Advisory Opinion #63

Parties: Tom Spencer, Fieldstone Homes Utah, LLC and City of Tooele

Issued: March 10, 2009

TOPIC CATEGORIES:
D: Exactions on Development

A local government may impose exactions on new development, which must satisfy rough proportionality analysis. Local governments may enter agreements with developers, but those agreements cannot bargain away police power or regulatory authority, and must comply with statutory and constitutional provisions. The Development Agreement was a valid bargain whereby the Developer agreed to construct "excess" improvements in exchange for concessions. The Developer received the benefit of his bargain, and could not now avoid its contractual obligation. There was no showing that the Developer was being asked to shoulder a disproportionate share of the costs of public improvements.

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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

ADVISORY OPINION

Advisory Opinion Requested by:	Tom Spencer
Local Government Entity:	Tooele City
Applicant for the Land Use Approval:	Fieldstone Homes Utah, LLC
Project:	Residential Subdivision
Date of this Advisory Opinion:	March 10, 2009
Opinion Authored By:	Brent N. Bateman, Lead Attorney, Office of the Property Rights Ombudsman

Issues

Is Fieldstone Homes entitled under the exaction law, UTAH CODE § 10-9a-508, to reimbursement from Tooele City for the costs of excess public improvements, where those excess improvements were installed under a development agreement between the City and the Developer's predecessor in interest?

Summary of Advisory Opinion

A local government may impose conditions and exactions upon development, so long as those conditions comply with the rough proportionality test of UTAH CODE § 10-9a-508. Since local governments cannot do by agreement what they have no authority to do otherwise, conditions or exactions imposed in a negotiated development agreement must comply with the rough proportionality test to be valid.

Where a developer has agreed to construct certain improvements as part of the overall consideration under a development agreement, and where the named consideration under that agreement is actually exchanged and the developer receives benefit of the bargain, then absent a showing of changed circumstances or unconscionability, that exchange of consideration must be considered adequate, and therefore roughly proportional under UTAH CODE § 10-9a-508. To hold otherwise would necessitate inquiry into the adequacy of consideration under a contract, an unwise and virtually impossible task.

Review

A request for an advisory opinion may be filed at any time prior to the rendering of a final decision by a local land use appeal authority under the provisions of UTAH CODE ANN. § 13-43-205. The opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

The request for this Advisory Opinion was received from Tom Spencer of The Spencer Company, Inc., on November 26, 2008. A letter with the request attached was sent via certified mail, return receipt requested, to Sharon Dawson, Tooele City Recorder, 90 North Main Street, Tooele, Utah 84074. Ms. Dawson's name was listed on the State's Governmental Immunity Database, as the contact person for the City. On December 5, 2008, Roger Baker, Attorney for Tooele City, submitted a request that the OPRO review the appropriateness of the Advisory Opinion request under Utah Code § 13-43-205. Paxton Guymon, attorney for Fieldstone Homes, sent a response to Tooele's request by email on December 11, 2008. Mr. Baker, on behalf of the City sent an email in reply on December 15, 2008. On December 16, 2008, the Office of the Property Rights Ombudsman issued a letter to the parties indicating that it had limited jurisdiction to issue an Advisory Opinion in this matter.

On January 21, 2009, Tooele City sent an email responding to the Advisory Opinion request, making reference to several previously provided materials. In a telephone conversation dated January 28, 2009, Mr. Guymon indicated that no further response on behalf of Fieldstone Homes would be necessary.

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 dated November 19, 2008 with the Office of the Property Rights Ombudsman by Tom Spencer, on behalf of Fieldstone Homes Utah, LLC, with attachments.
2. Fieldstone Homes' Application for Reimbursement, Copper Canyon PUD Phase 2A & 2B, dated October 2, 2008.
3. Tooele City's request to review the appropriateness of the Advisory Opinion, dated December 5, 2008, with attachments.
4. Fieldstone Homes' email response to Tooele's request dated December 11, 2008.
5. Tooele City's email reply dated December 15, 2008.
6. Tooele City's email response to the Advisory Opinion request dated January 21, 2009.

Background

Fieldstone Homes Utah, LLC ("Fieldstone"), is the developer of the Copper Canyon PUD project ("Project") within Tooele City. On February 15, 2006, Fieldstone's predecessor in interest, Gardner-Plumb LC entered into a development agreement titled *Amended and Restated Development Agreement for Copper Canyon PUD* ("Development Agreement"). The parties have not questioned the validity or enforceability of the Development Agreement, nor whether the Project is governed by the terms of the Development Agreement. The Development Agreement contains several provisions relevant to this decision. Most importantly, the Development Agreement states that "Developer agrees to construct and pay for two lanes of Tooele Boulevard in accordance with plans and specifications determined by the City, including asphalt, curb and gutter on both sides of the street, sidewalk adjacent to all Copper Canyon P.U.D. Developed areas, and public improvements." The Development Agreement was recorded in the Office of the Tooele County Recorder on March 6, 2006.

On October 2, 2008, following substantial completion of the Project, Fieldstone submitted to Tooele City a packet titled *Application for Reimbursement* ("Reimbursement Application"). Tooele City Ordinance section 7-19-13 permits a subdivision developer to request reimbursement of the costs to install certain eligible public improvements. In the Reimbursement Application, Fieldstone requested partial reimbursement of the costs of improvements to Tooele Boulevard. Fieldstone claimed that Tooele Boulevard is shown on the Tooele City Master Transportation Plan, and is "a limited access collector road which provides very little benefit to the project." Fieldstone goes on to state that the connectivity provided to the project "could have just as easily been provided by an internal direct access collector street."

On October 14, 2008, Fieldstone received a letter from Tooele City Mayor Patrick Dunlavy denying Fieldstone's Request for Reimbursement. Mayor Dunlavy's letter referred to an email from City Attorney Roger Baker for the reasons that reimbursement was rejected. In the email, Mr. Baker stated that the Developer assumed certain obligations in the Development Agreement, and the Development Agreement thereby precluded reimbursement for those obligations.

On November 19, 2008, Fieldstone requested an Advisory Opinion from the Office of the Property Rights Ombudsman regarding whether Fieldstone was entitled to reimbursement under the Reimbursement Application. By letter dated December 16, 2008, Brent N. Bateman, Lead Attorney in the Office of the Property Rights Ombudsman found that it had limited jurisdiction to issue an Advisory Opinion in this matter to determine whether Tooele City's denial of the Reimbursement Application complied with the law of exactions under UTAH CODE § 10-9a-508.

Analysis

I. The Relationship Between Development Agreements and Exactions

A. Development Exactions

"Exactions are conditions imposed by governmental entities on developers for the issuance of a building permit or subdivision plat approval." *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 34, 128 P.3d 1161, 1169.[1] 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.

In 2005, the Utah Legislature enacted § 10-9a-508 of the Utah Code, which authorizes cities to impose exactions on new development, within established limits:

> (1) A municipality may impose an exaction or exactions on development proposed in a land use application if:
>
> (a) an essential link exists between a legitimate governmental interest and each exaction; and
>
> (b) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.

UTAH CODE § 10-9a-508(1).[2] The Utah Supreme Court observed 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*, 2006 UT 2, ¶ 41, 128 P.3d at 1170. In those two landmark cases, the U.S. Supreme Court promulgated rules for determining when an exaction may be validly imposed under the federal constitution's Takings Clause.[3] This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis has been codified in UTAH

[1] *See also Salt Lake County v. Board of Education, Granite School District*, 808 P.2d 1056, 1058 (Utah 1991) (holding that "development exactions" are "contributions to a governmental entity imposed as a condition precedent to approving the developer's project.")

[2] There is a corresponding statute applicable to counties found at § 17-27a-507 of the Utah Code.

[3] *See* U.S. CONST., amend. V. ("nor shall private property be taken for public use, without just compensation.") The Supreme Court has interpreted the Takings Clause as limiting a government's ability to impose conditions on development. Furthermore, "[t]he Utah Constitution reinforces the protection of private property against uncompensated governmental takings . . . ." *B.A.M.*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. *See also* UTAH CONST. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation.")

CODE § 10-9a-508.[4] In order to be valid, the requirements imposed by the City must satisfy the rules of this section.

The Utah Supreme Court further honed the "rough proportionality" analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 45 ("*B.A.M. II*"), which was a second appeal stemming from the same development project at issue in the earlier decision. This opinion explained that rough proportionality analysis "has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent." *B.A.M. II*, 2008 UT 45, ¶ 9. The "nature" aspect focuses on the relationship between the purported impact and proposed exaction. The court agreed that the approach should be expressed "in terms of a solution and a problem . . . . [T]he impact is the problem, or the burden which the community will bear because of the development. The exaction should address the problem. If it does, then the nature component has been satisfied." *Id.*, 2008 UT 45, ¶ 10.

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

> The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively. The impact of the development can be measured as the cost to the municipality of assuaging the impact. Likewise, the exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction.

Id., 2008 UT 45, ¶ 11. The court continued by holding that "roughly proportional" means "roughly equivalent." Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the cost that a local government would incur to address (or "assuage") the impact attributable to a new development. Therefore, in order to be a valid exaction, the exaction must meet each of the aspects of this rough proportionality test.

B. Development Agreements

Utah law permits local governments to enter into development agreements with property owners, see UTAH CODE § 10-9a-102,[5] to govern the development of land within its local boundaries. Development agreements provide multiple benefits to both the developer and the local government. For example, a development agreement provides the developer with certainty as to the regulations and requirements that will be imposed upon the project. To the municipality, a development agreement helps ensure that the development will proceed in accordance with long

[4] The *B.A.M.* decision indicates that the Utah Supreme Court—as well as Utah Legislature—agrees that any condition imposed on development approval is an "exaction," whether the local government requires dedication of a property right or not. *See B.A.M.*, 2006 UT 2, ¶ 46, 128 P.3d at 1171. Based on the language in *B.A.M.*, as well as § 10-9a-508, it appears that the rough proportionality test applies to all conditions imposed on new development.

[5] "(2) To accomplish the purposes of this chapter, municipalities may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and *development agreements* that they consider necessary or appropriate for the use and development of land . . ." (emphasis added). A corresponding statute applicable to counties is found at UTAH CODE § 17-27a-102.

range planning goals. Most importantly, a development agreement can be advantageous to both parties by facilitating a development process governed by cooperation rather than confrontation. *See* Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP.U.L.REV. 383, 394 (2004). Development agreements can reduce costs and administration for both parties, and facilitate a project that is beautiful, workable, and sellable – common goals of the developer and the local government. For these reasons, development agreements advance important public policies and are to be encouraged.

Nevertheless, the scope of a development agreement is limited, because local governments cannot enter into contracts that exceed their constitutional or statutory powers. For example, a municipality cannot by agreement promise to grant the developer certain zoning approvals. A municipality's authority to zone and accordingly to impose conditions on a developer is a delegation of police power received from the state. *Marshall v. Salt Lake City*, 105 Utah 111, 121, 141 P.2d 704 (1943). The state cannot contract away its police power. *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877). Accordingly, an agreement between a developer and a municipality in which the municipality agrees that it will make certain zoning decisions in the future is therefore void *ab initio*. *See* Green, 33 CAP.U.L.REV. at 401.

If a local government contracts with a private individual, and that contract calls upon the local government to take an action that the local government does not have constitutional authority to take, the local government would be operating outside of the proscribed limits of its authority. *See Price Dev. Co. v. Orem City*, 2000 UT 26, ¶ 10, 995 P.2d 1237, 1243 ("When reviewing a local government action, we give local government great latitude in creating solutions to the many challenges it faces, unless the action "is arbitrary, or is directly prohibited by, or is inconsistent with the policy of, the state or federal laws or the constitution of [Utah] or of the United States.").[6] A development agreement cannot give to the local government authority to act outside of its constitutional limitations. Since imposing a development condition in violation of the exaction law would be outside of the constitutional authority of the local government, the local government cannot do so in a development agreement.

C. Applying the Law of Exactions to Development Agreements

The exaction analysis "animates" the Takings Clause of the U.S. Constitution. *Monterey v. Del Monte Dunes at Monterey, LTD*, 526 U.S. 687, 703, 119 S.Ct. 1624, 1635 (1999). The *Nollan/Dolan* "rough proportionality test" ensures preservation of rights guaranteed by the Federal and Utah Constitutions. *See B.A.M.*, 2006 UT 2, ¶ 41. In addition, rough proportionality analysis is required by the Utah Code. *See* UTAH CODE § 10-9a-508. These limitations must apply to contracts negotiated between local governments and property owners in order to fulfill a condition imposed on development. Even if the agreements are entered voluntarily, the local government is constitutionally prohibited from imposing exactions that are constitutionally disproportionate.

[6] In *Price Development Co.*, the Utah Supreme Court considered the validity of an agreement between a city and a business, whereby the city provided significant financial incentives so that the business would remain in the city.

Determining whether an exaction is constitutionally disproportionate in a development agreement context necessitates the injection of contract law into the rough proportionality analysis. Under *B.A.M II*, the rough proportionality analysis requires exactions to be measured in terms of dollar value—the dollar value of the impact against the dollar value of the exaction. *B.A.M. II*, 2008 UT 45, ¶ 10. However, that kind of dollar-for-dollar analysis is inconsistent with the long-standing principles of contract law. There has never in contract law been a requirement that the consideration to a contract offered by both parties be equal. "Ordinarily, courts will not inquire into the adequacy of consideration unless it is so insufficient or illusory as to render enforcement of the contract unconscionable." *Reese v. Reese*, 1999 UT 75, P 27, 984 P.2d 987. Contract law is based upon the principle that parties should be able to bargain between them as they see fit, and thereby enjoy the benefit of their bargain. The consideration for a contract cannot, and should not, always be measured in terms of dollar value.[7] Contract law does not require that the values exchanged be objectively equal.

This conflict, the dollar-for-dollar exaction analysis in *B.A.M. II* against the consideration principles of contract law, is resolvable. Exactions imposed in a development agreement will be roughly proportionate, and therefore permissible, when those exactions are expressly a part of the consideration for the agreement, and consideration is actually exchanged and sufficient to not be unconscionable. In other words, when both parties enjoy the benefit of the bargain they made, adequacy of consideration can be assumed. Where consideration is adequate, rough proportionality is found.[8] Conversely, where bargained-for consideration is patently lacking, such exactions will be disproportionate and therefore illegal.

This approach is consistent with available caselaw. In *Toll Bros. Inc. v. County of Burlington*, 944 A.2d 1, 18 (N.J. 2008), a developer (Toll Brothers) entered into a development agreement with the County whereby Toll Brothers agreed to construct numerous roadways as part of a massive development project. However, circumstances subsequently changed and the developer dramatically scaled down the original plans. The County nevertheless refused to modify the development agreement, and insisted that Toll Brothers construct the roads as the development agreement dictated. The New Jersey Superior Court held that the County could not enforce the original agreement, because to do so would force Toll Brothers to bear a disproportionate share of the costs for the public improvements. Even though the development agreement was entered voluntarily, the "rough proportionality" test required by state and federal law still applied. "If we

[7] Translating the consideration in a contract into a dollar value is under most circumstances virtually impossible, and courts have never shown a willingness to do so. Doing so would require a quantification of every aspect of consideration in an agreement and a translation of that aspect into a financial equivalent. Many elements of the consideration to a contract are intangible and/or have a relatively high value to one party and a low value to another. Assigning a dollar value to the consideration exchanged in a contract is not only an impossible task, but an unwise one. See *Restatement 2d of Contracts*, § 79 (Comment C). Parties enter into contracts in order to obtain the relative benefit of their bargain. Subjecting the consideration in a contract to such an analysis will certainly cause contracting parties to hesitate before making such an agreement.

[8] Utah Supreme Count in *B.A.M. II* affirmed that "as the Court noted in *Dolan*, exact equality between the factors is unnecessary. *Dolan v. City of Tigard*, 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) ("No precise mathematical calculation is required . . . ."); *see also Banberry*, 631 P.2d at 904 ("Precise mathematical equality 'is neither feasible nor constitutionally vital.'")." *B.A.M. II*, 2008 UT 45, ¶ 12 n.4.

were to conclude otherwise . . . the effect would be to approve public entities and developers entering into "voluntary" agreements in violation of the specific provisions of [state law]. Such an approach cannot be countenanced." *Toll Bros.*, 944 A.2d at 17.

Nevertheless, the court in *Toll Brothers* held that the requirement that the developer build numerous roads was not inherently disproportionate, and therefore illegal. The requirement became disproportionate because of the changed circumstances. "A developer should be permitted to advance a material change in circumstances, short of abandonment, as a basis for a declaration . . . that the conditions, legitimate when originally imposed, have subsequently been rendered illegal." *Id*. at 18. The *Toll Brothers* court did not inquire into the value of the consideration or the proportionality of the consideration, but only found that since the development was now a fraction of its original size, the road building requirement in the development agreement was now patently disproportionate, and therefore, an illegal exaction.[9]

As stated above, development agreements between local governments and developers are mutually advantageous contracts that should be encouraged. As in any contract, the parties to the contract may voluntarily undertake obligations in consideration of the promises of the other party. The parties can certainly agree that, as part of the consideration, the developer will construct and dedicate public facilities. As long as consideration for such a promise is actually exchanged, and is not patently disproportionate, the constitutional protections against illegal exactions are not violated.

II. Fieldstone's Agreement to Construct Tooele Boulevard is Part of the Overall Consideration in the Development Agreement, and Complies with the *Nollan/Dolan* Test

The construction of Tooele Boulevard under the Development Agreement satisfies the *Nollan/Dolan* rough proportionality test. The construction of Tooele Boulevard satisfies the first half, or "prong" of the *Nollan/Dolan* test. Building and maintaining adequate roadways is a legitimate government interest. UTAH CODE § 10-8-8; *see also Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117.[10] Requiring Fieldstone to complete the roadway promotes the City's legitimate objectives, so the first prong of § 10-9a-508(1) is satisfied.[11]

[9] This approach is also consistent with the previous Advisory Opinion issued by this Office on June 26, 2008 in the matter between the City of Draper and R&D Property Holding, LLC. In that Advisory Opinion, this Office held that the developer's construction of 150 East was not entitled to reimbursement, because the parties recognized that some consideration had been exchanged for the construction of that road, and that there was no reason to doubt that the amount exchanged was unfair. That Advisory Opinion also held that the requirement that the Developer construct Carlquist Drive *was* an illegal exaction, even though the developer had signed a document indicating a willingness to build that road. That document was nothing more than an acknowledgement, and did not involve an exchange of consideration. It therefore did not contain "adequate safeguards against an improper exaction."

[10] "In order for a government to be effective, it needs the power to establish or relocate public throughways, even at the expense of some individual citizens, for the convenience and safety of the general public. . . . In fact, cities are vested with the statutory power to 'lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise

The requirement also satisfies the second prong of the rough proportionality test in that it is roughly proportionate to the impact of the development. The Developer specifically agreed in the Development Agreement to "construct and pay for two lanes of Tooele Boulevard in accordance with plans and specifications determined by the City, including asphalt, curb and gutter on both sides of the street, sidewalk adjacent to all Copper Canyon P.U.D. Developed areas, and public improvements."[12] Accordingly, this construction is a part of the consideration that the Developer promised to provide to the City in exchange for the covenants and obligations of the City.[13] There has been no claim that such consideration was not exchanged, or that the Developer did not receive value from the City or enjoy the benefits of its bargain. There have been no changed circumstances that would make construction of Tooele Boulevard an unconscionable burden upon the Developer. Therefore, since the consideration has been exchanged, there has been no information provided showing that the Developer is bearing more than what is roughly proportional. The second prong of the *Nollan/Dolan* test is therefore satisfied. The requirement that Fieldstone construct Tooele Boulevard in accordance with the Development Agreement is therefore not an illegal exaction.

Conclusion

Local governments and developers may enter into development agreements wherein both parties covenant to undertake certain obligations in consideration of the mutual exchange of promises. Such agreements are good public policy, and should be encouraged and enforced. Nevertheless, local governments cannot do by agreement what they have no authority to do otherwise. A local government may not impose conditions upon development that do not comply with the rough proportionality test of UTAH CODE § 10-9a-508, even under a development agreement.

When negotiating a development agreement, both parties bargain for an exchange of consideration that they consider appropriate and adequate. It is impossible and unwise to inquire into the adequacy of bargained-for consideration. A party's responsibility to ensure that the consideration received is adequate to compensate it for the obligations it voluntarily undertakes is during contract negotiations. Therefore, when a party agrees to undertake an obligation, and receives the benefit of its bargain in return for that obligation, the consideration is assumed to be adequate absent changed circumstances or a showing of unconscionability.

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improve streets, alleys, avenues, boulevards, sidewalks, . . . and may vacate the same . . . by ordinance'. UTAH CODE § 10-8-8." *Carrier*, 2001 UT 105, ¶ 18, 37 P.2d at 1117.

[11] Note that the first prong of the exaction test in § 10-9a-508 requires an essential link between the exaction (construction of the road) and a legitimate government interest (providing adequate roadways). This first prong does not, however, require an essential link between the exaction (completing the road) and the approval sought (a subdivison). *See Nollan*, 483 U.S. at 837. The "rough proportionality," or second prong of the test, weighs the impact of project for which approval has been sought against the nature and extent of the proposed exaction. *See B.A.M.*, 2006 UT 2, ¶¶ 39-40, 128 P.3d at 1169-70.

[12] To the extent that Fieldstone's work on Tooele Boulevard exceeds this bargained-for description, such as if the Developer constructed and paid for *three* lanes of Tooele Boulevard, that excess would *not* be a part of the exchanged consideration under the Development Agreement, and could therefore be an excessive exaction. Such amounts of excessive construction costs could be reimbursable by the City.

[13] The Development Agreement calls for additional consideration and obligations to be provided by both parties.

Fieldstone agreed to construct Tooele Boulevard to certain specifications. Doing so was a part of the bargained for consideration under the Development Agreement. Fieldstone received value from the City in return, and enjoyed the benefit of its bargain. There has been no showing of changed circumstances or unconscionability. Therefore, Fieldstone is considered to have been adequately compensated for construction of Tooele Boulevard, and therefore has not suffered an illegal exaction.

Brent N. Bateman, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in § 13-43-205 of the Utah Code. It does not constitute legal advice, and is not to be construed as reflecting the opinions or policy of the State of Utah or the Department of Commerce. The opinions expressed are arrived at based on a summary review of the factual situation involved in this specific matter, and may or may not reflect the opinion that might be expressed in another matter where the facts and circumstances are different or where the relevant law may have changed.

While the author is an attorney and has prepared this opinion in light of his understanding of the relevant law, he does not represent anyone involved in this matter. Anyone with an interest in these issues who must protect that interest should seek the advice of his or her own legal counsel and not rely on this document as a definitive statement of how to protect or advance his interest.

An advisory opinion issued by the Office of the Property Rights Ombudsman is not binding on any party to a dispute involving land use law. If the same issue that is the subject of an advisory opinion is listed as a cause of action in litigation, and that cause of action is litigated on the same facts and circumstances and is resolved consistent with the advisory opinion, the substantially prevailing party on that cause of action may collect reasonable attorney fees and court costs pertaining to the development of that cause of action from the date of the delivery of the advisory opinion to the date of the court's resolution.

Evidence of a review by the Office of the Property Rights Ombudsman and the opinions, writings, findings, and determinations of the Office of the Property Rights Ombudsman are not admissible as evidence in a judicial action, except in small claims court, a judicial review of arbitration, or in determining costs and legal fees as explained above.

MAILING CERTIFICATE

Section 13-43-206(10)(b) of the Utah Code requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with UTAH CODE ANN. § 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:

Sharon Dawson, City Recorder
Tooele City
90 N Main Street
Tooele, UT 84074

On this _____ Day of March, 2009, 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