Advisory Opinion #91

Parties: Norman Schmehl for Susan Schmehl Family Protection Trust & Jill Olsen Taylor Trust and City of North Ogden and Weber-Box Elder Conservancy District

Issued: October 6, 2010

TOPIC CATEGORIES:
D: Exactions on Development

The requirement that the developer install a connecting pipe to a secondary water system is an exaction subject to rough proportionality analysis. Both the local government and the local district operating the water system are responsible, since both are imposing the exaction, and since both are public bodies. The local district has discretion to determine how and where its secondary water system is operated, and thus has broad latitude to determine where connections to the system are made.

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ADVISORY OPINION

Advisory Opinion Requested by:	Norman Schmehl
Local Government Entity:	North Ogden City Weber-Box Elder Conservancy District
Applicant for the Land Use Approval:	Susan Schmehl Family ProtectionTrust Jill Olsen Taylor Trust
Project:	Residential Subdivision
Date of this Advisory Opinion:	October 6, 2010
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

Is a local government requirement that a developer connect to a secondary water system operated by a local district an exaction?

Summary of Advisory Opinion

The requirement that the developer connect to a secondary water system is an exaction subject to analysis required by the federal and state constitutions. Both the local government and the local district operating the water system are responsible for the exaction, since both are imposing the exaction, and since both are public bodies. Like all exactions, the requirement must satisfy the "rough proportionality" analysis. The local district has discretion to determine how and where its secondary water system is operated, and thus has broad latitude to determine where connections to the system are made.

Review

A request for an advisory opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE ANN. § 13-43-205. 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.

A request for an Advisory Opinion was received from Norman and Susan Schmehl on June 30, 2010. A copy of that request was sent via certified mail to Lynn Muirbrook, Mayor of North Ogden City, and to Terel Grimley, General Manager of the Weber-Box Elder Conservation District. Certified mail receipts, indicating that both the City and the District received copies, were delivered to the Office of the Property Rights Ombudsman on July 8, 2010. Both the City and the District submitted responses, and the Schmehls have replied to those responses. Jill Taylor, who has an interest in the property being developed, also submitted information.

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 from Norman and Susan Schmehl, filed June 30, 2010 with the Office of the Property Rights Ombudsman.
2. Response from North Ogden City, submitted by Dave Carlson, City Attorney, received on July 20, 2010.
3. Response from the Weber-Box Elder Conservation District, submitted by Terel Grimley, received on July 22, 2010.
4. Reply filed by the Schmehls, received on August 3, 2010.
5. Reply filed North Ogden, received on August 11, 2010.
6. Reply filed by the Schmehls, received on August 26, 2010.
7. Information submitted by Jill Taylor, received on August 26, 2010.
8. Reply filed by the District, received on August 30, 2010.
9. Reply filed by the Schmehls, received on September 27, 2010.
10. Information submitted by Jill Taylor, received September 28, 2010.

Background

The Susan Schmehl Family Protection Trust and the Jill Olsen Taylor Trust own property located at 3625 North 500 East in North Ogden City.[1] In the Summer of 2005, the Schmehls began the process of subdividing and developing the property into "Valley View Estates," with eight residential lots. Five of the lots are located on a cul-de-sac, and the remaining three lots are on 500 East. The Schmehls installed improvements for the subdivision, including the roads. In March of 2007, the City approved the subdivision. Except for secondary water, the improvements for Valley View Estates were completed by September of 2008.[2]

The City requires new development to connect to a secondary water system, which provides water for landscaping and "outside" activities. *See* NORTH OGDEN CITY CODE, §§ 9-2-2; 12-6-7.[3] The City provides culinary water for household use and fire suppression, but not secondary water for irrigation or landscaping. The Weber-Box Elder Conservation District ("District") provides secondary water for the area.[4] Although secondary water is required, the District was not directly involved in the preliminary discussions leading up to approval of the Valley View Estates subdivision.

In August of 2005, the District provided a letter to the Schmehls stating that it would provide service to the proposed subdivision.[5] That letter states that the subdivision could be served with secondary water "if main lines are run to the property." However, part of the property is apparently too high for normal service, but the District noted "[t]hat portion of the proposed subdivision could be delivered secondary water but would have to be pumped at the Pine View connection."[6] The Schmehls state that they relied upon this letter when it applied for approval of the subdivision.[7]

Irrigation water for the area comes from the Pine View Reservoir, located a short distance from the Valley View Estates subdivision. According to the materials submitted for this Opinion, water service is delivered from the reservoir through underground pipes. A six inch line runs down Lakeview Drive and then beneath 3550 North. Four inch diameter branch lines serving residential neighborhoods are connected along 3550 North. A branch line runs beneath 475 East,

[1] The Schmehl and Taylor Trusts are evidently co-owners and co-developers of the property. This Opinion will refer to both owners as the Schmehls.
[2] The City required improvements that are typical for a new subdivision, including roads, storm water drainage and retention, etc.
[3] The City Code states that the secondary water requirement is necessary to conserve water and decrease demand on the culinary water system. *See* NORTH OGDEN CITY CODE, § 9-2-1.
[4] The Weber-Box Elder Conservation District is independent of the City, and is a special service district established to provide irrigation water. The District is also referred to as "Pine View Water," but this Opinion will refer to it simply as "the District."
[5] The Schmehls state that this letter was submitted to the City on August 31, 2005, as part of the original application for Valley View Estates.
[6] The District explained that it could not deliver water to elevations higher than 5,018 feet above sea level. In order for the new subdivision to have adequate pressure, the water would need to be pumped. The Valley View Estates Subdivision is no higher than 5,008 feet. The Schmehls were prepared to install a pump for the secondary water.
[7] The City disputes that the Schmehls submitted the August 2005 letter from the District, but the Schmehls state that it was included in their original application. Jill Taylor also confirms that the letter was received from the District.

and terminates near the southern boundary of the Valley View Estates subdivision.[8] The Schmehls planned to tie into this branch and extend water service to the eight lots in the new subdivision, possibly using a pump to augment the water pressure. The plans submitted for the subdivision indicate a connection to the secondary water line located beneath 475 East.

The City reviewed the application during the Fall of 2006. Although the District was apparently informed of the application, and invited to participate, there are no records of comments from the District while the application was being reviewed.[9] A memorandum from November, 2006 indicates concerns about whether the District had committed to provide secondary water.[10] In December, the District was contacted by Judco Engineering, the firm designing the subdivision for the Schemhls. That firm inquired about the connections, and evidently received information that was incorporated into the subdivision plans.[11]

The City states that it never received satisfactory commitment that the District would provide secondary water to the new subdivision, and faults the Schmehls for failing to obtain that commitment. However, both the Schmehls and the District acknowledge that the August 2005 letter was a commitment to serve the property, although they disagree over the details of how the water service would be delivered.[12] The City must have received some sort of satisfactory assurance that secondary water would be provided, because it approved the subdivision in March of 2007. Upon receiving approval from the City, the Schmehls began construction of the improvements.[13]

Some time during construction, the District informed the Schmehls that connecting to the branch line on 475 East alone was not acceptable, because there would not be enough pressure to serve eight additional homes. Evidently, the District also felt that installing a pump at the connection point would not work either. Instead, the District required a connection to a six inch line that

[8] 475 East becomes 500 East, which runs through Valley View Estates. The culinary water line that serves the subdivision also runs beneath this street.

[9] The City stated that the District is informed of all subdivision applications, and is invited to participate in the review process. A memorandum, dated February 19, 2007, explained 13 items that needed to be addressed before final approval would be granted. None of the items referred to the secondary water system. It is worth noting, however, that the City required homes in the new subdivision to have sprinkler systems, because of concerns that the culinary water system would not have adequate pressure for fire suppression.

[10] The memo was written by Kent L. Jones, the City Engineer.

[11] The Schmehls submitted two emails from David Judd, of Judco Engineering, reporting that Todd Richins from the District responded after several phone calls, and that Mr. Richins provided information about "the placement of the main and meters." That information was incorporated into the plans. The District disputes that contact was made, and notes that Mr. Richins is the inspector for the District, not the District's engineer. The District also denies that it formally reviewed and approved the plans for the subdivision.

[12] There is no dispute that the District will provide service, and that the Schmehls have sufficient water shares for the property. The dispute centers on how that service will be delivered.

[13] The Schmehls report that the total cost of the improvements was $300,000. An estimate from February 2007 notes that the cost of the equipment needed for pressurized irrigation (*i.e.*, secondary water) was approximately $15,000. This estimate does not include installation of the six-inch branch line, or acquisition of an easement for that line.

branches off from the Lakeview Drive line.[14] That line is about 600 feet from the western boundary of the Valley View Estates property. The Schmehls would be required to extend the new six inch line across privately-owned property, and then dedicate that new line to the District.[15] The owner of that property, however, has refused to grant an easement for the new line.[16]

Construction of the improvements (other than the secondary water system) was completed in the Summer of 2008. The City accepted the public improvements (except for the secondary water system), and the Schmehls obtained a warranty bond to cover any repairs necessary for the next 12 months. The City evidently has no issues with any of the other improvements. By September of 2009, when the warranty bond was set to expire, the City informed the Schmehls that it would not issue building permits for the lots in the subdivision until the secondary water system was installed. The Schmehls believed that connection to the 475 East line was sufficient, particularly with a pump. They noted that other subdivisions directly to the east of Valley View Estates are adequately served by four inch branch lines similar to the one beneath 475 East. The Schmehls explained that they were not able to complete the system, because of the additional costs of installing the six inch line, and because the neighboring property owner was uncooperative.[17] They also felt that installing a line to serve the Valley View Estates subdivision was an impermissible exaction, because the line was larger than necessary for the subdivision, and because it would also serve other nearby properties, but the Schmehls would bear the entire cost.[18]

The City argues that it is not responsible to approve connections to the secondary water system, leaving that matter to the Schmehls and the District. However, since secondary water service is required, the City will continue to bar building permits until a system is completed. The District states that it never approved a connection to the 475 East line, and that the only way to provide adequate service is to extend the six inch line to the Valley View Estates subdivision. The District also points to an agreement signed by the former owners of the property being subdivided, which states that any expansion to the distribution system is to be installed by the property owners (at their expense) and then dedicated to the District.[19]

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[14] It appears that the District will allow connection to the 475 East branch, but that will not serve all of the lots. The six inch line is necessary to provide full service. The District did not comment on why a pump would not be acceptable.

[15] According to Jill Taylor, the District plans to connect the new six-inch line to the four-inch line beneath 475 East. Ms. Taylor states that a six-inch to four-inch reduction connection has been installed in anticipation of the new six-inch line.

[16] There is an existing road easement that has been used for underground utilities, but there are still questions about whether that easement could be used for the secondary water.

[17] The Schmehls requested that either the City or the District acquire an easement across the neighboring parcel through eminent domain, but both entities declined to exercise this power.

[18] The Schmehls estimate that as many as 50 homes could directly benefit from the 600 foot branch line they would be required to install. (There are many undeveloped parcels surrounding the subdivision). In addition, many more homes could indirectly benefit from the 600 foot line, if it is extended beyond the boundaries of Valley View Estates.

[19] The agreement was signed by the property's former owners in 1979, as a condition for inclusion in the District (as well as water service from the District). Evidently, the agreement runs with the land, and may be binding upon the Schmehls. The entire agreement was not provided for this Opinion.

Analysis

I. The City May Validly Require Connection to a Secondary Water System.

A. The City has a Legitimate Interest in the Economical and Efficient Use of Water, and may Require New Development to Connect to a Secondary Water System.

Since ensuring adequate and reliable water service is a legitimate government interest, the City may require developers to install a secondary water system. Local governments have a legitimate interest in ensuring that high quality water supplies are available to residents, including reliable supplies for fire suppression and irrigation. *See Summit Water Distribution Company v. Mountain Regional Water Special Service District*, 2005 UT App. 66, ¶¶ 11-14, 108 P.3d 119, 121-22. Municipal general plans should provide for "the efficient and economical use, conservation, and production of . . . food and water." UTAH CODE ANN. § 10-9a-401(2)(c). In fact, local governments must require new development to obtain approval from culinary water suppliers. *See id*. §§ 10-9a-602(2)(a) (municipalities); 17-27a-602(2)(a) (counties).

Given this important public interest, it is appropriate for the City to require a separate system for secondary water. This helps provide adequate supplies of culinary water, both for household use and fire suppression.

> The city council has determined that heavy demand is being placed upon the culinary water system by use of culinary water for irrigation purposes, and that such heavy demand, if continued, could result in a shortage of culinary water and could result in inadequate water supply for fire protection in some areas.

NORTH OGDEN CITY CODE, § 9-2-1. This requirement also promotes the efficient and economical use of water, because the secondary system can be easily controlled, if necessary, to restrict non-essential water use.

B. Connection to a Secondary Water System is a Valid Condition, Because it is Imposed by the City's Ordinances.

The requirement that new development connect to a secondary water system is a valid condition, because it is found in the City's ordinances. Local governments may impose conditions on new development, but only if those conditions are stated at the time the development application is approved:

> A municipality may not impose on a holder of an issued land use permit or approved subdivision plat a requirement that is not expressed:
>
> (i) in the land use permit or subdivision plat, documents on which the land use permit or subdivision plat is based, or the written record evidencing approval of the land use permit or subdivision plat; or
> (ii) in [Chapter 10-9a] or the municipality's ordinances.

UTAH CODE ANN. § 10-9a-509(h). When the Schmehls applied for subdivision approval, the City's Code required connection to a secondary water system. It was thus validly imposed upon the new subdivision.

II. The Required Connection to a Secondary Water System is an Exaction, and both the City and the District are Responsible.

A. The Required Connection is an Exaction

Because the Schmehls must install a new line connected to the secondary water system in order to obtain subdivision approval and building permits, the requirement to connect to the system is an exaction. Governmental entities may impose exactions on new development, but the exaction must satisfy the "rough proportionality" test expressed by the U.S. and Utah Supreme Courts. "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 ("*B.A.M. I*").[20] 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.[21] 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. Since the Schmehls must install and dedicate a water line in order to obtain approval for a subdivision and building permits, the City and the District are requiring an exaction, which must satisfy the "rough proportionality" test.

B. Both the City and the District must Demonstrate that the Exaction Satisfies the "Rough Proportionality" Test.

The City and the District are both responsible for the exaction, because both are public entities, and both have imposed the requirement upon the Schmehls. There is no question that the City must show that its exactions satisfy the "rough proportionality" test. 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

[20] *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.")

[21] *Id.* "Development exactions may take the form of (1) mandatory dedications of land . . . as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees." (internal quotations omitted).

(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).[22] Furthermore, exactions analysis is required to implement constitutional protections for property owners and limit governmental authority.[23] Since the City's requirement that the Schmehls connect to a secondary water system is an exaction, it is subject to the "rough proportionality" test.

The City is imposing an exaction, because the Schmehls must install improvements to the secondary water system in order to obtain approval from the City for their development.[24] After it is built, the system will be dedicated to the District, as required by the agreement explained above.[25] But the *City* is the land use authority, and it has imposed the requirement. As with any requirement imposed by the City, the City must ensure that the requirement is not disproportionate in violation of the exaction law. There is no reason to give the City immunity for the requirements it imposes simply because another entity dictates the requirements. The City is requiring the Schmehls to construct and dedicate a public improvement.[26] This is an exaction. Although the requirement is carried out by a separate entity, since the City imposes the requirement it is responsible to ensure that the exaction satisfies constitutional scrutiny.

The District is also subject to "rough proportionality" analysis, because it is a public body which requires exactions as a condition of development. Local Districts are public bodies, governed generally by Title 17B of the Utah Code. The Weber-Box Elder Conservation District exercises powers normally associated with public agencies. It may, for example, levy assessments on private land within its boundaries, exercise eminent domain to acquire property, and may impose impact fees.[27] In fact, local districts have long been considered "quasi-public" agencies, and the scope of their authority is similar to that of local governments. "Being public in [their] purpose and nature, [the] rights and duties [of local districts] are to be determined, generally speaking, by the same considerations which determine the rights and duties inhering in what are commonly known as municipal or public bodies." *Upper Blue Bench Irrigation District v. Continental National Bank & Trust Company*, 93 Utah 325, 330, 72 P.2d 1048, 1050 (1937). Therefore, the District must be considered a public body subject to the same constitutional restrictions as any governmental agency. Section 10-9a-508 of the Utah Code does not specifically mandate that local districts conduct "rough proportionality" analysis when they impose exactions on development. However, "rough proportionality" analysis is required of all governmental bodies

[22] There is a corresponding statute applicable to counties found at § 17-27a-507 of the Utah Code.
[23] "The 'exactions' theory has roots in the well-settled doctrine of 'unconstitutional conditions,' which sets constitutional limits on the manner by which the government bargains away its discretionary authority." *St. John's River Water Mgmt. Dist. v. Koontz*, 5 So.3d 8, 9 n.2 (Fla. Dist. Ct. App. 2009) (citations omitted).
[24] In addition, the City is withholding building permits until the secondary water system is complete.
[25] The extent of the dedication was not explained, but it is likely that the "public" portion of the system, such as the delivery lines running to individual lots, would need to be dedicated to the District.
[26] *See Salt Lake County v. Board of Education, Granite School District*, 808 P.2d at 1058. The District is also requiring that the Schmehls install a new six-inch line to the subdivision. If this line is larger than what is necessary to serve the subdivision, or is capable of serving other properties, requiring its installation is an exaction.
[27] *See* UTAH CODE ANN. § 17B-1-103 (general powers of local districts); § 17B-1-111 (local districts may impose impact fees). *See generally*, Title 17B (governing local districts).

to protect the constitutional rights of property owners against excessive exactions.[28] Therefore, the District is also responsible for showing that requiring the secondary water connection satisfies the "rough proportionality" analysis required by the U.S. and Utah Constitutions.

C. In Order to be Valid, the Requirement Must Satisfy "Rough Proportionality" Analysis.

The Utah Supreme Court observed that the "rough proportionality" test derives from the U.S. Supreme Court analyses in *Nollan v. California Coastal Commission*, 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 I*, 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.[29] 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.

The Utah Supreme Court further honed the "rough proportionality" analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 ("*B.A.M. II*"), which was a second appeal stemming from the same development project at issue in the earlier decision.[30] The decision explained that rough proportionality analysis "has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent." *B.A.M. II*, 2008 UT 74, ¶ 9, 196 P.3d at 603. The "nature" aspect focuses on the relationship between the purported impact and proposed exaction. The court agreed that the approach should be expressed "in terms of a solution and a problem . . .. [T]he 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.*, 2008 UT 74, ¶ 10, 196 P.3d at 603-04.

The "extent" aspect measures the impact against the proposed exaction in terms of cost:

> The most appropriate measure 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.

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[28] Local districts are subject to the "Constitutional Takings Issues Act," which requires that each political subdivision in the state adopt guidelines that help identify takings or exactions, including an appeal process for property owners. *See* UTAH CODE ANN. §§ 63L-4-101 to -301. This further reinforces the conclusion that the District must abide by the "rough proportionality" test.

[29] *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 I.*, 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.")

[30] The final "B.A.M." decision was an amendment to an opinion issued a few months earlier. (*See B.A.M. Dev. LLC v. Salt Lake County*, 2008 UT 45).

Id., 2008 UT 74, ¶ 11, 196 P.3d at 604. The court continued by holding that "roughly proportional" means "roughly equivalent." Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the cost that a governmental entity would incur to address (or "assuage") the impact attributable to a new development.

D. In Order for the Secondary Water Connection Requirement to be Valid, the Private Cost of Compliance Must be Roughly Equivalent to the Public Expense to Address the Impact.

Both the City and the District must demonstrate that the required connection to the secondary water system is a valid exaction. To begin with, there is an essential link between the condition that the developer connect to the secondary water system and a legitimate interest in the public's health and welfare. Ensuring safe and adequate water supplies is a legitimate public interest. *See Summit Water Distribution Company v. Mountain Regional Water Special Service District*, 2005 UT App. 66, ¶¶ 11-14, 108 P.3d 119, 121-22. Requiring developers to install and connect to a secondary water system helps ensure that supplies for culinary water are sufficient, by reducing the demand on a culinary system due to irrigation. A secondary water system also helps reduce costs for water, because secondary water does not need to meet more stringent water quality standards. Thus, there is an essential link between the county's legitimate interest of ensuring a safe and adequate water supply and the requirement that the new subdivision install connect to the secondary water system.[31]

The required connection must also satisfy the "nature" and "extent" aspects of the rough proportionality test. The "nature" aspect is satisfied because connecting to the secondary water system is a reasonable means to address the "problem" of providing water for irrigation and landscaping. The Valley View Estates subdivision will create an impact, because the new homes will require water for landscaping. Requiring a connection to the secondary water system "solves" the problem, by providing the needed water. Based upon the information provided for this Opinion, the nature of the exaction is roughly proportionate to the impact created.[32]

Determining whether the secondary water connection requirement meets the "extent" aspect is not possible in this Opinion, because there is not enough information about the costs associated with the requirement. Ultimately, the question will require a comparison of the expenses incurred by the Schmehls against the projected costs of the impacts faced by the City and the District. As required by the Utah Supreme Court, the costs of compliance must be roughly equal

[31] Note that the first step of the evaluation under § 10-9a-508(1)(a) requires an essential link between the exaction and a legitimate governmental interest. This first prong of the test does not require a connection between the exaction and a need attributable to new development. As has been discussed, the "nature aspect" expressed in § 10-9a-508(1)(b) concerns the relationship between the exaction and the need created by new development. *See B.A.M. II*, 2008 UT 74, ¶ 10, 196 P.3d at 603-04.

[32] The Schmehls point out that several other nearby homes are adequately served by four-inch lines branching from the 3550 North line, and so they believe that the line beneath 475 East could adequately serve their subdivision (possibly with a pump). The District states that the 475 East line would not provide enough water pressure to serve the entire subdivision, and so the new six-inch line is necessary. The necessity of the new line is a factor in whether the required connection is roughly proportionate to the impact created. However, this Opinion cannot determine if the District's assertion is correct. Such a determination is a factual matter that would need to be resolved separately.

to the expense necessary to address the impact of the new subdivision. If the compliance costs are greater than needed to address the impact, the Schmehls may be entitled to compensation.[33]

The facts of this Opinion, however, merit a few observations. First, although the City and the District are jointly responsible for the exaction, it does not necessarily follow that they equally share responsibility.[34] Both entities are imposing the condition, and therefore both are responsible to ensure that it is constitutionally valid. However, the impact of the new subdivision may not be the same for the two entities, and their respective responses to the impact may also be different. The City and the District operate independently of each other, and it would not be fair for one to assume responsibility for compensation for an improvement that benefits the other. The measure of each public entity's responsibility is derived from the respective impacts upon them.[35]

Second, the Schmehls are responsible to bear the costs of compliance, but only to the extent necessary to meet the impact of the Schmehls' new subdivision. Any requirement that the Schmehls oversize the line beyond the Schmehls' needs, or bring the line to an area where it can serve other properties, or improve the line in any respect beyond what is necessary for the Schmehls' development is an exaction which must be borne by the public agencies if the line is to be dedicated to or used by the District.[36] If the new pipeline is installed, and it can also serve other properties, the Schmehls should not bear the full cost of installation, but only the costs necessary to address the impact of their new subdivision. Finally, the costs should also include the cost to obtain any easements necessary for the connection.[37]

III. The District has Discretion to Determine How and Where New Development Connects to its Water System, Provided the Choice is Reasonable and Rational.

The District has discretion to determine how and where secondary water service will be delivered to the Valley View Estates subdivision, provided the decision is rationally based and reasonable under the circumstances. The District has authority to build and maintain its water

[33] If the costs are roughly equal, the exaction is constitutionally valid, and no compensation is necessary. However, if the compliance costs are greater, the Schmehls are being asked to bear costs that ought to be borne by the public in general. They would either need to be compensated, or the requirement modified to reduce the excess burden.

[34] Both the City and the District have imposed the exaction, so it follows that they are jointly responsible if compensation is required.

[35] This conclusion is based upon principles of fairness. In the same way that an individual property owner should not bear costs that ought to be borne by the general public, a government entity should not be forced to assume responsibility for costs imposed because of a separate entity's decisions. Without any more specific guidance on this important issue, it is the position of the Office of the Property Rights Ombudsman that fairness dictates such a conclusion. *See City of Monterrey v. Del Monte Dunes at Monterrey, LTD.*, 526 U.S. 687, 702 ("[I]n a general sense concerns for proportionality animate the Takings Clause.")

[36] According to Jill Taylor, the new six-inch line will be connected to the existing four-inch line beneath 475 East. If that is true, the new line is a system improvement, along with providing direct service to the Valley View Estates subdivision. As has been stated, the Schmehls should be responsible for the portion of the installation cost necessary to serve the subdivision's needs, but not for any additional costs, particularly for system improvements.

[37] As provided in § 78B-6-501(5) of the Utah Code, the Schmehls themselves may exercise eminent domain and purchase an easement for the water line. Of course, both the City and the District may also exercise eminent domain authority to purchase the easement.

delivery system, and has discretion to select how that system is to be operated. *See* UTAH CODE ANN. § 17B-1-103(2)(d). A local district's decisions regarding connection to the service provided by the district is within the discretion of the governing body.

There are limits to local government discretion, however. The District's decision must be rationally based and reasonable. In addition, the District's decision must not give rise to an impermissible exaction violating constitutional protections. Each decision must be evaluated on a case-by-case basis. It would not be rational, for example, to require a developer to connect at a point some distance away when there is an acceptable connection point nearby. It would also be unreasonable to select a connection point that requires a great deal of additional equipment, when a more accessible and acceptable connection is available, without some rational basis to favor the less accessible connection point.

The District should consider the cost to the Schmehls, but cost is not the controlling factor. The District may weigh various considerations, such as ease of accessibility (including accessibility for maintenance), capacity of the system, anticipated future needs, possible service disruption due to construction, disturbance of existing residents' property, etc. "[A public agency], in an expansion movement involving the furnishing of essential public services, has a generous latitude for controlling and administering such expansion and services to advance the public welfare, and a concomitant latitude of discretion to approve plans affecting other citizens and interests." *Seal v. Mapleton City*, 598 P.2d 1346, 1347 (Utah 1979).[38] If there is more than one acceptable connection point, a local district has discretion to choose any one of those connections—provided the choice is reasonable—even if it results in greater costs to the developer.

As long as the District's decision is rationally based and not unreasonable, it may dictate the location of the connection to the secondary water system. However, only limited information was provided about the two possible connection points. As has been discussed, the District maintains that the 475 East line will not provide adequate service. This is within the District's discretion, and ultimately, the District may, within established limits, determine the location for a connection that best serves its customers' needs.

Conclusion

The City's requirement that the Schmehls install a secondary water system is a valid condition. It serves a legitimate public purpose, and was imposed by the City's ordinance. The requirement is an exaction, because it is a condition of subdivision approval and building permits. Both the City and the District have imposed the exaction, and the requirement is subject to the "rough proportionality" analysis, and both public entities are responsible to ensure compliance with the constitutional standard.

[38] As has already been discussed, the rights and duties of a local district are comparable to those of a local government. *See* Footnote 24 and related text, *supra*.

Like all exactions, the public bodies must show that the secondary water connection is valid under the "rough proportionality" test required to implement the property rights protections of the federal and state constitutions. It is very likely that there is an essential link between the requirement and the legitimate public objective of promoting the efficient use of water resources. In addition, the nature of the requirement is roughly proportionate to the impact created by the proposed subdivision.

There has not been enough information provided to determine whether the required secondary water connection satisfies the "extent" aspect of the analysis. The developer's costs to comply with the requirement must be roughly equivalent to the public expense needed to address the impact caused by the development. The developer may only be required to construct an addition to the system to the extent necessary to serve the subdivision. Any excess capacity is an exaction that must be funded by public agencies. The costs of compliance include any costs to acquire easements for the system.

Finally, the District has fairly broad discretion to determine how and where connections to its secondary water system are made. As long as the choice is rational and reasonable, the District may require connection in any manner it chooses. The District should consider such factors as the system capacity, anticipated future needs, and ease of access. Cost to the developer should be considered, but cost is not the controlling factor.

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. § 63G-7-401 (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:

S. Annette Spendlove, City Recorder
North Ogden City
505 East 2600 North
North Ogden, Utah 84414

Weber-Box Elder Conservation District
Terel H. Grimley, General Manager
471 West 2nd Street
Ogden, Utah 84404

On this _____ Day of October, 2010, 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.

_____
Office of the Property Rights Ombudsman