utah Code Ann. 10-8-8." *Carrier*, 2001 UT 105, ¶ 18, 37 P.2d at 1117.

<sup>5</sup> Note that the first prong of the exaction test in § 10-9a-508 requires an essential link between the exaction (dedication of the road) and a legitimate government interest (maintaining adequate roadways). The first prong of the test does not require an essential link between the exaction (widening the road) and the approval sought (building the pavilion). See *Nollan*, 483 U.S. at 837. The "rough proportionality" prong of the test weighs the impact of project for which approval has been sought against the nature and extent of the proposed exaction. See *B.A.M.*, 2006 UT 2, ¶¶ 39-40, 128 P.3d at 1169-70.

1169-70. Without such an individualized analysis, the City's requirement is an improper exaction.

### **Conclusion**

The City has not demonstrated how dedicating property for a roadway is roughly proportionate to the impact caused by the proposed pavilion. Building and widening roads is a legitimate government interest, and there is an essential link between that interest and obtaining property for building and widening roads. However, the City has not shown the sort of individualized analysis showing that the impact of the proposed pavilion is roughly proportionate to the dedication of the property. Without such an individualized analysis, the City's condition is an improper exaction, and is not allowed under § 10-9a-508 of the Utah Code.

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

**NOTE:**

**This is an advisory opinion as defined in Utah Code Annotated, §13-43-205. 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

U.C.A. §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. §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:

Stephanie N. Carlson, City Recorder  
4580 S. 2300 East  
Holladay, UT 84117

On this \_\_\_\_\_ Day of February, 2008, 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