Advisory Opinion 268

Parties: Dan S. Hales; Box Elder County
Issued: May 24, 2023

TOPIC CATEGORIES:

Exactions

The county may require that the half-width of an adjacent local road be dedicated and improved as a condition of development. Furthermore, this required half-width is appropriately measured from the centerline of the existing right-of-way unless the local ordinances or master plan clearly indicate otherwise.

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ADVISORY OPINION

Advisory Opinion Requested By:	Dan S. Hales
Local Government Entity:	Box Elder County
Applicant for land Use Approval:	Dan S. Hales
Date of this Advisory Opinion:	May 24, 2023
Opinion Authored By:	Marcie M. Jones, Attorney Office of the Property Rights Ombudsman

ISSUE

May the county require a property owner to dedicate to the public the entire half-width of an adjacent road as a condition of approval of a 2-lot subdivision when a portion of the roadway has already been dedicated and improved?

SUMMARY OF ADVISORY OPINION

The county may require that the half-width of an adjacent local road be dedicated and improved as a condition of development. Furthermore, this required half-width is appropriately measured from the centerline of the existing right-of-way unless the local ordinances or master plan clearly indicate otherwise.

In this case, the ordinances require the right-of-way for local roads, which parties have agreed is 66''. The current right-of-way has already been improved and is approximately 33' wide. Therefore, to bring the adjacent half-width up to code, the property owner must dedicate an additional 16½' (i.e. half of the current right-of-way, or 16½' of the currently paved roadway, plus an additional 16½ ' which results in the required 33' half-width).

It is acknowledged that the 33' of current roadway was built on land once belonging to a neighboring property and that requiring this owner to dedicate the remaining 33' right-of-way appears "fair." However, because the ordinances do not stipulate this interpretation, the County may not impose this burden on the property owner.

Additionally, the exaction falls below the commonly accepted standard to require the dedication and improvement of the half-width of the adjacent local street and appears lawful.

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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 this can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

A Request for an Advisory Opinion was received from Dan Hales (the property owner) on July 1, 2022. A copy of that request was sent via certified mail to Stephen R. Hadfield, Box Elder County Attorney's Office, 81 North Main Street, Suite 102, Brigham County, Utah 84302.

EVIDENCE

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

1. Request for Advisory Opinion submitted by Dan Hales on July 1, 2022.
2. Letter from Stephen R. Hadfield, on behalf of Box Elder County, on September 2, 2022.
3. Letter from Dan Hales on October 16, 2022.

BACKGROUND

Dan Hales (the "Property Owner") has applied for a 2-lot subdivision (the "Subdivision" and also "Salina Acres Subdivision") to Box Elder County (the "County"). The Subdivision abuts the roadway 6800 North which is currently developed as a paved road with dedicated right-of-way 33' wide.

The Subdivision is still in the approval process, but the County has preliminarily determined that as a condition of approval the Property Owner must dedicate the remaining needed 33' wide right-of-way running along the approximate 400' of frontage the Subdivision shares with 6800 North. The proposed dedication constitutes half of the total 66' ultimately required right-of-way for 6800 North.

The Property Owner questions whether this requirement is lawful on two points.

First, the Property Owner questions why credit for the existing 33' right-of-way is granted entirely to the neighboring property. The existing 33'[1] of right-of-way for 6800 North was dedicated under UTAH CODE § 75-5-104, often called the "roads by use" statute, whereby once private property is used as a public thoroughfare continuously for ten years, it is automatically dedicated to the

[1] The quiet title judgment stipulates that 29' of existing right-of-way was created, rather than 33'. This includes 25' of paved roadway surface plus 2' of shoulder on either side. Because both parties refer to the existing right-of-way width as being 33' feet wide we will use the 33' in our discussion. The legal principles discussed remain the same regardless.

public.[2] The public used the neighbors' property as a roadway for the necessary time period, and in accordance with state statute, ownership dedicated has transferred to the public.

This dedication was recognized in 2004 by a quiet title action judgment[3] so the location of the roadway and property boundaries are well settled. This judgment clearly establishes the location for the paved right-of-way for 6800 as well as the boundaries for the plaintiff property owners, including the predecessor in interest for the Property Owner.

The Property Owner maintains that before the survey debacle that led to the quiet title action, his property had been defined as "to the centerline of the 6800 right-of-way." It is not clear from the record whether this was the centerline of the ultimately planned for 66' right-of-way, or, the centerline of the existing 33' of existing pavement. Regardless, this deed is superseded by the survey connected to the quiet title judgment which describes the Property Owner's property as extending to the edge of the existing right-of-way pavement/shoulder which runs along the quarter section line. The survey does not include any reference to future rights-of-way.

The County maintains that the legal history, including the quiet title order,[4] clearly establishes that the current 33' of roadway was dedicated by use from what had formerly been the neighbor's land and therefore, the remaining 33' half-width is appropriately exacted from the Subdivision property.

This distinction makes the difference between the Property Owner's "share" of the half-width being the remaining 33' of needed right-of-way, or only 16½' with the remaining needed 16½' to come from the neighbor on the other side of the roadway.

Both parties acknowledge that property immediately adjacent to the Subdivision was recently subdivided with 16½' additional feet being dedicated for 6800 North. That plat, the Cody Riedesel Subdivision, indicates that the an additional 16½' for the future 66' right-of-way is expected to be dedicated from the other side of the street. Both parties agree that this subdivision is provided for information purposes only and not dispositive. The County maintains that this subdivision was improperly approved.

Second, the Property Owner questions whether requiring 33' of property along the entire roughly 400' of frontage along 6800 North is proportional to the impact of developing one additional lot. This amounts to nearly one-third of an acre of property. Both lots will be over five acres each. Neither party has included the current zoning for the property nor the proposed use for the new lot.

To counter these objections, the County maintains that that the existing roadway right-of-way came out of the neighbor's property, therefore, it is fair that the remainder come from the Property Owner.

Accordingly, the Property Owner has requested this Advisory Opinion from the Property Rights Ombudsman to determine whether the County may lawfully require the Property Owner to

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[2] *See e.g. Heber City Corp. v. Simpson*, 942 P.2d 307 (Utah 1997).

[3] There is a history of conflicted ownership which was settled in 2004 by quiet title action judgment. The conflict arose from the placement of an apparently errant corner section marker by the County surveyor which shifted property boundaries as much as 27 feet to the north and over 6 feet to the west. The quiet title action was filed to settle property ownership boundaries, including for the Property Owner and the County right-of-way.

[4] Order, Judgment, and Decree Approving Settlement, Civil No. 020101094 PR, Judge: Thomas L. Willmore, First Judicial District Court in and for Box Elder County, March 2004.

dedicate 33' of right-of-way along the 400' of frontage of 6800 North as a condition of approval for a two-lot residential subdivision.

ANALYSIS

May the County lawfully require the Property Owner to dedicate 33' of right-of-way along the 400' of frontage as a condition of approval for a two-lot residential subdivision?

I. As a starting point, the County may only require what is clearly expressed in ordinance

The Property Owner first questions why the County credits the existing 33' right-of-way entirely to the neighboring property, thus requiring the entire remaining 33' of needed right-of-way entirely from the Subdivision property.

The roadway half-width is customarily measured from the centerline of the existing right-of-way. This approach would credit half of the existing 33' of right of way (16½') to the Property Owner, and require the further dedication of only another 16½' from the property on the other side of the road.

As an initial matter, we note that the County may only impose on the Property Owner a specific requirement to dedicate property as a condition of Subdivision approval if the requirement is clearly expressed in County ordinances or specifications. UTAH CODE § 17-27a-508(1)(e) reads "A county ***may not impose*** on an applicant who has submitted a complete application ***a requirement that is not expressed***: (i) ***in this chapter***; (ii) ***in a county ordinance***; or (iii) ***in a county specification for public improvements*** applicable to a subdivision or development that is in effect on the date that the applicant submits an application" (emphases added).

County ordinances as well as the transportation masterplan do not specify where the centerline for 6800 North lies, nor whether the remaining dedication for 6800 North should come from the Property Owner's property. The quiet title judgment does not provide this answer because it only locates the boundaries of the currently existing roadway and adjoining properties. Similarly, other official County documents do not provide any information clarifying where the centerline of 6800 will be located at build-out.

When evaluating the ordinances, meaning must be given to words which are missing as well as those included. It must be presumed "that each term included in the ordinance was used advisedly"[5] and "[o]missions in statutory language should be taken note of and given effect."[6] Furthermore, it is important to recognize that zoning ordinances should be strictly construed in favor of the property owner, since such ordinances are in derogation of an owner's use of land.[7] Therefore, lack of information clarifying where the centerline for 6800 North will rest once the road is completed must be given weight. Moreover, Utah Code 17-27a-308 states that "[i]f a land use regulation does not plainly restrict a land use application, the land use authority shall interpret and apply the land use regulation to favor the land use application."

As a result, because the applicant in this case is proposing to locate the road in a way that measure the centerline from the center of the existing right-of-way, and because a roadway half-

[5] *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 30, 104 P.3d 602, 606 (Utah Ct. App. 1995).
[6] *Biddle v. Washington Terrace*, 1999 UT 110, ¶ 14.
[7] *Carrier*, 2004 UT 98 ¶31.

width is customarily measured from the centerline of the existing right-of-way, and the County ordinances and other official documents do not prescribe otherwise, the County, in interpreting and applying the land use regulation to favor the applicant's proposal, must measure the required roadway dedication from the centerline of the existing right-of-way. This translates to a required dedication from the Property Owner capped at 16½'.

II. Requiring dedication of right-of-way is an exaction which must satisfy the Rough Proportionality Test to be lawful

The County requirement to dedicate land for a roadway as a condition of plat approval is a development exaction. Utah law defines development exactions as "conditions imposed by governmental entities on developers for the issuance of [development approval]" that "typically require the permanent surrender of private property for public use."[8]

Exactions implicate the Takings Clause of the U.S. Constitution and Article I Section 22 of the Utah Constitution, which protect private property from governmental taking without just compensation. The standard for measuring whether an exaction imposed by a county is lawful is found at Utah Code § 17-27A-507(1):

> A county 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 (emphasis added).

This standard lays out a two-part "rough proportionality" test for determining whether an imposed exaction appropriately offsets the impacts of a development proposal.[9] If the proposed exaction satisfies the legal test, the exaction is a proper exercise of the local government's police power to regulate for health, safety, and welfare.[10] If, however, the exaction lacks an essential link to a legitimate government interest, or is disproportionate to the impact of the proposed development, the exaction is excessive and an unlawful taking of property without compensation.[11] A principal objective of the test is to "bar 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."[12]

Note that the County bears the burden to show the proposed exaction is proportionate to the development's impacts.[13] "*No precise mathematical calculation is required*, but the County must

[8] *B.A.M. Dev., LLC v. Salt Lake County* (BAM I), 2006 UT 2, ¶ 34.
[9] This test was originally established in the U.S. Supreme Court decisions of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. County of Tigard*, 512 U.S 374 (1994). The Utah Supreme Court has also provided additional guidance on how to apply this test to a given situation in *B.A.M. Development, LLC v. Salt Lake County* (BAM II), 2008 UT 74.
[10] *See* Shelley Ross Saxer, *Exactions and Impact Fees*, 7 Brigham-Kanner Property Rights Conf. J. 77, 83 (2018) ("Insisting that landowners internalized the negative externalities of their conduct is a hallmark of responsible land-use policy….").
[11] *See Banberry Development Corporation v. South Jordan City*, 631 P..2d 899, 903 (Utah 1981).
[12] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[13] *See Dolan*, 512 U.S. at 391-92.

make some sort of *individualized determination* that the required dedication is related both in nature and extent to the impact of the proposed development."[14]

Accordingly, the County's requirement that the Property Owner dedicate land for a future right-of-way must satisfy all parts of the rough proportionality test to be lawful.

A. An essential link exists between the County's proposed exaction and a legitimate government interest

The first part of UTAH CODE § 17-27A-507(1) requires an essential link between a legitimate governmental interest and the imposed exaction. In this case, the County's legitimate governmental interest is safe and efficient access and traffic flow. Constructing new roadways is a vital component in accomplishing this objective.[15] Requiring roads to serve proposed development satisfies this interest. Accordingly, the County's dedication requirement complies with the first part of the rough proportionality test.

B. The exaction satisfies the nature portion of the analysis

The *nature* aspect of the rough proportionality test asks whether the exaction provides a solution to a problem created by the development activity.[16]

The Property Owner intends to subdivide his property in order to create a second lot. When developed, this will cause an increase in traffic along 6800 North. Furthermore, the property will use existing roadways, utilities, and other improvements and it is appropriate for the Property Owner to contribute to that system. Requiring the dedication of land to expand the roadway to existing development standards therefore provides a solution to a problem created by the development and the *nature* portion of the rough proportionality test is satisfied.

C. The exaction satisfies the extent portion of the analysis

The *extent* portion of the exaction analysis compares the County's cost to the property owner's cost. These two costs should be roughly equivalent. Generally, greater impact justifies a greater exaction. Where the impact is small, the exaction should likewise be small.

The County has asked that Property Owner dedicate 33' along the approximate 400' of frontage the Subdivision shares with 6800 North. Note that the County is not requiring that Property Owner pay to construct the road, curb, gutter, or sidewalk improvements in this area, just to dedicate the land where the future road will be built. Because we have already determined that requiring the dedication of 33' of right-of-way was not lawful in Section I above, we will use the allowed 16½' instead.

The County bears the burden of showing that its proposed exaction satisfies the rough proportionality test.[17] The County must conduct some sort of individualized determination that the value of the 16½' x 400' property required to be dedicated offsets the impact of the development of the single new lot. Without this analysis, the County has not satisfied the *extent* aspect of the

[14] *Id*. at 391 (emphasis added).
[15] *See Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117 ("In order for a government to be effective, it needs the power to establish or relocate public throughways . . . for the convenience and safety of the general public.") *See also* Utah Code § 10-8-8.
[16] *B.A.M. Dev., LLC v. Salt Lake County* (BAM I), 2006 UT 2,
[17] *See* Dolan, 512 U.S. at 391.

rough proportionality test. To establish rough proportionality the County includes bare statements that the requirement meets County's established standards, and that it is fair because the existing 33' came out of the neighbor's property.

However, we note that the full analysis required to show rough proportionality is very impractical to provide, and perhaps impossible. In fact, after many Advisory Opinions addressing exactions over several years, this Office has never seen such an analysis. As a result, in an attempt to resolve disputes, past Advisory Opinions have articulated a commonly used industry standard:

> *It is common for a county to exact the dedication and construction of a half-width of a road, curb, gutter, etc., along the entire frontage of the property. This half-width frontage dedication and construction is common practice and generally accepted as roughly proportionate to a typical road impact. An abutting half-width generally does not require one developer to provide improvements that others should provide — i.e., the opposite abutting landowner typically provides the other half-width.*[18]

The requirement for a developer to dedicate and improve the half-width of the local roadway fronting the property is a common standard, and one that appears to be widely credible throughout the development community. It is grounded in the need for a practical, straight-forward standard to apply in the thousands of building permit approvals made across the state each year. The half-width standard fits the legal standard explained in relevant Utah court cases and is reasonable on its face. If everyone in the County improves the local roadway half-width adjacent to their property when they develop, we have local roadways that we all can use. Larger lots require more roadway and smaller lots require less roadway - thus balancing proportionality.

Therefore, the County may lawfully require that the Property Owner dedicate and improve up to the half-width of the adjacent local road, in light of the existing circumstances. Because a portion of the roadway has already been dedicated and improved, the County may require that the Property Owner dedicate and improve the 16½' remaining to make the half-width complete.

In summary, the County bears the burden to establish that the required dedication is roughly proportional to the impact the proposed development will have. Without this analysis, the County has not satisfied the *extent* aspect of the rough proportionality test. However, the common standard is to require the dedication and improvement of the half-width of the adjacent local street, therefore, the County may require the Property Owner to dedicate and improve up to 16 ½ feet of right-of-way.

CONCLUSION

Because the application proposes to measure the right-of-way from the centerline of the existing road, and because a roadway half-width is customarily measured from the centerline of the existing right-of-way and the County ordinances and transportation master plan do not require otherwise, the County should measure the required roadway dedication from the centerline of the existing right-of-way. In requiring that the Property Owner dedicate the half-width of the intended 66' of right-of-way for 6800 North, the measurement shall begin at the centerline of the existing

[18] Ombudsman Advisory Opinion 205. *See also* Ombudsman Advisory Opinions 221 and 180. While not legally binding, our Office does endeavor to issue opinions using consistent analysis and reasoning.

roadway, resulting in 16½' already established and a lawful dedication request of an additional 16½'.

Furthermore, the County bears the burden to establish that the required dedication is roughly proportional to the impact the proposed development will have. Without this analysis, the County has not satisfied the *extent* aspect of the rough proportionality test. However, the common standard is to require the dedication and improvement of the half-width of the adjacent local street. Therefore, exacting an additional 16½' to complete the requested half-width appears lawful.

Jordan S. Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

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

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

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.
The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees and civil penalty provisions, found in § 13-43-206 of the Utah Code, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.