

# Advisory Opinion #188

Parties: Sherwood Hirschi, Nibley City

Issued: July 13, 2017

**TOPIC CATEGORIES:**  
**Exactions on Development**

The city's exaction requiring the developer to construct the full width of 1200 West where it abuts three lots with no access to the road is excessive. While some exaction appears appropriate, requiring the developer to construct all the improvements along an 80 foot wide regional highway in addition to requiring street dedication and improvements along the lot frontages would require the developer to pay for impacts beyond its own. The city's exaction must be reduced to bring it into compliance with Utah's development exaction law.

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The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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### ADVISORY OPINION

Advisory Opinion Requested By: Sherwood Hirschi

Local Government Entity: Nibley City

Applicant for Land Use Approval: Nibley Sunrise Meadows, LLC

Type of Property: Residential

Date of this Advisory Opinion: July 13, 2017

Opinion Authored By: Jordan S. Cullimore  
Office of the Property Rights Ombudsman

### ISSUE

Is Nibley City's requirement that the developer construct an 80 foot wide, regional, limited-access road that abuts lots within the developer's subdivision legal?

### SUMMARY OF ADVISORY OPINION

The City's exaction requiring Sunrise Meadows to construct the full width of 1200 West where it abuts three lots with no access to the road is excessive. While some exaction appears appropriate, requiring Sunrise Meadows to construct all the improvements along an 80 foot wide regional highway in addition to requiring street dedication and improvements along the lot frontages would require Sunrise Meadows to pay for impacts beyond its own. Nibley City's exaction must be reduced to bring it into compliance with Utah's development exaction law.

### 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 § 13-43-205. 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 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 Sherwood Hirschi on March 14, 2016. A copy of that request was sent via certified mail to David Zook, City Manager for Nibley City at 455 West 3200 South, Nibley, Utah 84321. Nibley City received the request on March 16, 2016.

## **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 Sherwood Hirschi. Received March 14, 2016.
2. Response submitted by Shari Phippen, City Planner for Nibley City, on April 15, 2016.
3. Reply submitted by Chris Daines, Attorney for Nibley Sunrise Meadows, LLC, on December 23, 2016.
4. Reply submitted by Miles P. Jensen, Attorney for Nibley City, on January 23, 2017.
5. Reply submitted by Chris Daines, Attorney for Nibley Sunrise Meadows, LLC, on February 9, 2017.

## **BACKGROUND**

Sunrise Meadows Subdivision is a multi-phase subdivision located in Nibley City (the "City"). Phase 1 of the subdivision was approved around 2003, and other phases of the project have been approved and constructed over the years first by Meadowland Development, Inc., and then by Nibley Sunrise Meadows, LLC ("Sunrise Meadows"). The applicant for this Advisory Opinion, Mr. Sherwood Hirschi, has been involved with both entities in some capacity. Presently, Sunrise Meadows seeks approval of Phase 8 of the subdivision, which consists of 12 residential lots.

The subject of this Opinion involves 1200 West, a master-planned, limited-access road that will ultimately serve as a regional north-south corridor once fully constructed. The overall plan of Sunrise Meadows Subdivision depicts 1200 West running along the west side of the development on the southern half of the subdivision. The road then turns northeast and runs diagonally through the subdivision, exiting on the north side between Phase 1 and the current phase.

The lots in Phase 8 all front along a separate local street, and none of the lots will access 1200 West. However, according to the submitted plat maps, three of the lots in phase 8 back up to and abut 1200 West. Consequently, the City is requiring, as a condition of approval for Phase 8, that Sunrise Meadows construct the full width of 1200 West along the entire stretch of these three lots, a distance of approximately 350 feet. The other side of 1200 West along this segment abuts the back side of lots in Phase 1, also without access. The actual land within the 1200 West right-of-way was dedicated to the City when Phase 1 was approved and constructed, but the actual road and curb, gutter, and sidewalk were not constructed.

Sunrise Meadows argues that the Nibley City Code does not require a developer to improve an already dedicated right-of-way as a condition of subdivision plat approval. Moreover, Sunrise Meadows claims that even if the City possesses authority to require road improvements, it waived the requirement when it approved Phase 2 of the development because it did not require improvement of the segment as a condition of approval with Phase 2. The meeting minutes from a September 4, 2003 City Council meeting indicate that the Council waived the requirement “until Phase II goes in, so that the financial obligation will be less on the developer....” Sunrise Meadows reasons that because the City did not subsequently impose the requirement on Phase 2, the requirement was permanently waived.

The City contends that while the road segment in question was not required as part of Phase 2, the City nonetheless did not waive its authority to require Sunrise Meadows to construct 1200 West at some point. The City further asserts that Mr. Hirschi has known all along that he would need to improve the road segment. Accordingly, the City claims that it may appropriately require construction of the subject segment of 1200 West with Phase 8.

## ANALYSIS

### I. The “Rough Proportionality” Test for Development Exactions

Nibley City’s requirement, that Sunrise Meadows construct the full width of 1200 West, is a development exaction. A development exaction “is a government-mandated contribution of property imposed as a condition” of development approval. *B.A.M. Dev., L.L.C. v. Salt Lake County*, (BAM III), 2012 UT 26, ¶16. Exactions arise from the principle that development causes impacts to a community. In order to address and offset these impacts, the community may exact from the developer property, or improvements such as asphalt, curb, gutter, and sidewalk, for dedication to the public. These mandatory dedications implicate the Takings Clause of the U.S. Constitution, “which protects private property from governmental taking without just compensation.” *Id.*

Development exactions are legal and appropriate if they are “roughly proportionate” to the impact the development creates. This principle governing exactions is derived from the U.S. Supreme Court’s landmark decisions in *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Utah Legislature distilled and codified the U.S. Supreme Court’s exaction analysis from these opinions in Utah Code § 10-9a-508(1). The analysis has been termed the “rough proportionality test,” and provides:

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). If an exaction satisfies this test, it is valid. If the exaction fails this test, it violates protections guaranteed by the Takings Clauses of the Utah and U.S. Constitutions. *Call v. West Jordan*, 614 P.2d 1257, 1259 (Utah 1980). A principal purpose 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.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960). An exaction is valid and proportionate when it offsets the costs of a development’s impact. An excessive exaction requires the developer to pay for impacts beyond his own development activity. *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899, 903 (Utah 1981).

The Utah Supreme Court has provided specific guidance on how to determine if an exaction is valid. In *B.A.M. Development, LLC v. Salt Lake County* (BAM II), 2008 UT 74, the Court 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.” *Id.* at ¶9. The “nature” aspect focuses on the relationship between the anticipated impact and proposed exaction. The Court described the approach “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.* at ¶10.

The “extent” aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost. *Id.* at ¶11 (“The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively.”). The court explained that “roughly proportional” means “roughly equivalent.” *Id.* at ¶8. Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the cost that a local government would incur to assuage the impact attributable to development.

In the third “B.A.M.” decision, the Utah Supreme Court summarized this analysis, firmly tying the exaction to the infrastructure needs *created by the development*:

[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.

*BAM III*, 2012 UT at ¶ 26. Accordingly, the City’s requirement that Sunrise Meadows construct the improvements within the 1200 West right-of-way, imposed as a condition of plat approval, is an exaction that must satisfy the rough proportionality test. The City may impose the exaction “so long as there is a ‘nexus’ [or link] and ‘rough proportionality’ between the property that the government demands and the social costs of the applicant’s proposal.” *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586, 2595 (2013). The City’s exaction must solve a problem that Sunrise Meadow’s development activity creates. Moreover, the costs to Sunrise Meadows to improve the 1200 West right-of-way must be proportionate to the impacts the development imposes on the community.

Because constitutional protections are involved, the City, as the government entity imposing the dedication requirement, possesses the burden of showing that the proposed requirement is proportionate, or equivalent, to the development's impacts and therefore valid. *See Dolan*, 512 U.S. at 391-92. “*No precise mathematical calculation is required*, but the city 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.” *Id.* at 391 (emphasis added).

Accordingly, we analyze the City's reasons for imposing the exaction to determine “whether [their] findings are constitutionally sufficient to justify the conditions imposed” on the developer. *Id.* at 389.

## **II. The 1200 West Exaction**

The City indicates, as stated above, that 1200 West has been designed, and portions have been constructed, as a limited-access road that, once completed, will serve as a “regionally significant north-south corridor,” connecting the cities of Hyrum and North Logan. The City asserts that the road “has served and will continue to serve developments in [Nibley] City, including [the Sunrise Meadows] subdivision.”

The City argues that it may require Sunrise Meadows to construct the unimproved segments of the 1200 West right-of-way abutting Phase 8 because Mr. Hirschi knew that the improvements would need to be completed at some phase of the overall development. Moreover, the City asserts that the improvements were required under the Subdivision Ordinance in effect in 2003 and 2004 when Phase 1 of the subdivision was approved. The final plat for Phase 1, signed by Mr. Hirschi, contains a plat note that reads in full:

Expenses for improvements or extensions of gas, electrical lines, grading, landscaping, storm drainage, curb & gutter, fire hydrants, pavement, street lighting, and other improvements shall be financed by the subdivider.

The City claims that until now, Mr. Hirschi has never questioned the requirement to improve the road. Consequently, the City concludes that it is appropriate to require the developer to “finish what he started.”

Lastly, the City argues that the proposed exaction is roughly proportionate to the proposed development for multiple reasons. First, the unimproved segment is shown on the approved plat of a prior phase of the development and is recorded on the overall plat for the development. Second, “the unimproved segment is a portion of a larger thruway that, when surrounding areas are fully developed, will connect all property in the development to the surrounding neighborhoods and communities. Finally, the City asserts that “the unimproved segment, roughly 28,000 square feet, is but a very tiny fraction, about 1/100, of the total area developed in Sunrise Meadows.”

A. *When Viewed in Isolation, the Exaction Is Excessive Under the “Rough Proportionality” Analysis*

Of the several arguments the City has advanced that its requirements are appropriate and valid, none of them address the dispositive question of development impacts. Setting aside for now other factors, such as whether the developer is obligated to construct 1200 West by agreement or prior knowledge or obligation, the City’s requirement is excessive under the exaction law. The amount a city may exact from a developer depends upon the particular development’s impacts, not a subdivision ordinance, prior expectations, or the city’s need or desire for certain improvements.

The City may plan for and intend that a certain roads be established, but it may only require Sunrise Meadows to construct the road segment if the requirement to do so is roughly proportionate to the impact created by the proposed development activity. Even if a requirement is imposed by ordinance, a city can only require the developer to pay its proportionate share. *See BAM I*, 2006 UT 2, ¶46 (“[T]he legislature intended to apply the rough proportionality test to all exactions, irrespective of their source.”). An excessive exaction imposed by ordinance is still excessive. If the desired road will cost more than the developer’s share, then the City will need to find other ways to pay for the remainder of the road. As addressed below, the City’s exaction satisfies certain aspects of the rough proportionality analysis, but ultimately fails the test as excessive.

1. *The Exaction Advances a Legitimate Government Interest*

The first part of Utah Code section 10-9a-508(1) requires an essential link between a legitimate governmental interest and the exaction imposed. The City’s legitimate government interest in this case is safe and efficient traffic flow for vehicles and pedestrians. Constructing new roadways is vital component in accomplishing this objective. *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 thoroughways . . . for the convenience and safety of the general public.”) *See also* Utah Code § 10-8-8. Accordingly, the *essential link* portion of the rough proportionality test is satisfied. UTAH CODE § 10-9a-508(1)(a).

2. *The Requirement to Construct Road Improvements Satisfies the Nature Aspect of the Analysis*

As indicated above, the “nature” aspect of the rough proportionality test asks whether the exaction provides a solution to a problem the proposed development activity creates. Here, Phase 8 of the Sunrise Meadows Subdivision, along with the other phases of the subdivision, creates a problem the City must address. Additional residences will add vehicles to the City’s streets and increase traffic volumes. A requirement to construct roads to address the increased traffic impact and improve street connectivity is a reasonable solution to this problem. Accordingly, the *nature* aspect of the rough proportionality test is satisfied.

### 3. *The Proposed Exaction Does Not Satisfy the Extent Aspect of the Analysis*

The extent aspect of the rough proportionality test compares the City's cost to address a development's impact with the developer's cost to dedicate and/or construct the required exaction—in this case the cost to construct the segment of 1200 West abutting the back yard of certain lots in the subdivision. These two costs must be roughly equivalent for the exaction to pass constitutional muster. In this case, it appears the City is requiring too much.

To fully analyze this aspect of the test, the City would need to quantify how much it will cost to address the development's transportation impacts if the developer was not contributing any public improvements and compare that cost with the developer's cost to construct the required improvements. The parties have not provided this data. Consequently, we are unable to conduct a complete analysis. Since the burden to prove an exaction is roughly equivalent to a development's impact rests with the City, the City has failed to meet its burden in satisfying the *extent* aspect of the rough proportionality analysis.

Nevertheless, even without a complete analysis<sup>1</sup> the circumstances suggest that the City has imposed an excessive exaction. A commonly imposed road exaction to offset typical traffic impacts in a residential setting consists of dedication and construction of a half-width street along a developed lot's frontage. This half-width frontage exaction is common practice and generally accepted as roughly proportionate to a residential development's typical transportation impact. An abutting half-width generally does not require one developer to provide improvements that others, such as the opposite abutting landowner or the public as a whole, should provide. Consequently, this typical half-width road exaction, in response to typical impacts, may be useful as a yardstick of rough proportionality where a full analysis of costs is neither provided nor practical.<sup>2</sup>

The City's exaction requiring Sunrise Meadows to construct and dedicate to the public full width road improvements along 1200 West in addition to the half-width land dedication and improvement requirement along the lot frontages represents a much greater dedication than the typical half-width exaction. It is likely true that a double-frontage<sup>3</sup> lot produces slightly more transportation impacts than a typical single-frontage lot because a double-frontage lot interacts with two streets and conveys pedestrians and vehicles along greater distances. This may warrant a slightly greater exaction than what is typical for a single-frontage lot. However, the potential additional impact in this case is reduced by the fact that the three lots abutting 1200 West will not be allowed to access or directly use 1200 West along that frontage.

Accordingly, if a typical and generally accepted exaction has any value in determining whether an exaction is excessive, this exaction appears to impose a greater cost on the developer than what is typically attributable to a residential building lot. Consequently, it appears to be a case of an excessive exaction. The abutting lots create some impact, and some exaction providing for

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<sup>1</sup> Experience in this Office suggests that the full analysis required to show rough proportionality is very impractical to provide.

<sup>2</sup> Referring to this generally accepted half-width exaction is not meant to adopt a *de facto* rule or to endorse this as an acceptable or legal exaction. It simply provides a useful measure of proportionate exactions, when a full analysis is not provided, in order to promote settlement of disputes.

<sup>3</sup> In other words, a lot with frontage along two roads instead of just one.



some improvements along 1200 West would be appropriate.<sup>4</sup> However, asking Sunrise Meadows to improve the entire width of an 80 foot wide road that will function as a regional corridor and won't provide direct access to lots within the subdivision is not roughly proportionate.

In further support of this conclusion, 1200 West, as a regional corridor, will be heavily used by other properties in the region, both inside and outside of the City. Requiring construction of the entire width appears to obligate Sunrise Meadows to pay for other properties' impacts. The City has not justified the conclusion that Sunrise Meadows should bear the burden of constructing the entire width of the road along this segment of 1200 West.

*B. We Cannot Determine Whether the Developer has an Independent Obligation to Construct 1200 West*

The City, in arguing the appropriateness of requiring Sunrise Meadows to improve the full-width of 1200 West, essentially asserts that Mr. Hirschi agreed in 2004 to construct 1200 West, or he at least had knowledge then that the requirement would be imposed. Some evidence supports this argument. The note on the Phase 1 plat, which does include 1200 West and is signed by Mr. Hirschi, appears to obligate the subdivider to install curb and gutter, pavement, and other improvements at his expense. Moreover, minutes from the September 4, 2003 City Council Meeting indicate that Mr. Hirschi requested a concession on the road construction requirements imposed at the time in exchange for building the road later.

A property owner may voluntarily enter into a binding agreement to dedicate and/or construct more than what the "rough proportionality" analysis would otherwise allow in exchange for some additional benefit to which the property owner is not entitled. State Code authorizes such development agreements.<sup>5</sup> If the City can establish that Mr. Hirschi, representing the developer at the time of Phase 1 was approved, willingly and lawfully agreed to dedicate and construct the full width of 1200 West to obtain some additional benefit from the City, and also prove that the obligation remains in effect today, the City may appropriately require Mr. Hirschi to fulfill that agreement.

We are unable to conclusively reach this result, however, because doing so would require us to make assumptions that are not expressly evident from the submitted materials. There is a degree of ambiguity regarding whether the note represents an agreement between the parties, or is simply a restatement of an imposed condition. The U.S. Supreme Court, in explaining the "well-settled doctrine of unconstitutional conditions," has noted that "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditional doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Koontz*, 133 S.Ct. at 2594. The Court explained that by conditioning development approval "on the owner's deeding over [or constructing] a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." *Id.* In light

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<sup>4</sup> It is worth noting here that the entire width of this segment of the 1200 West right-of-way was previously dedicated to the City in Phase 1 of the development at no cost to the City.

<sup>5</sup> "[M]unicipalities may...enter into...development agreements...they consider necessary or appropriate for the use and development of land within the municipality...." UTAH STATE CODE § 10-9a-102(2).

of this observation, we decline to make assumptions regarding intent to reach a conclusion that a valid and binding agreement exists.

If the parties did agree in 2004 that the developer would construct the full-width of 1200 West, they must show evidence needed to establish an obligation such as the terms of that accord, the validity of consideration, the legitimacy of the original requirement, et cetera. Thus, although some facts indicate that the developer may have agreed to provide the road, the evidence is not strong enough to so conclude. Moreover and finally, and most importantly, interpretation and enforcement of contracts is outside of this Office's purview.

## **CONCLUSION**

The City's exaction requiring Sunrise Meadows to construct the full width of 1200 West where it abuts three lots with no access to the road is excessive. While some exaction appears appropriate, requiring Sunrise Meadows to construct all the improvements along an 80 foot wide regional highway in addition to requiring street dedication and improvements along the lot frontages would require Sunrise Meadows to pay for impacts beyond its own. Nibley City's exaction must be reduced to bring it into compliance with Utah's development exaction law. Insufficient evidence has been provided to indicate whether or not the Developer is obligated to provide the improvements under a valid development agreement.

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.**

**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 § 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:

Larry Anhder, City Administrator  
Nibley City  
625 West 3200 South  
Nibley, Utah 84321

On this \_\_\_\_\_ Day of July, 2017, 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