

Advisory Opinion #221

Parties: Ryan Bybee, Lindon OW, LLC; Lindon City

Issued: April 21, 2020

TOPIC CATEGORY:

Exactions on Development

The City's requirement that applicant connect the roadway serving his proposed development to an existing stub road, including the construction of approximately fifty feet of off-site roadway, extension of public utilities, and a creek culvert, as a condition to develop his light industrial real estate project constitutes a lawful exaction. The required improvements are necessary for, and directly serve, the proposed project, and appear to be roughly proportionate to the proposed development's impact on the community.

DISCLAIMER

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.



The Office of the Property Rights Ombudsman
Utah Department of Commerce
PO Box 146702
160 E. 300 South, 2nd Floor
Salt Lake City, Utah 84114

(801) 530-6391
1-877-882-4662
Fax: (801) 530-6338
www.propertyrights.utah.gov
propertyrights@utah.gov



GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah Department of Commerce

OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

CHRIS PARKER
Interim Executive Director

JORDAN CULLIMORE
Lead Attorney, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested By: Ryan Bybee, Lindon OW, LLC

Local Government Entity: Lindon City

Property Owner: Ryan Bybee, Lindon OW, LLC

Applicant for Land Use Approval: Subdivision plat

Type of Property: Light Industrial

Date of this Advisory Opinion: April 21, 2020

Opinion Authored By: Marcie M. Jones, Attorney
Office of the Property Rights Ombudsman

ISSUE

Can Lindon City lawfully require the construction of approximately fifty feet of off-site roadway and related improvements as a condition to develop a light industrial parcel?

SUMMARY OF ADVISORY OPINION

Lindon City's requirement that Mr. Bybee connect the roadway serving his proposed development to an existing stub road at 200 North, including the construction of approximately fifty feet of off-site roadway, extension of public utilities, and a creek culvert, as a condition to develop his light industrial real estate project constitutes a lawful exaction. The required improvements are necessary for, and directly serve, Mr. Bybee's project, and appear to be roughly proportionate to the proposed development's impact on the community.

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 Ryan Bybee, dated September 10, 2019. A copy of that request was sent via certified mail to Kathy Moosman, City Recorder for Lindon City, at 100 North State Street, Lindon, Utah 84042.

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 Ryan Bybee and dated September 10, 2019.
2. Response Letter submitted by Brian K. Haws, Lindon City Attorney, and dated October 7, 2019.
3. Response email from Ryan Bybee dated October 21, 2019.
4. Response email from Brian Haws dated October 24, 2019.

BACKGROUND

Ryan Bybee recently purchased and is in the process of developing a parcel of real estate located at 64 North 1550 West in Lindon, Utah (the "Subject Property"). The Property is currently vacant and will be developed as part of the surrounding commercial and light industrial neighborhood.

As a condition of development, Mr. Bybee was required to dedicate and improve a roadway serving the Subject Property. The new roadway cuts through the Subject Property on a diagonal connecting the existing 200 North stub road (to the northwest) with the existing 1550 West stub road (to the southeast), in accordance with the Lindon Streets Master Plan Map. The issue under dispute arises because the 200 North stub road historically was not developed all the way to the Subject Property boundary line, so recent construction of the connector road included significant additional expense for off-site improvements.

The 200 North stub road was constructed in 2001 in conjunction with development of the adjacent Ostler Industrial Park. At that time, the owner of the Subject Property indicated that they had no immediate plans to develop the Subject Property and did not want to invest in building the roadway at that time. Consequently, 200 North was built to serve only the Ostler Industrial Park.

An irrigation ditch runs between the Ostler property and the Subject Property. Until Mr. Bybee improved the area, the ditch had not been piped and did not have any structures to stabilize the banks. The roadway and utilities were therefore stubbed back a short distance from the ditch so

that they would not be impacted by erosion caused by the wandering of the natural ditch bank. Lindon did not require the Ostler Industrial Park developer to install a culvert or other ditch crossing “as such structures were unnecessary for [the Ostler] development and would have only benefitted the owner of the [Subject Property].”

As a result, when constructing the connector roadway, Mr. Bybee was required to improve not only the roadway frontage adjacent to his property, but also the roughly fifty feet of 200 North on the adjacent property which had yet to be improved. The off-site construction included extending 200 North approximately fifty feet to the property line, extending an 8” waterline and other utilities a similar distance, and building a culvert to contain the irrigation ditch under the new road (the “Off-site Improvements”).

Mr. Bybee objects to being required to pay for the Off-site Improvements. Mr. Bybee argues that the street and utilities should have been stubbed to the property boundary in anticipation of future development, or alternatively, funds for their share of the eventual completion should have been collected from Ostler’s developers. Mr. Bybee further asserts that the ditch has been surveyed and staked by a professional surveyor and found to be entirely on property owned by Lindon, and as such, Lindon should be required to pay to have it channelized.

Rather than construct the Off-site Improvements, Mr. Bybee would have preferred that the new roadway serving his development connect only to the 1550 West stub road to the southeast, with the new road dead-ending at his new development. Unfortunately, Lindon fire code does not allow dead-end roadways longer than 650 feet. The roadway Mr. Bybee proposed would have resulted in a dead-end road of approximately 2,000 feet and was therefore not permitted.

According to Mr. Bybee, Lindon originally agreed to participate in constructing or paying for these required improvements. However, any agreement was never put in writing and the City Planner and Assistant Planner who apparently made these representations have since left the City. Lindon maintains that they are only required to share in the cost of the asphalt. Lindon further asserts that the required improvements both directly serve and benefit the Subject Property and are proportionate to the impact created by development proposed on the Property.

Note that Mr. Bybee is not objecting to the dedication and construction of the connector road on that portion of property immediately fronting his property. He is only objecting to the Off-site Improvements.

Mr. Bybee is requesting this Advisory Opinion to determine whether requiring the off-site construction of approximately fifty feet of roadway, extending an 8” waterline and other utilities a similar distance, and building a culvert as condition to develop a light industrial building is a lawful exaction.

ANALYSIS

I. The legal standard for development exactions

Lindon City's requirement that Mr. Bybee construct a culvert and extend the utilities and roadway to the existing 200 North stub road is a development exaction. A development exaction "is a government-mandated contribution of property imposed as a condition" of development approval.¹ Exactions arise from the principle that development causes impacts to a community. In order to address and offset these impacts, the community may require dedication of land, or construction of public improvements such as roadways, sidewalks, and flood control measures. Such mandatory dedications implicate the Takings Clause of the U.S. Constitution and Article I Section 22 of the Utah Constitution, which each protects private property from governmental taking without just compensation.

Development exactions are legal and appropriate only if they are "roughly proportionate" to the impact the development creates. This principles governing exactions are derived from the U.S. Supreme Court's landmark decisions in *Nollan v. California Coastal Comm'n*² and *Dolan v. City of Tigard*³ which the Utah Legislature has distilled and codified 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 a proposed exaction satisfies this test, and is otherwise legal, it is valid. If the exaction fails the test, it violates protections guaranteed by the Takings Clauses of the Utah and U.S. Constitutions and is illegal.⁴

An exaction is valid and proportionate when it offsets the costs of a development's impact. An excessive exaction requires a property owner to pay for impacts beyond his own.⁵ A principal objective of the test is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁶

The Utah Supreme Court has provided further refinement on how to analyze rough proportionality. In *B.A.M. II*, the Court explained that rough proportionality analysis articulated above "has two aspects: first, the exaction and impact must be related in nature; second, they

¹ *B.A.M. Dev., L.L.C. v. Salt Lake County*, (BAM III), 2012 UT 26, ¶16.

² *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

³ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁴ *Call v. West Jordan*, 614 P.2d 1257, 1259 (Utah 1980).

⁵ *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899, 903 (Utah 1981).

⁶ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

must be related in extent.”⁷ 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.”⁸

The “extent” aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost.⁹ “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.”¹⁰ 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 mitigate impacts attributable to development.

Accordingly, the City’s requirement that Mr. Bybee construct the off-site roadway, utilities, and ditch crossing improvements must satisfy the rough proportionality test. The proposed exactions must solve problems the proposed development creates. Moreover, the costs to Mr. Bybee to construct these improvements must be proportionate to the impacts the development imposes on the City’s ability to provide services.

The City has the burden to show the proposed exactions are proportionate, or equivalent, to the development’s impacts and therefore valid. Note that “[n]o 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.”¹¹

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 Mr. Bybee’s development proposal.¹²

II. Requirement to build Off-site Improvements does not appear to be excessive

A. Essential link exists between legitimate governmental interest and exaction

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 on roadways which are free from flooding and erosion concerns. Requiring newly constructed roadways to connect to existing stub roads, thus avoiding excessively long dead-end streets which are difficult for the public and emergency responders to navigate, is a legitimate method to accomplish this objective.¹³ “In order for a

⁷ *B.A.M. Development, LLC v. Salt Lake County* (BAM II), 2008 UT 74, at ¶9.

⁸ *Id.* at ¶10.

⁹ *Id.* at ¶11

¹⁰ *Id.* at ¶8.

¹¹ *See Dolan*, 512 U.S. at 391-92.

¹² *Id.* at 389.

¹³ *See Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117.

government to be effective, it needs the power to establish . . . public throughways . . . for the convenience and safety of the general public.”¹⁴

Accordingly, the *essential link* portion of the rough proportionality test is satisfied.

B. The exaction appears to satisfy the nature aspect of the rough proportionality test

The second step in the legal standard codified as 10-9a-508(1) requires that “each exaction is roughly proportionate, both in *nature and extent*, to the impact of the proposed development.”¹⁵

The *nature* aspect of the rough proportionality test requires an exaction provide a solution to a problem the proposed development presents. As has been discussed, Mr. Bybee constructed a road to serve his proposed development. If Mr. Bybee had not built the Off-site Improvements, the road serving his property would only been connected to 1550 West and would have resulted in a dead-end street over the maximum length permitted by the city fire code. Therefore, the Off-site Improvements directly serve and are necessary for, the proposed development. By definition, the Off-site Improvements provide a solution to a problem the proposed development creates. Therefore, the *nature* aspect of the test is satisfied.

C. The exaction appears to satisfy the extent aspect of the rough proportionality test

The *extent* aspect of the rough proportionality test requires an exaction not exceed the impact of the development. The City must “compare the government’s cost of alleviating the development’s impact on infrastructure with the cost to [the developer] of the exaction.”¹⁶

To illustrate the proper *extent* analysis, we have only a single example from the Utah Supreme Court. In the B.A.M. III¹⁷ case, the Court held that requiring the dedication of 13 feet of right of way for the expansion of an adjacent roadway as a condition of approval of a fifteen-acre residential subdivision was a legal exaction. In that case, the value of the dedicated property was estimated at \$83,997, while road-widening projects in the vicinity intended to alleviate generalized increased traffic cost an estimated \$6,748,700. Traffic engineers further estimated that increased traffic from the planned subdivision represented 5% of the total traffic increase, and was therefore liable for up to 5%, or \$337,500, of the road-widening projects in the vicinity. As the developer’s total cost for the additional 13 feet dedication was \$83,997, the Court concluded that the exaction was less than the impact and did not violate the extent aspect of the rough-proportionality standard.

In the case at hand, Lindon estimates that the disputed improvements cost \$45,248.00 to construct, thus putting a value on the exaction. However, estimates of the total cost to provide increasing roadway capacity in the vicinity and what percentage Mr. Bybee’s proposed development is liable for have not been provided.¹⁸

¹⁴ *Id.*

¹⁵ UTAH CODE §10-9a-508(1)(b).

¹⁶ B.A.M. Dev., L.L.C. v. Salt Lake County, 2012 UT 26, ¶5, 282 P.3d 41.

¹⁷ *Id.*

¹⁸ The City instead justifies the cost of the Off-site Improvements as being proportional to the cost and benefit to Mr. Bybee for the overall project. Such a comparison is not relevant to the established *extent* analysis.

Nonetheless, we can use the limited information available to resolve the dispute.¹⁹ Because the Off-site Improvements are *necessary* for the development of the Subject Property, their construction is part of the impact burden placed on Lindon City. By definition, Off-site Improvements valued at \$45,248 are necessary for, and directly attributed to, the development of the Subject Property. Therefore, the impact on Lindon is at least \$45,248, and they can impose an equivalent exaction. The exaction appears generally proportional in *extent*.

As the essential link portion of the rough proportionality test is satisfied, and the exaction appears generally proportional in nature and extent, the exaction to build the Off-site Improvements does not appear excessive.

Note that the established legal analysis does not factor in whether Lindon should have required the developer of the Ostler Industrial Park to either stub the street and utilities to the property boundary, or collected funds for their eventual completion. Similarly, ownership of the irrigation ditch property is also not relevant. The established legal test does not require that the exaction be the best way to provide the improvements. Therefore, these arguments do not affect the legal analysis or conclusion.

CONCLUSION

Lindon City's requirement that Mr. Bybee connect the roadway serving his proposed development to an existing stub road at 200 North, including the construction of approximately fifty feet of off-site roadway improvements, public utilities extensions, and a creek culvert, as a condition to develop his light industrial real estate project constitutes a lawful exaction. The required improvements are necessary for, and directly serve, Mr. Bybee's project, and appear to be roughly proportionate to the proposed development's impact on the community.

Jordan Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

¹⁹ The full analysis required to show rough proportionality is very impractical to provide, and perhaps impossible. In fact, after many advisory Opinions addressing exactions over several years, this Office has seen none.

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 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:

Lindon City Recorder
100 North State Street
Lindon, Utah 84042

On this 22nd Day of April, 2020, 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