

# Advisory Opinion 304

Parties: Jess Lynn Green Descendents Trust / American Fork

Issued: March 17, 2025

## TOPIC CATEGORIES:

### Exactions on Development

Local governments may only impose exactions on a landowner when the landowner is proposing development that will create impacts and need municipal services. In this case, the landowner is requesting approval of a zone change that will allow higher densities on the land, and nothing more. Since the landowner is not presently proposing development that will create new and immediate impacts, the City's attempt to impose an exaction on the landowner at the rezone stage, as opposed to at some later point when actual development is proposed, will violate the constitutionally required rough proportionality test as a solution in search of a problem, and would therefore be unlawful.

If the landowner were proposing development at this time the City could require the particular development proposal to contribute its proportionate share of the City's need for a 100-foot-wide, five-lane arterial road included in the City's transportation master plan, according to the development's impact. However, the City may not require the property owner to contribute more than its proportionate share attributable to the development's impact. Requiring any more would require an individual to bear public burdens that should be borne by the public as a whole, in violation of the Takings Clause of the U.S. Constitution.

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### ADVISORY OPINION

Advisory Opinion Requested By:	Jennifer Green Delliskave, Trustee Jess Lynn Green Descendants Trust
Local Government Entity:	American Fork City
Applicant for Land Use Approval:	Jess Lynn Green Descendants Trust
Type of Property:	Residential
Date of this Advisory Opinion:	March 17, 2025
Opinion Authored By:	Jordan S. Cullimore, Lead Attorney Office of the Property Rights Ombudsman

### ISSUE

The American Fork Planning Commission has recommended approval of a zone change from various residential zones to a Transit Oriented Development zone. The Commission is recommending that the City Council impose a requirement to dedicate a 100-foot-wide right-of-way for a proposed 5-lane arterial road depicted on the city's transportation master plan. Where a landowner has requested a zone change without a specific development proposal, may the City condition the rezone approval on requiring this dedication of property?

### SUMMARY OF ADVISORY OPINION

Local governments may only impose exactions on a landowner when the landowner is proposing development that will create impacts and need municipal services. In this case, the landowner is requesting approval of a zone change that will allow higher densities on the land, and nothing more. Since the landowner is not presently proposing development that will create new and immediate impacts, the City's attempt to impose an exaction on the landowner at the rezone stage, as opposed to at some later point when actual development is proposed, will violate the constitutionally required rough proportionality test as a solution in search of a problem, and would therefore be unlawful.

Additionally, even if the landowner were proposing development at this time, the City would be well advised to tread lightly. While the City possesses certain transportation corridor preservation

powers, which include designating rights-of-way on official maps, requiring dedication of property or other public contributions as a condition of development approval is limited to conditions which are related to, and only offset the impact of, the proposed development.

The City may require a particular development proposal to contribute its proportionate share of the City's need for a 100-foot-wide, five-lane arterial road included in the City's transportation master plan, according to the development's impact. However, the City may not require the property owner to contribute more than its proportionate share attributable to the development's impact. Requiring any more would require an individual to bear public burdens that should be borne by the public as a whole, in violation of the Takings Clause of the U.S. Constitution.

### **EVIDENCE**

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

1. Request for an Advisory Opinion, submitted by Jennifer Green Delliskave, Trustee for the Jess Lynn Green Descendants Trust, received May 23, 2024.
2. Supplemental information submitted by Andy Flamm on behalf of Jennifer Green Dellisakave, received from May 31 to June 27, 2024.
3. Interview with American Fork City Staff, conducted July 11, 2024.
4. Supplemental information submitted by Patrick O'Brien on behalf of American Fork City, received July 11, 2024.

### **BACKGROUND**

The Jess Lynn Green Descendants Trust (Trust) owns 24.4 acres (Property), located at approximately 200 South Millpond Road in American Fork City (City). The Property is currently split zoned among the RA-1, RA-5, R1-20000, and Transit Oriented Development (TOD) zoning districts. The Property is not far from the American Fork UTA Front Runner Station. Sometime in or prior to May 2024, the Trust submitted a zone change request to the city to rezone the entire Property to the TOD zone. In reviewing the documents submitted to this Office, it appears that the Trust does not presently have a particular development proposal to submit to the City for consideration. The Trust is simply looking to rezone the property in anticipation of future development. The General Plan designation for the Property is Transit Oriented Development.

On May 22, 2024, the American Fork City Planning Commission considered the Trust's zone change application. According to the Staff Report on the item, the request follows the current General Plan and satisfies any City Code requirements for the requested change to the TOD Zone. The City's "Vision Roadway Network," which operates as the City's transportation master plan, depicts a master planned 100-foot-wide, five-lane arterial highway running north to south through the Property for some 1,600 feet.<sup>1</sup>

The Staff Report advised the Planning Commission to recommend approval of the zone change to the City Council, but with the following condition:

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<sup>1</sup> A very rough estimate obtained from Google Maps.

The master transportation plan identifies 1300 West as a 100-foot-wide right-of-way for an arterial through portions of the proposed zone change area. If the zone change is approved, the necessary right-of-way for the arterial shall be dedicated to the city without compensation by deed or by plat submittal within 90 days of zone change approval.

*Planning Commission Staff Report*, Dated May 22, 2024. During the meeting, the question came up whether the City has authority to require dedication of the full right-of-way without compensating the owner. The following excerpts from the official minutes for the meeting provide a helpful picture of the issue and the discussion:

Andy Flamm who was there to represent the applicant, thanked the staff for including the transportation master plan map in the packet. He expressed that his only concern with the staff report was the request that they dedicate 100 feet of right of way, as his understanding of State Law defines that as a taking. As he reviewed the capital facilities plan, he found that only arterial and collector improvements were identified since local roads are required to be built as part of future development. He added that our master plan says that arterial and collector roads engineering, acquisition, and improvements should be paid for by the city, and this is typically done through impact fees. For those reasons, he wants that dedication removed as a condition.

...

[A Commissioner] asked for clarification on if the 100 foot right of way is a taking. [The City Attorney] explained that while the right of way is an exaction, and the road is an arterial on the transportation master plan as of right now, that road is critical if we are going to be bringing in higher density property. For that reason, she explained that the city's perspective is that this is proportionate to a zone change from a lower to a higher density to ensure we have the necessary connectivity for that higher density.

...

Andy Flamm reminded [another Commissioner] that half of the property is already zoned TOD, and also told the commissioners that because the transportation master plan has already designated that 100-foot road, and there's already huge traffic concerns down there, to have this property owner give up land for a road that's already planned is an illegal [exaction] in his opinion. [The City Attorney] told the commissioners that without dedication to ensure the road will go in, she does not believe the city would recommend approval of the zone change. She pointed out that there have been significant changes to the land use and development in this area. The current impact fee study was done in 2013, and she believes the city is updating its study to see if it needs to be an even larger road, as the city is already looking at adding additional roads and has added a number of corridors through that area that weren't there at the time that the impact fee study was done.

*American Fork Planning Commission Meeting Minutes*, dated May 22, 2024.

Following this discussion, the Planning Commission voted 5-0 to recommend approval of the zone change request to the City Council and included the proposed condition that the Trust would need to dedicate the 100-foot right-of-way for the future arterial highway.

Subsequently, and before taking the matter to the City Council for a final decision, the Trust submitted an Advisory Opinion request to this Office asking whether the City may lawfully impose the condition of approval on the Trust's zone change request to dedicate the 100-foot right-of-way.

## ANALYSIS

### **I. The City's Condition to dedicate the 1300 West Right-of-Way is Subject to the Constitutional Rough Proportionality Analysis and Fails to Pass the Test**

#### **A. Exactions and Rough Proportionality**

The City's demand that the Trust dedicate the 100-foot-wide right of way for a future arterial road is a development exaction. "A development exaction is a government-mandated contribution of property imposed as a condition of approving a developer's project." *B.A.M. Development, LLC v. Salt Lake County* ("B.A.M. III"), 2012 UT 26 ¶ 16. Under applicable state and federal law, local governments may require dedication of property for public facilities, such as roads, provided the dedication address only the impacts created by the proposed new development. An "exaction must alleviate the burdens imposed on infrastructure *by the development*." *B.A.M. III*, 2012 UT 26 ¶ 26 (emphasis added).

Moreover, any contribution of money or property mandated to obtain development approval is an exaction, regardless of whether the requirement is imposed by an administrative approval process, or through a legislative enactment. *See generally, Sheetz v. Cnty. of El Dorado*, 601 U.S. 267 (2024) (explaining that the essential question is not whether the government action at issue is legislative or administrative, but whether the government has "physically taken property for itself or someone else"); *see also B.A.M. Development, LLC v. Salt Lake County (B.A.M. I)*, 2006 UT 2, ¶ 46.

When a local government imposes an exaction and requires a landowner to dedicate land for a public purpose as a condition of some land use approval, the local government has the burden of proving that the requirement satisfies a constitutional "rough proportionality" test. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (stating that the government "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development"). This rough proportionality test is articulated in the Utah Code as follows:

- (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 § 10-9a-508(1). The U.S. and Utah Supreme Courts have provided some guidance on how to apply this test to a given situation to determine whether an exaction may validly be imposed under the Takings Clause of the U.S. and Utah Constitutions. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *B.A.M. Development, LLC v. Salt Lake County (B.A.M II)*, 2008 UT 74.

The first part of the test requires an “essential nexus” or close connection, between the required exaction and a legitimate land use interest or purpose. Thus, “if a proposed development will substantially increase traffic congestion, the government may condition [development approval] on the owner’s willingness to deed over the land needed to widen a public road,” because addressing traffic congestion is a legitimate land use interest and widening the newly congested road is closely connected with alleviating the congestion the proposed development will create. *Sheetz*, 601 U.S. at 274.

The second part of the test requires rough proportionality or “equivalence” and has two aspects. The first aspect requires that “the exaction and the impact must be related in *nature*; second, they must be related in *extent*. *B.A.M. II*, 2008 UT 74 at ¶ 9.

The *nature* aspect focuses on the relationship between the exaction and the proposed development’s impact on public infrastructure. The Utah Supreme Court explained that this relationship should be expressed in terms of a problem and a solution. “The impact is the problem, or the burden which the community will bear because of the development. The exaction should address the problem. If it does, then the nature component has been satisfied.” *Id.* at ¶ 10.

The *extent* aspect addresses relative costs. The Utah Supreme Court explained it this way:

The most appropriate measure [of the extent aspect] is cost—specifically the cost of the exaction and the impact to the developer and the municipality, respectively. The impact of the development can be measured as the cost to the municipality of assuaging the impact. Likewise, the exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction.

*Id.* at ¶ 11. Thus, if the costs are roughly equivalent, the extent aspect of the analysis is satisfied.

For an exaction to qualify as a lawful exaction, it must satisfy the entirety of the rough proportionality test. If it fails any component of the test, the exaction is unlawful, and the local government may not impose the requirement unless it is willing to compensate the landowner for the land or improvements taken.

## B. The City’s Condition Fails the Nature Aspect of the Rough Proportionality Test

Turning now to the present case, the City justifies its proposed exaction as a condition of zone change approval by stating that the 1300 West right-of-way will be critical if the City is going to

change the zoning from a lower to a higher density. In other words, but for the increase in allowable density, the City would not have the concern for the road at this time.

While it is appropriate for a local government to plan for future development by laying out system-wide roads it will need to serve development in a transportation master plan, and to acquire land and improvements in anticipation of those needs through appropriate means and at appropriate times, the local government, simply stated, may not impose an exaction on a landowner that is not proposing development. To do so would be to leverage the City's approval monopoly "to exact private property without paying for it." *Sheetz*, 601 U.S. at 275.

In this case, the landowner has yet to present a specific development proposal for the City's consideration. Sometimes, when a landowner approaches a local government seeking a zone change, the landowner concurrently submits a land use application proposing development, such as a subdivision application or a master planned development. In such a scenario, the local government may perform its obligation to determine the impacts of the proposed development on the City's infrastructure and ability to provide services, and decide whether to impose exactions to offset those impacts.

Here, the Trust is simply seeking to bring all its land under the same zoning designation in anticipation of a potential and future development proposal. The Trust is not asking for approval of proposed development that creates new impacts on municipal services.

Accordingly, and in the context of the rough proportionality test, while the City may be able to argue that it is imposing the exaction in pursuit of a legitimate land use interest, and that the exaction serves that interest (in satisfaction of the "essential nexus" part of the test), the exaction nonetheless fails the *nature* aspect of the rough proportionality test because, as applied to the landowner's current request to simply change the zoning of the property, the exaction is a solution in search of a problem.

Simply rezoning a property from a lower density zone to a higher density zone does not, in and of itself, create new development impacts. When a landowner exercises its rights by proposing actual development in accordance with the applicable zoning, the City may then require proportional exactions to address and offset those impacts, but not before. Since the Trust's present request is to rezone land and not to propose development, there is no problem for an exaction to solve, and the condition therefore fails the rough proportionality test.

This conclusion is further supported by the plain language of Utah Code § 10-9a-508, which authorizes local government to impose exactions. It states that a "municipality may impose an exaction...on *development proposed*" in an application (emphasis added). It follows that if the applicant is not proposing development, the local government lacks authority to impose an exaction.

Rezoning property is a legislative decision in which the elected legislative body weighs competing policy interests to make a decision. The City Council may approve or deny a rezone request for legitimate policy consideration related to the community's interests. But while the City may have legislative discretion to deny a rezone request for several reasons, it may not do so because the

landowner refuses to accept an unconstitutional condition to dedicate land to the City for a future road when the landowner's current request does not present clear and measurable impacts that would warrant requiring an exaction.

## **II. A Condition Requiring a Single Development Proposal to Contribute Land and Facilities for a System Improvement Likely Fails the Rough Proportionality Test**

Even assuming the Trust had brought a proposal to develop its land at this time, the City would likely be on shaky legal ground in this case. Requiring a single development to dedicate land for a road of regional or system-wide significance and benefit similarly violates the *nature* aspect of the rough proportionality test because the condition solves more than just the problem presented by the specific development proposal and it requires an individual development to bear public burdens that should be borne by the public as a whole, in violation of the Takings Clause of the U.S. Constitution. *Armstrong*, 364 U.S. at 49.

The law of exactions often makes an important distinction between *system* improvements and *project* improvements. *See* UTAH CODE § 11-36a-101. While a project improvement serves occupants or users of a specific subdivision or development, *see* UTAH CODE § 11-36a-101(15), system improvements are “designed to provides services to service areas within the community at large.” UTAH CODE § 11-36a-101(22)(a)(i)(B).

While it would be appropriate for a local government to require a single development to provide local roads to serve that development proposal, a 100-foot-wide, five-lane arterial road included in a city's transportation master plan is undoubtably a system improvement, and requiring any one development to bear the full burden of dedicating the full width of that right-of-way, where the proposed development does not alone necessitate the entire road, violates the Takings Clause of the U.S. Constitution.

The way local governments capture each individual development's fair-share contribution to system improvements is typically through impact fees. The local government may, in accordance with the Utah Impact Fees Act, *see* UTAH CODE Chapter 11-36a, collect impact fees and then use those fees to acquire land for and construct system improvements. As Mr. Flamm indicated in the May 22, 2024 Planning Commission meeting, the City should use impact fees, or some other source of funding, to pay for system improvements that have a system-wide benefit and that solve system-wide problems of connectivity and traffic flow.<sup>2</sup>

## **CONCLUSION**

Local governments may only impose exactions on a landowner when the landowner is proposing development that will create impacts and need municipal services. In this case, the Trust is requesting approval of a zone change that will allow higher densities on the land, and nothing more. Since the Trust is not presently proposing development that will create new and immediate impacts, the City's attempt to impose an exaction on the Trust at the rezone stage, as opposed to at

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<sup>2</sup> This isn't to say that a local government and a developer cannot voluntarily agree to some cost sharing agreement to address “upsizing” and system improvements as development occurs, on terms satisfactory to both parties. The local government simply may not *impose* disproportionate requirements as conditions of land use decisions or approvals.



some later point when actual development is proposed, will violate the constitutionally required rough proportionality test as a solution in search of a problem, and would therefore be unlawful.

Additionally, even if the Trust were proposing development at this time, the City would be well advised to tread lightly. While the City possesses certain transportation corridor preservation powers, which include designating rights-of-way on official maps, requiring dedication of property or other public contributions as a condition of development approval is limited to conditions which are related to, and only offset the impact of, the proposed development.

The City may require a particular development proposal to contribute its proportionate share of the City's need for a 100-foot-wide, five-lane arterial road included in the City's transportation master plan, according to the development's impact. However, the City may not require the property owner to contribute more than its proportionate share attributable to the development's impact. Requiring any more would require an individual to bear public burdens that should be borne by the public as a whole, in violation of the Takings Clause of the U.S. Constitution.

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

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