

# Advisory Opinion # 154

Addendum to Advisory Opinion # 150

Parties: David Davis and Tooele City

Issued: March 2, 2015

## TOPIC CATEGORIES:

### Exactions on Development

Development exactions must be justified by an impact created by new development. Construction of a home in place of an older home does not create a new impact, but is simply a continuation of an existing burden on public services. Because exactions must be tied to *new* impacts, it is not permissible to require an exaction to cure deficiencies in public services.

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## ADVISORY OPINION ADDENDUM

Advisory Opinion Requested by: David Davis  
Local Government Entity: Tooele City  
Date of Advisory Opinion: March 2, 2015  
Addendum Authored By: Elliot R. Lawrence  
Office of the Property Rights Ombudsman

### Issue

May a City require dedication of water rights as a condition of building permit approval to construct a new home on a lot where an older home once stood?

### Summary of Advisory Opinion Addendum

This addendum to the Advisory Opinion originally issued on December 18, 2014 responds to issues raised by Tooele City after that Opinion was completed. The conclusions of the December 18 Opinion remain unchanged. An exaction may only be justified when there is a new impact caused by new development. Replacing an existing home does not create a new impact, it only transfers the burden attributed to an older building to the new. Impacts are created by new development, and do not exist on already-developed properties. An exaction may not be used to cure infrastructure deficiencies.

### Discussion

#### **The “Replacement” Home Does not Cause a New Impact on the City’s Water Services.**

##### *A. Development Exactions Must be Based on a Development’s New Burdens on Public Infrastructure.*

The materials submitted for December 18 Advisory Opinion seemed to indicate that Tooele City disputed the existence of a home on the parcel now owned by Dave Davis. The language of the Opinion was thus couched to accommodate the possibility that the Davis home was a new development rather than a “replacement” for an older home. After that Opinion was completed,

the City confirmed that an older home was on that parcel, which had been demolished by Mr. Davis. This information clarifies the factual circumstances, but does not alter the analysis—the new home has no new impact, because it is replacing the older home.

In its reply to the Advisory Opinion, the City overlooks the fact that no new impact would be created if Mr. Davis builds a home to replace the one that was torn down. The City correctly notes that “[t]he act of turning the tap on a water faucet” creates an impact on the City’s water system.<sup>1</sup> However, the City forgets that in this analysis, the theoretical tap was already turned on. The previous home used the City’s water services, and so will the new home. It is not the lack of impact that led to the conclusions in the Advisory Opinion, but the lack of *new* impact. There is no new impact on the City’s water system, only a replacement of the older home’s impact.

This position is not an oversimplified “feel good conclusion of a house for a house” resolution of the matter. Exactions are a type of property takings, which implicate the protections found in the State and Federal Constitutions.<sup>2</sup> Government agencies may impose exactions on new development, but only to the extent that the development creates a need for additional public services.

If the burden cast upon the [developer] is *reasonably* attributable to [the development] activity, then the requirement of dedication or fees in lieu thereof is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than a reasonable regulation under the police power.

*Banberry Development Corp. v. South Jordan*, 631 P.2d 899, 905 (Utah 1981)(quoting *Home Builders Ass’n of Greater Kansas City v. City of Kansas City*, 555 S.W.2d 832, 835 (Mo. 1977))(original alterations omitted).<sup>3</sup> The impact caused by replacing a home on the Davis parcel is not a new impact attributable to the development activity, and is therefore impermissible.

This conclusion is also demanded by the Utah Supreme Court’s application of the *Nollan/Dolan* Rough Proportionality analysis. In the third “*B.A.M.*” decision, the Court firmly linked the allowable extent of an exaction to the impact created by new development:

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<sup>1</sup> The City divides the impact into three distinct areas: Water rights (or the actual water being delivered); the water distribution system facilities; and project improvements.

<sup>2</sup> See U.S. CONST., amend. V. (“nor shall private property be taken for public use, without just compensation”). The Takings Clause of the Federal Constitution is applicable to state actions (including local subdivisions of states) by the language of the Fourteenth Amendment. *Chicago, Burlington, & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). Furthermore, “[t]he Utah Constitution reinforces the protection of private property against uncompensated governmental takings . . . .” *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. See UTAH CONST. art. I, § 22 (“Private property shall not be taken or damaged for public use without just compensation”).

<sup>3</sup> See also *Call v. City of West Jordan*, 606 P.2d 217, 220 (Utah 1979)(An exaction “should have some reasonable relationship to the needs created by the [development]”). The “reasonable relationship” test from *Call* was adopted by the U.S. Supreme Court in *Dolan v. Tigard*, although it was renamed as the “rough proportionality” test. See 512 U.S. 374, 391 (1994).

[N]ot only must the *nature* of an exaction relate to government purpose or need (in that the exaction must alleviate *the burdens imposed on infrastructure by the development*), but the *extent* of the exaction must also be roughly proportional to the government's need for infrastructure improvements created by the development.

*B.A.M. Development, LLC v. Salt Lake County*, 2012 UT 26, ¶26, 282 P.3d at 47 (emphasis added). The burden (or “impact”) on the infrastructure means the additional public infrastructure needed to serve the additional (or “new”) development. If the development in question replaces an older building, however, there is no need for additional public infrastructure, because there is no additional burden. An exaction is not justified by development or construction activity alone, but by the new impacts created by the development activity.

*B. An Exaction May Not Be Used to Make Up for a Deficiency in Infrastructure.*

In like manner, since exactions must be linked to impacts caused by new development, they may not be required to make up for supposed deficiencies in infrastructure. The City claims that its water dedication requirement is valid because the previous owners of the parcel did not dedicate water rights (or pay for water rights). The City continues that if had been such a dedication associated with the Davis parcel, then the new owner would receive credit for the dedication.<sup>4</sup> The City did not state whether it had ever requested that the parcel's previous owners dedicate any water rights.

The cases already cited show that exactions are only warranted by the new impacts created by new development, and may not be required unless an impact can be shown.<sup>5</sup> The City erroneously concludes that an impact has always existed on the property, regardless of when the home was built. As has already been discussed, since that the older home also used the City's water services, there is no *new* impact from the new home, because the service level remains unchanged. Without a new impact, the required water right dedication is an invalid exaction.

The City's approach wrongly uses exactions on new buildings as a means to cure deficiencies in its infrastructure. It is not acceptable to require an exaction simply because of need. The City has sufficient authority to purchase the water rights (and other public infrastructure) that it needs. It may not, however, unfairly impose the burden of curing infrastructure deficiencies solely on new development.

## Conclusion

After considering the information submitted by Tooele City, the Office of the Property Rights Ombudsman sees no reason to modify the Advisory Opinion issued on December 18, 2014. The

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<sup>4</sup> The City did not elaborate on how (or if) exactions associated with specific properties were tracked. The City Code makes no reference to water rights being assigned to particular properties.

<sup>5</sup> The burden of showing that a proposed exaction is roughly proportionate to the impact of the new development lies with the local government. *Dolan*, 512 U.S. at 320. The extent of the analysis is up to the discretion of the City, as long as it demonstrates with objective data that the exaction is proportionate to the development's impact.

City's position on its authority to impose exactions is misplaced, and it potentially violates the Takings Clauses of the Federal and Utah Constitutions, as well as the Utah Code. Exactions must be based on new impacts attributed to new development. If there is no new impact, there can be no exaction. The City may not require exactions of properties, but only from new impacts. Furthermore, the City has sufficient authority to purchase water rights to meet its needs.

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.**

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**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 provisions, found in Utah Code § 13-43-206, 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.**

## MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with Utah Code Ann. § 63-30d-401 (Notices Filed Under the Governmental Immunity Act).

These provisions of state code require that the advisory opinion be delivered to the agent designated by the governmental entity to receive notices on behalf of the governmental entity in the Governmental Immunity Act database maintained by the Utah State Department of Commerce, Division of Corporations and Commercial Code, and to the address shown is as designated in that database.

The person and address designated in the Governmental Immunity Act database is as follows:

Michelle Y. Pitt  
Tooele City Recorder  
90 North Main  
Tooele, Utah 84074

On this \_\_\_\_\_ Day of March 2015, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

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Office of the Property Rights Ombudsman