

# Advisory Opinion #41

Parties: Rory Ukena, Sam Stanger & Mike Clark and South Weber City

Issued: May 13, 2008

## TOPIC CATEGORIES:

- D: Exactions on Development
- J: Requirements Imposed Upon Development

The Developers are not entitled to reimbursement or a renegotiation of the agreement which allocated costs based on the amount of water being contributed to the basin, not the total size of the basin. The City could choose to enlarge the basin to accommodate more water, but was not obligated to alter the contribution from the Developers, because the amount of water that was to be contributed did not change.

## 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.



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# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

### ADVISORY OPINION

Advisory Opinion Requested by: Rory Ukena  
Sam Stanger  
Mike Clark

Local Government Entity: South Weber City

Project: Detention Basin Construction Agreement

Opinion Authored By: Su J. Chon, Attorney  
Office of the Property Rights Ombudsman

Date of this Advisory Opinion: May 13, 2008

#### Issue

May a local government who has a written agreement with developers to pay for the construction costs of a detention basin change the scope of the project to increase the depth of the detention basin? Does that action constitute an illegal exaction?

#### Summary of Advisory Opinion

The City's requirement that the Developers provide a means for storm drainage is an exaction because it is required in order to obtain approval for a subdivision under §10-9a-508. It must therefore be analyzed using the "*Nollan/Dolan*" rough proportionality test found in §10-9a-508(1). The City has a legitimate interest in ensuring adequate storm drainage and the detention basin is a reasonable means of accomplishing that objective. The allocation of costs for the construction of the detention basin must also meet the rough proportionality prong of §10-9a-508(1)(b). The City must determine the allocation of use that the developments will place on the storm drainage system. It appears that the City determined each development's storm water contribution, and allocated the cost to each Developer based on that contribution. Although the City has increased the size of the detention basin, it has not increased the amount of the allocation for which Developer would be responsible. Therefore, the amount that the City has allocated to each developer of the cost of constructing the basin remains roughly proportional to the impact of the Developers' activities. In addition, the City and Developer have entered into an agreement whereby the Developers agree to pay for a set allocation percentage for construction costs. The enforceability of the agreement is not impacted the rough proportionality analysis.

## **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. 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.

The request for this Advisory Opinion was received from Rory Ukena, Sam Stanger and Mike Clark on February 7, 2008. As provided in statute, a letter with the request attached was sent via certified mail, return receipt requested, to Joseph E. Gertge, Mayor of South Weber City, at 1600 East South Weber Drive, South Weber, Utah 84405. The return receipt was signed and was received on February 25, 2008, indicating that it had been received by the City. Stephen F. Noel, attorney for South Weber City, responded by mail on or about March 6, 2008.

## **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, submitted by Rory Ukena, Sam Stanger and Mike Clark, and received by the Office of the Property Rights Ombudsman, February 7, 2008, with attachments.
2. Letter dated March 6, 2008 from Stephen F. Noel, appointed City Attorney for South Weber City with attachments.
3. Title 11 of the South Weber City Code, governing subdivisions.
4. Utah Code Ann. §10-9a-508.

## **Background**

Approximately two years ago, Rory Ukena, Sam Stanger and Mike Clark (collectively, “Developers”) each approached the City of South Weber (“City”) regarding proposals to develop their respective properties.<sup>1</sup> The Developers’ properties are located within a small distance from each other. Under the City’s ordinances, the Developers would be responsible to provide some means of storm drainage as part of the requirements for subdivision approval. The City

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<sup>1</sup> It is presumed that the Developers have complied with any other conditions imposed on them by the City for subdivision approval. Those other conditions are not at issue with this Advisory Opinion.

determined that, rather than have several small detention basins, the parties and other property owners would use a regional detention basin. The City, Developers and other property owners would enter into an agreement to construct the combined detention basin. The cost of constructing the basin would be allocated among the parties based on each participant's estimated contribution to the water volume of the basin. The City engineer determined that the parties would contribute approximately 2.703 acre-feet of storm water to the detention basin. The detention basin was proposed to be located at approximately 1900 E. and South Weber Drive, South Weber, Utah.

The City and the Developers executed a Detention Basin Cost Share Agreement ("Agreement") agreeing to the allocation of construction costs for the detention basin. Under the Agreement, the Developers would be responsible for a certain percentage of the construction costs based upon estimated contribution of the respective subdivisions of storm water to the detention basin. The Developers' participation shares were determined as follows:

1.	Sam Stanger (S&S Foundation)	.501 acre feet	18.54%
2.	Michael L. Clark & Beverly A. Clark Trust	.914 acre feet	33.80%
3.	Rory Ukena	.064 acre feet	2.38%

The Developers would pay their percentage allocation after the final construction costs were determined. The Agreement noted that an estimated total amount of the construction costs would be approximately \$405,000.00.

Sometime thereafter, the City began construction on the detention basin. The Developers observed that the detention basin being constructed was much deeper than 2.703 acre feet estimated contribution of all the parties. The Developers asked the City about this, and the City responded that the City made it deeper at the City's cost. The Developers objected to this increase in size and believed that the Agreement should be modified so that their percentage allocations would be less with regard to the additional acre feet of the detention basin.

The Developers approached the City Council regarding this change and their concerns were aired at the City Council meeting on October 23, 2007. The Developers stated that they were willing to pay their fair share of the detention basin but felt that they were paying more than they were legally required to because of the increase in size. The City Council tabled the discussion until they received more information. On or about November 7, 2007, the South Weber City Engineer prepared a Memorandum regarding the detention basin project, with cost analysis based on the agreement and other factors. On November 13, 2007, the City Council met again to discuss the issue of the Agreement. The Developers were present. The City Council discussed the issue of allocation and voted in favor of continuing with the Agreement as signed by the participants.

## Analysis

### **I. The City's Requirement that the Property Owners Provide Storm Water Drainage through the Construction of a Regional Detention Basin is Proportional to the Impact of the Proposed Subdivisions.**

The City's requirement that the property owners provide storm drainage facilities complies with the City's ordinances for subdivision approval and ensures that flooding is minimized by having facilities to accommodate storm water.<sup>2</sup> In this instance, the City asked that the Developers pay the City for construction costs relative to their approximate expected contribution to the detention basin. The requirement that the Developers participate in a regional detention basin is an exaction. The Developers dispute whether the change in the size of the basin without a change to payment allocation is roughly proportional to the impact of their development.

A. *The Required Participation in the Regional Detention Basin is an Exaction, which is Subject to the Rough Proportionality Analysis Required by § 10-9a-508 of the Utah Code.*

In 2005, the Utah Legislature enacted Section 10-9a-508 of the Utah Code, which authorizes cities to impose exactions on new development, and also prescribes limits on that authority:

A county may impose an exaction or exactions on development proposed in a land use application provided that:

- (1) an essential link exists between a legitimate governmental interest and each exaction; and
- (2) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

UTAH CODE ANN. § 10-9a-508(1).<sup>3</sup> The Utah Supreme Court noted that the language of this statute was borrowed directly from the U.S. Supreme Court analyses in *Nollan v. California Coastal Comm'n*, 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. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 41, 128 P.3d 1161, 1170. In those two cases, the Supreme Court promulgated rules for determining when an exaction is valid under the federal constitution's Takings Clause.<sup>4</sup> This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis is reflected in § 10-9a-508.

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<sup>2</sup> South Weber City Code, §11-4-3.

<sup>3</sup> There is a corresponding statute applicable to counties found at § 17-27a-507 of the Utah Code.

<sup>4</sup> See U.S. Const., amend V. 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.*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. See also Utah Const. art. I, § 22.

The City's requirement that the Developers pay for construction costs of the regional detention basin constitutes an exaction under Utah law. "Exactions are conditions imposed by governmental entities on developers for the issuance of a building permit or subdivision plat approval." *B.A.M.*, 2006 UT 2, ¶ 34, 128 P.3d at 1169. 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. 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. The participation of the Developers in the regional detention basin is an exaction because the Developers are required to provide storm water drainage facilities before the City grants approval of their final subdivision plat.

*B. There is an Essential Link Between the Storm Drainage Requirement and the Legitimate Government Objective that New Development Provide Facilities to Accommodate such Requirement.*

An exaction analysis requires two inquiries. First, there must be an essential link between a legitimate governmental interest and each exaction. Second, each exaction must be roughly proportionate, both in nature and extent, to the impact of the proposed development. Under the first prong, the analysis must show what the legitimate governmental interest is and its essential link to the exaction imposed by the City. The Utah Governmental Immunity Act, § 63-30d-301(5)(p), considers flood control activities to be a governmental function. It stands to reason that because flood control is a governmental function under the Utah Governmental Immunity Act, the City has a legitimate interest in ensuring that storm drainage be adequately controlled or mitigated. The City may require that the Developers provide those facilities to adequately control or mitigate storm drainage. In this instance, rather than have the Developers build separate storm drainage facilities, the City required that they contribute to a combined detention basin by paying a share of the construction costs. Thus, there is an essential link between the county's legitimate interest of ensuring that adequate storm drainage facilities are provided by new developments and the requirement that the Developers contribute to the regional detention basin construction.

*C. The City's Requirement of Developers' Participation in the Regional Detention Basin Must be Evaluated Under the "Rough Proportionality" Aspect of §10-9a-508(1)(b).*

In order to satisfy § 10-9a-508(1)(b), the City's requirement that the Developers participate in an agreement for construction costs of the regional detention basin must be shown to be roughly proportional to the impact of the development. Once an essential link between the government's requirement and a legitimate objective has been established, the analysis turns to whether the exaction is roughly proportionate, both in nature and extent, to the impact of the development. If the City's requirement is not roughly proportionate to the impact of the subdivisions, it is not a valid exaction. This analysis should take into account the costs of the construction of the

regional detention basin in relation to the impact that the subdivisions may have on storm drainage.

Ordinarily, the Developers would have been responsible to provide some sort of storm drainage facility within their subdivisions at their own cost as required by the City's ordinances. In this instance, the City provided the land and location of the basin and asked that the Developers contribute to the payment of the detention basin's construction costs. The Developers were not required under the Agreement to help pay for the costs of the land being used for the detention basin. According to the documents and statements provided by both the Developers and the City, the City's engineer determined what the estimated contribution to the retention basin would be by all the participants.<sup>5</sup> The City's engineer met with Gardiner Engineering (Mr. Clark's engineer) "to break up each developer's cost share for this project."<sup>6</sup> Those calculations determined that the subdivisions proposed by the Developers would contribute an estimated amount of acre feet to the regional detention basin which totaled approximately 1.48 acre feet. The remaining participants under the Agreement were responsible for the balance of the estimated acre feet of water usage. The City's engineer then calculated the construction costs based on the estimated contribution to the detention basin by all the Agreement's participants and allocated those construction costs to each participant by percentages. *See* Exhibit A of the Agreement. These calculations regarding the construction costs are roughly proportional because the Developers are paying a percentage of the construction costs that are related to their subdivisions' impact on the storm water drainage system.

At issue to the Developers is that the City has increased the depth of the detention basin. The construction costs for the increased depth are being borne by the City, not the Developers. The Developers feel that they are no longer paying their "fair share". In Exhibit A of the Agreement, the City incorporated the calculations of the estimated acre feet of storm water contributions by all the participants which totaled 2.703 acre-feet. The parties then agreed to pay a percentage of the construction costs based on their estimated contributions of storm water. The Agreement itself is silent as to the total size of the actual detention basin. It appears that the Developers are arguing that they should be entitled to reform the contract because their shares are no longer proportional and that the percentage allocation should be less. Under the exaction analysis required by the Utah Code, the amount paid must be roughly proportional to the estimated impact that the Developers' subdivisions will have on the storm drainage system. This does not mean that the costs must be precisely allocated according to the contributions of the Developers, only that they be approximately proportionate to the impact of the development. Even if the detention basin is deeper than what was proposed when the Agreement was signed, the contributions from the Developers are still roughly proportionate to the impact from their proposed subdivisions.

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<sup>5</sup> The Developers did not submit anything indicating that they were in disagreement with the determined estimated contribution to the retention basin. *See also*, Memorandum dated November 7, 2007.

<sup>6</sup> *See*, Minutes of the South Weber City Council Meeting, October 23, 2007.

*D. The Detention Basin Cost Share Agreement is a Valid Contract, and the City is Entitled to Enforce its Provisions.*

Notwithstanding the analysis of this Opinion, government entities may contract with private parties to modify the exchange of property rights or other benefits that would ordinarily be governed by an exaction or takings analysis.<sup>7</sup> Such agreements are not prohibited. “[I]t is still the law in Utah that parties may contract at arms length without the intervention of the courts to rescue one side or the other from the result of that bargain.” *Woodhaven Apts v. Washington*, 942 P.2d 918 (Utah 1997).<sup>8</sup> The City and the Developers entered the Agreement voluntarily, and the Developers are presumed to have participated in the determination of the impact of their subdivisions on the storm drainage facilities which determined their allocation of the construction costs. The Agreement specifically states that “[t]he respective shares are indicative of the amount of storm water each participating property, once developed, is likely to contribute to the regional basin, regardless of the actual amount of such storm water contribution.”<sup>9</sup> Pursuant to that Agreement, the Developers are bound to pay the allocated construction costs based on their subdivisions’ relative contribution of storm water to the basin because it is roughly proportional to their estimated impact. Thus, the rough proportionality analysis does not affect the enforceability of the Agreement.

## **Conclusion**

The City may require that Developers contribute to the payment of construction costs for a combined regional detention basin as a condition of approval of a subdivision. The City’s requirement is an exaction subject to the “rough proportionality” analysis of § 10-9a-508(1). It is an exaction because it is a condition imposed in order to obtain approval for a subdivision. The detention basin requirement meets the “essential link” prong, because there is a link between the requirement and the City’s legitimate interest that to control and mitigate storm water and flooding by the provision of detention basins by the Developers.

Requiring the Developers to contribute to the construction costs for a combined regional detention basin appears to meet the second prong of § 10-9a-508(1)(b), or the “rough proportionality” test. The amount of each of the Developers’ contribution is based on the subdivisions’ estimated impact and contribution of storm water to the storm drainage facilities.

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<sup>7</sup> See, Utah Code Ann. § 10-1-202.

<sup>8</sup> The underlying notion of contract law that parties have freedom to contract allows parties to enter into contracts that have been negotiated and understood by the parties. Utah has recognized the underlying theory of freedom to contract in various cases which are not on point to this matter but demonstrate that the courts will not undo a contract unless a valid defense exists to do so. For example, *see also, Holmes Dev., LLC v. Cook*, 2002 UT 38, 48 P.3d 895 (where parties to a title insurance policy were free to contract the scope of the policy); and *Berry v. Greater Park City Co.*, 2007 UT 87, 171 P.3d 442 (where the Supreme Court declined to negate the freedom to contract in all instances where the right to recover from someone else existed).

<sup>9</sup> Agreement, Paragraph 3.



Furthermore, it appears that the Developers and the City entered voluntarily into the Agreement which identified that the participants would pay an allocated share of the construction costs, based on their subdivisions' estimated contribution of storm water to the regional detention basin. This Agreement appears to be valid and binding upon the participants, and its enforceability is not affected by the rough proportionality analysis.

Elliot R. Lawrence, Acting Lead Attorney  
Office of the Property Rights Ombudsman

**NOTE:**

**This is an advisory opinion as defined in Utah Code Annotated, § 13-42-205. 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 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. § 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:

Mayor Joseph E. Gertge  
South Weber City  
1600 E. South Weber Drive  
South Weber, UT 84405

On this \_\_\_\_\_ Day of \_\_\_\_\_, 2008, 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