Advisory Opinion #44

Parties: Ryan Pool & Ron Smith and City of Draper

Issued: June 26, 2008

TOPIC CATEGORIES:
H: Compelling, Countervailing Public Interests
J: Requirements Imposed Upon Development

A developer and a local government may enter a development agreement, but that agreement must comply with statutory and constitutional restrictions. A local government may not avoid constitutional limits on exactions through contract provisions.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Dedication and Construction of Public Improvements as Condition of Development, and Alterations in Construction and Design Standards Prior to Final Approval

Advisory Opinion Requested by:	Ryan Pool/Ron Smith
Local Government Entity:	Draper City
Applicant for the Land Use Approval:	R&D Property Holding, LLC
Project:	Residential Subdivision
Date of this Advisory Opinion:	June 26, 2008
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

I. May a local government require construction of public improvements without providing reimbursement, if the developer acknowledges that it will be solely responsible for the improvements?

II. May a local government impose new construction and design standards on public improvements in a proposed development, while the land use application is pending, but prior to final approval?

Summary of Advisory Opinion

The City's requirements that R&D complete a section of 150 East not located within the subdivision property, adhere to new road construction standards, install additional storm drains, and complete Carlquist Drive to its full width are all exactions. They must all satisfy the *Nollan/Dolan* "rough proportionality" test in order to be valid. The City reimbursed the developer for at least part of the costs associated with the construction of 150 East. This shows that the City acknowledges its responsibility to compensate the developer if exactions exceed the

property owner's proportional share. Nothing has been provided to show that the developer is entitled to more compensation for the 150 East construction than has already been paid

The new road construction standard and the design changes to the storm drain system were both adopted prior to final plat approval. The incremental increase in costs due to the new standards does not necessarily make the conditions excessive. The storm drain design was changed due to concerns about flooding, and were agreed to by the developer. The City is not barred from adopting new road construction standards and applying them to pending land use applications.

The City's requirement that the developer construct Carlquist Drive to its full width, at the developer's expense, is an excessive exaction. There has been no showing that the impact attributable to the subdivision is roughly proportional to the burden of dedicating and constructing the road. The subdivision consists of 13 lots and a commercial parcel, and the new road will probably serve future development as well. An affidavit from the developer acknowledging that it is responsible to build the road at its expense does not excuse the City from statutory and constitutional limitations. Unless there is a finding that the impacts of the subdivision are roughly proportional to the costs of dedicating and constructing Carlquist Drive, the City must reimburse the developer for at least a portion of the costs.

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 § 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 this Advisory Opinion was received from R&D Property Holding, LLC on April 30, 2008. A letter with the request attached was sent via certified mail, return receipt requested, to Kathy Montoya, City Recorder, Draper City, at 1020 E. Pioneer Road, Draper, Utah 84020. Ms. Montoya's name was listed on the State's Governmental Immunity Database, as the contact person for the City. The City submitted a response, which was received by the Office of the Property Rights Ombudsman on May 12, 2008.

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 filed April 30, 2008 with the Office of the Property Rights Ombudsman by R&D Property Holdings, LLC, with attachments.
2. Response from Draper City, submitted by Douglas Ahlstrom, City Attorney
3. Previous Request for Advisory Opinion, submitted by R&D Property Holding, LLC, January 9, 2007 (This request was withdrawn in 2007, but included some of the issues raised in the later request).

Background

R&D Property Holding, LLC proposed a 13-unit residential subdivision in Draper, known as "Levoy Estates." In addition to the 13 residential lots, the developers included a commercial parcel to the west. All of the residential lots were located south of Carlquist Drive, which was designated as a "major arterial road" by the City. There could be no access from Carlquist Drive directly to any of the building lots. In order to accommodate this restriction, the developers proposed a crescent-shaped private driveway off of Carlquist, as access to 4 of the lots. The other lots were accessed via a secondary street and a cul-de-sac.

A. Approvals and Carlquist Drive Right-of-way

In March of 2006, R&D applied for preliminary review of the Levoy Estates Subdivision. On August 1, the City Council granted preliminary plat approval. Over the next few months, city staff met with R&D several times to work on technical aspects of the proposed development. One of the issues that arose during these discussions was construction of the full width of Carlquist Drive. The proposed right-of-way included a small portion of property that did not belong to R&D. Even though approval from the parcel's owner had not been obtained, in January of 2007 R&D asked that the City Council consider granting final plat approval. The City Council continued the matter because the R&D did not have approval from the owner of the parcel, which meant that Carlquist Drive could not be built to its full width.[1] After these concerns were satisfactorily addressed, the City Council granted final plat approval on June 19, 2007.[2]

Even though final approval had not been granted, the City nevertheless approved a subdivision bond in February of 2007. The bond amount was $677,604.20, which was determined by the estimated costs to complete the public improvements, including the public streets, storm drains, sidewalks, etc. R&D secured a bond for that amount, and continued work to secure final plat

[1] The minutes of the January 2, 2007 meeting of the Draper City Council indicate some discussion over whether Carlquist Drive would need to be constructed to its full width. In July of 2006, during discussions about the subdivision's concept plan, the City had indicated that only about one-half (40.5 feet) of Carlquist Drive could be built to accommodate two lanes of traffic. The remaining half of the street would be built when the property to the north was developed. However, by the time the final plat was considered, the City required construction of the full width of Carlquist Drive. The land in dispute was a small triangle-shaped parcel that was needed for Carlquist Drive, but was not part of the Levoy property. Because R&D originally understood that only the southern half of the street would need to be built, it did not negotiate purchase of that small parcel until after the January, 2007 meeting.
[2] During the spring of 2007, R&D was able to purchase the parcel.

approval. It is not clear whether the estimate included the cost for constructing the total width of Carlquist Drive, or only the southern half.[3]

R&D requested reimbursement for a portion of the costs for Carlquist Drive, arguing that it is building more road than is necessary due to the subdivision. The City states that reimbursement from impact fees is impossible, because there was no reimbursement agreement in place prior to construction, and also because Carlquist Drive did not include sidewalks or park strips.

B. 150 East Construction & Reimbursement

In the vicinity of Levoy Estates, 150 East was not finished, although completed roadways stubbed just to the north and just to the south of the subdivision. Approximately 95 feet of the undeveloped land that would be 150 East is not included within the Levoy Estates Subdivision, and about 84 feet was within the development's boundaries. The City wished to connect 150 East to make it a through street. Therefore, one of the conditions of approval was that R&D complete the road, including the portion that was not part of the Levoy Estates subdivision. The City agreed to use impact fees to reimburse R&D for the cost of completing the street on the 95 feet that was not part of Levoy Estates. An agreement was drafted whereby that the City would pay $44,836.28 as reimbursement, as impact fees were received. Both the City and R&D signed the contract, which had an effective date of January 8, 2008.[4]

R&D states that it anticipated reimbursement of $63,000, based on its cost estimate for the project, which was prepared and submitted to the City in February of 2007. R&D acknowledges signing the reimbursement contract, but admits that it did not review the final figures in that agreement. R&D completed 150 East, and made up the difference between the reimbursement amount and the construction costs.

C. Changes to Construction Standards

When R&D proposed its preliminary plat in the spring of 2006, the City's roadway standards called for 4 inches of asphalt paving, 7" base gravel, and 9" sub-base. On March 31, 2007, before the final plat was approved, but after R&D requested approval, the City increased its standards to 6" of asphalt paving, 8" road base, and 10" of structural fill. Upon final plat approval, the City required the new standards for the roads in Levoy Estates, including Carlquist Drive.

Around the same time, the City informed R&D that Levoy Estates required an underground drain system within its streets, requiring a new engineering design along with the additional construction costs. The City states that this change was made after a geotechnical report found

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[3] The City's list of costs included "Asphalt Paving & Base," which was estimated at 70,029 square feet.

[4] The Reimbursement Agreement includes a breakdown of costs as an exhibit. The Agreement does not identify how this information was obtained.

that the area has a shallow water table, and that the underground drains were a compromise with R&D, so that the homes in the subdivision could be built with basements.[5]

Although the new roadway standards and new drain installation increased the costs for R&D, the subdivision bond approved in February of 2007 was unchanged. The increase in construction costs caused financial difficulty for R&D, forcing them to borrow more money than anticipated.

Analysis

The Conditions Imposed on the Levoy Estates Subdivision are Exactions, Subject to the *Nollan/Dolan* "Rough Proportionality" Analysis

A. The City's Requirements are Exactions

The requirements imposed by the City on the Levoy Estates Subdivision constitute "exactions" under Utah law. "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.[6] 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. The requirements that R&D construct Carlquist Drive to its full width, complete 150 East, apply the newly-adopted roadway standards, and install additional storm drains are all exactions, and all are subject to statutory and constitutional regulation.

In 2005, the Utah Legislature enacted § 10-9a-508 of the Utah Code, which authorizes cities to impose exactions on new development, within established limits:

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

UTAH CODE ANN. § 10-9a-508(1).[7] The Utah Supreme Court observed that the language of this statute was borrowed directly from the U.S. Supreme Court analyses in *Nollan v. California*

[5] The City also required a note on the plat, as a disclaimer and notice about the water table and the possibility of flooding in basements.
[6] *See also Salt Lake County v. Board of Education, Granite School District*, 808 P.2d 1056, 1058 (Utah 1991) (*holding* that "development exactions" are "contributions to a governmental entity imposed as a condition precedent to approving the developer's project.")
[7] There is a corresponding statute applicable to counties found at § 17-27a-507 of the Utah Code.

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 landmark cases, the U.S. Supreme Court promulgated rules for determining when an exaction may be validly imposed under the federal constitution's Takings Clause.[8] This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis has been codified in § 10-9a-508. In order to be valid, the requirements imposed by the City must satisfy the rules of this section.

B. Reimbursement for Completing 150 East

Because the City has committed to reimburse R&D for a portion of its construction costs, the requirement that 150 East be completed appears valid under rough proportionality analysis. The requirement satisfies the first half, or "prong" of the *Nollan/Dolan* test. Building and maintaining adequate roadways is a legitimate government interest. UTAH CODE ANN. § 10-8-8; *see also Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117.[9] Requiring R&D to complete the roadway promotes the City's legitimate objectives, so the first prong of § 10-9a-508(1) is satisfied.[10]

The requirement also appears to satisfy the second prong of the rough proportionality test, because the City has reimbursed R&D for a portion of the construction costs. A local government may require that a developer meet conditions or exactions, but only to the extent that the exaction is "roughly proportionate" to the impact of the development. Any cost in excess of what is roughly proportionate would be a "taking," requiring just compensation." *See Dolan*, 512 U.S. at 391. The City recognized its responsibility, and agreed to reimburse R&D for at least a portion of the construction costs. The parties signed the agreement in February of 2007. While R&D disputes the amount of the reimbursement, there has been no information provided that it is

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[8] *See* U.S. CONST., amend. V. ("nor shall private property be taken for public use, without just compensation.") The Supreme Court has interpreted the Takings Clause 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 ("Private property shall not be taken or damaged for public use without just compensation.")

[9] "In order for a government to be effective, it needs the power to establish or relocate public throughways, 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.

[10] Note that the first prong of the exaction test in § 10-9a-508 requires an essential link between the exaction (construction of the road) and a legitimate government interest (providing adequate roadways). This first prong does not, however, require an essential link between the exaction (completing the road) and the approval sought (a subdivison). *See Nollan*, 483 U.S. at 837. The "rough proportionality," or second 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.

bearing more than what is roughly proportional.[11] Without such information, there is no reason to doubt that the reimbursement provided is fair.

C. The New Roadway Standards & Strom Drain Upgrades

Because the new roadway standards were adopted prior to final plat approval, R&D must comply with them. Along the same lines, the additions to the storm drain system were proposed prior to final plat approval, and so R&D must also comply. Prior to issuing a land use permit, a local government may adopt new construction or design standards, and may require alternative designs of public improvements in order to meet specific needs. A local government may not, however, change the standards or designs *after* approval of a land use permit:

> A municipality may not impose on a holder *of an issued land use permit* a requirement that is not expressed:
> (i) in the land use permit or in documents on which the land use permit is based; or
> (ii) in [Chapter 10-9a of the Utah Code] or the municipality's ordinances.

UTAH CODE ANN. § 10-9a-509(e) (emphasis added).[12] Both the roadway standards and the storm drain design changes were adopted prior to the final plat approval for Levoy Estates. In fact, the City notes that the changes to the storm drain design were discussed, and approved by R&D prior to final plat approval. In short, R&D must comply with the construction and design standards adopted by the City, because those standards were in place when the final plat was approved.

Section 10-9a-509(e) implies that construction and design standards can be changed prior to final approval. The doctrine of vested rights, as explained in *Western Land Equities v. City of Logan*, 617 P.2d 388 (Utah 1980), does not mean that each and every construction standard is "frozen" on the date a land use application is submitted. As an application is evaluated and processed, information may be discovered (such as the ground water problem) which requires changes to design or construction. It is acknowledged that the road construction standards were not changed because of specific problems identified with the Levoy Estates subdivision. However, the change only impacts how the road will be built, not whether the road will be built, or what type of use R&D may build on the property. Since the construction standards do not affect regulation of land use, it is acceptable for the City to adopt new standards which would apply to pending land use development applications.

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[11] R&D reports that it estimated the cost for the 150 East construction at $63,000. The reimbursement agreement provides that the City pay R&D about $44,800.00. That amount is based on cost estimates included as an exhibit to the agreement. There has been no information provided which helps determine what R&D's proportionate share should be. The "rough proportionality" test does not require mathematical precision, but only a showing that the cost borne by the property owner or developer is roughly proportionate to the impact attributable to the development activity. *Dolan*, 512 U.S. at 391.

[12] There is a corresponding statute applicable to counties found at § 17-27a-508 of the Utah Code.

Furthermore, the increased cost due to the road construction standards and the storm drain changes do not appear to be invalid exactions. There has been no showing that the increased cost is disproportional to the impact caused by the subdivision. The City proposed the storm drain changes in response to a geotechnical report that identified shallow ground water, which may lead to flooding problems. In order for the homes in Levoy Estates to have basements, the parties agreed to the additional storm drains. The storm drains and roads are necessary improvements, regardless of what standard or design is used. In short, the increased costs alone do not necessarily mean that the condition is an invalid exaction.[13]

D. Construction of Carlquist Drive

Because the burden of dedicating and constructing Carlquist Drive is not roughly proportional to the impact generated by the Levoy Estates Subdivision, R&D should be partially compensated. As stated above, a local government may require an exaction, but only if it satisfies the *Nollan/Dolan* rough proportionality test. The City's requirement that Carlquist Drive be built satisfies the first prong of the rough proportionality test.[14] However, the City has not shown that requiring construction of the full width of Carlquist Drive is roughly proportional to the impact attributable to Levoy Estates. The subdivision consists of only 13 residential lots (and one commercial parcel). Carlquist Drive will serve as the primary access to the subdivsion, and will also be a through street, linking 150 East and 300 East.[15] More importantly, Carlquist Drive will most likely serve future residential development to the north. R&D should not be required to shoulder the entire burden of the road, when the impact resulting from R&D's development will only be a portion of that served by the road.[16]

The City explains that it cannot use impact fees to reimburse R&D for Carlquist Drive, because there was no reimbursement agreement in place, as required by the City's ordinances, and because there are no sidewalks or park strips. The City also notes that it hasn't collected impact fees from the Levoy Estates Subdivision yet, because impact fees are paid when building permits are issued. Even if impact fees are not used to reimburse R&D, the City cannot impose the full burden of constructing Carlquist Drive on the developer. To do so violates § 10-9a-508 of the Utah Code, as well as the Utah and Federal Constitutions, by forcing a private property owner to bear the disproportionate cost of a public improvement.

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[13] Many factors are relevant in determining rough proportionality, such as those listed in *Banberry v. South Jordan*, 631 P.2d 899, 903-04 (Utah 1981). Proportionality analysis is rarely simple and straightforward. Thus, the requirement of *rough* proportionality rather than *exact* proportionality.

[14] As was discussed above, building and maintaining roadways for traffic flow is a legitimate governmental interest. Requiring construction of a roadway to serve present and future traffic needs is a legitimate means of promoting that interest. *See* note 9, *supra*, and associated text.

[15] There is commercial development along 150 East, which is where R&D's commercial parcel is located.

[16] "The Fifth Amendment's guarantee . . . was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Monterrey v. Del Monte Dunes at Monterrey, LTD*, 526 U.S. 687, 703 (1999).

While the City acknowledges that Carlquist Drive is part of its Major Transportation Plan, it states that R&D signed an affidavit "admitting and acknowledging" that it would construct the road at its expense. Agreements between local governments and developers to dedicate and construct public facilities are valid, and developers may voluntarily undertake construction of public improvements. When approval of new development is conditioned on construction of such improvements, however, the conditions are subject to statutory and constitutional limitations. Draper City is a subdivision of the state, and may only exercise those powers granted to it, within constitutional limits.

> 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. A state cannot empower local governments to do that which the state itself does not have authority to do.

State v. Hutchinson, 624 P.2d 1116, 1121 (Utah 1980) (citation omitted). A corollary to that rule must necessarily follow: A local government cannot do indirectly what it is prohibited from doing directly. As is more fully explained below, a contract does not provide a "back door" through which a government entity may elude statutory or constitutional obligations.

All local government action must operate within the parameters of a statutory and constitutional framework.

> When reviewing a local government action, we give local government great latitude in creating solutions to the many challenges it faces, unless the action "is arbitrary, or is directly prohibited by, or is inconsistent with the policy of, the state or federal laws or the constitution of [Utah] or of the United States."

Price Dev. Co. v. Orem City, 2000 UT 26, ¶ 10, 995 P.2d 1237, 1243 (quoting *Hutchinson*, 624 P.2d at 1126).[17] This includes any government action, including negotiating and executing contracts with private parties: "The exercise [of a local government's planning] power must conform with [state statutes] even if embodied in a contract; a developer and a [local government] cannot do by contract what the statute prohibits." *Toll Bros. Inc. v. County of Burlington*, 944 A.2d 1, 18 (N.J. 2008). Otherwise, a local government could use its authority to enter contracts as a means of operating outside proscribed limits, undermining established constitutional authority.

The New Jersey Supreme Court considered whether a developer and a local government may validly agree for the developer to fund public improvements in excess of what is necessitated by a proposed development. The New Jersey Court began its analysis from the standpoint that the local government must comply with constitutional provisions, including the *Nollan/Dolan* rough

[17] In *Price Development Co.*, the Utah Supreme Court considered the validity of an agreement between a city and a business developer.

proportionality test, which "animates" the Takings Clause of the U.S. Constitution.[18] A development agreement requiring construction of public improvements is valid, provided it does not obligate a developer to bear a disproportionate share of the cost for those improvements.[19] An agreement that imposes a disproportionate burden on a developer, even if entered voluntarily, would be unenforceable.[20] "If we were to conclude otherwise . . . the effect would be to approve public entities and developers entering into "voluntary" agreements in violation of the specific provisions of [state law]. Such an approach cannot be countenanced." *Toll Bros.*, 944 A.2d at 17.

The Court pointed out that allowing voluntary agreements in which a developer contributes more than a fair share towards construction of public improvements could lead to inequity,[21] corruption,[22] and poor planning decisions.[23] A policy allowing such voluntary agreements as a means of promoting community spirit and altruistic volunteerism is problematic and does not justify ignoring the statutory and constitutional limits on governmental authority. Such a policy "fails to provide an adequate safeguard against municipal duress to procure otherwise unlawful exactions because the line between true volunteerism and compulsion is fragile one." *Toll Bros.*, 944 A.2d at 17 (citation omitted).

By limiting governmental authority, the Takings Clause protects property owners' rights from excessive government exactions, including those expressed in a contract with a government entity:

> The *Dolan* test is intended to address land use "bargains" between property owners and regulatory bodies—those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic permit context—where the individual property owner-developer

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[18] *Toll Bros.*, 944 A.2d at 13-14; *see also Monterey,* 526 U.S. 687, 703 (1999) ("[I]n a general sense, concerns for proportionality animate the Takings Clause.") The *Toll Brothers* case concerned a development agreement, whereby the developer (Toll Brothers) agreed to construct roadways as part of a massive development project. However, economic conditions forced the developer to dramatically scale down the original plans. The County rejected Toll Brothers' request that the development agreement be modified to reflect the smaller project. The Court held that the County could not enforce the original agreement, because to do so would force Toll Borthers to bear a disproportionate share of the costs for the public improvements. Even though the development agreement was entered voluntarily, the "rough proportionality" test required by state and federal law still applied.

[19] "The fundamental requirement . . . is that the *end result* must be equitable." *Toll Bros.*, 944 A.2d at 14. (emphasis in original.)

[20] *Toll Bros.*, 944 A.2d at 21.

[21] *Toll Bros.*, 944 A.2d at 18 ("Allowing such a scheme not only impacts the developers willing to pay, but threatens the livelihood of those unable or unwilling [to] submit to the illicit exaction toll.")

[22] *Toll Bros.*, 944 A.2d at 17 ("A developer's voluntary contribution to defray the cost of a municipal obligation, should not be permitted to influence or affect municipal zoning decisions.") (citation omitted)

[23] *Toll Bros.*, 944 A.2d at 18 ("Permitting these excess exactions would in effect allow sale of development to those who are able to pay the asking price. It would be fair to assume that the zeal to increase revenue would result in inattention to more appropriate planning concerns.")(citation and alterations omitted).

seeks to negotiate approval of a planned development—that the combined *Nollan* and *Dolan* test quintessentially applies.

Town of Flower Mound v. Stafford Estates LP, 71 S.W.3d 18, 33-34 (Tex. App. 2002)(emphasis in original, citation omitted).[24] Constitutional protections and restrictions are paramount, and a government's authority to enter agreements must yield to their limitations.[25]

As has been discussed, local governments in Utah must operate within statutory and constitutional limits. *See Price Dev. Co.*, 2000 UT 26, ¶ 10, 995 P.2d at 1243; *Hutchinson*, 624 P.2d at 1126. The *Nollan/Dolan* rough proportionality analysis is required to ensure preservation of rights guaranteed by the Federal and Utah Constitutions. *See B.A.M.*, 2006 UT 2, ¶ 41. In addition, rough proportionality analysis is required by the Utah Code. *See* UTAH CODE ANN. § 10-9a-508. These limits must extend to contracts negotiated between local governments and property owners, even if the agreements are entered voluntarily, even if they are financially advantageous to the property owner, and even if they result in the construction of desired public improvements.[26] Development agreements between local governments and property owners are permitted under Utah Law[27], but they must comply with statutory and constitutional guidelines.

Turning to the Levoy Estates Approval, whatever the understanding was between Draper City and R&D, there does not appear to be adequate safeguards against an improper exaction. It is simply insufficient to state that R&D signed an affidavit "acknowledging" that it would bear the full expense of the road, because the City could not impose the condition unless it compensated the developer.[28]

Conclusion

Each condition imposed by Draper City on the Levoy Estates Subdivision is an exaction, which must satisfy the *Nollan/Dolan* rough proportionality analysis. The City's requirement that R&D complete 150 East on property not located within the subdivision is a valid condition, because the City reimbursed R&D for at least part of the work that was done. There has been nothing

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[24] *Aff'd, Town of Flower Mound v. Stafford Estates, LP*, 135 S.W.3d 620 (Tex. 2004). It is noted that the *Flower Mound* case did not involve a development agreement, but a condition imposed directly by a municipality. However, the rough proportionality test must apply to any "bargain" negotiated between a local government and a property owner., in order to preserve constitutional rights.

[25] By way of example, it would be unthinkable to allow a local government to skirt the limitations imposed by the First Amendment to the U.S. Constitution simply by drafting a contract with a private party.

[26] "A strong public desire to improve the public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Dolan*, 512 U.S. at 396; (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

[27] *See* UTAH CODE ANN. §§ 10-9a-102(2); 17-27a-102(2) (Local governments authorized to use various forms of land use control, including development agreements). A local government may enter a development agreement with a property owner covering any number of enforceable terms. To the extent that the terms of an agreement do not run afoul of constitutional protections or statutory limitations, it would be valid

[28] There is no prohibition against providing reimbursement to a developer over a reasonable period of time, as long as developer is not required to bear more than its proportional share of the cost for a public improvement.

provided which would indicate that R&D's share after this reimbursement is disproportional to the impact of the proposed development.

The City's adoption of new road construction standards and the changes to the underground storm drains are valid conditions which were imposed prior to final plat approval. Local governments may impose reasonable conditions on new development prior to receiving final approval, including changes to construction standards. The changes affect how necessary improvements would be built, and do not impose new requirements, because the roads and storm drains were required before the standards were changed. The changes to the storm drain system were required because of flooding concerns raised in an expert report, and were agreed to by R&D. Since the storm drain changes were determined to be necessary, and were negotiated between the parties, it cannot be said that they were improperly imposed, or are invalid exactions. The changes may have increased construction costs, but not to the point that the increased costs become invalid exactions.

Finally, the City's requirement that Carlquist Drive be constructed to its full width, at R&D's expense, is an excessive exaction. The subdivision consists of 13 residential lots, and a commercial parcel. There has been no showing that the impact caused by the Levoy Estates Subdivision is roughly proportional to the burden of dedicating and constructing Carlquist Drive. Without such a showing, the City cannot require R&D to assume the full burden of building the road. An acknowledgement that R&D was responsible for the road does not excuse the City from statutory and constitutional limitations. The City must compensate R&D, at least to the extent that the cost of dedicating and constructing Carlquist Drive exceeds R&D's proportional share.

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

NOTE:

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

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

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

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

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:

Kathy Montoya, City Recorder
Draper City
1020 E. Pioneer Road
Draper, UT 84020

On this ___________ Day of June, 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