Advisory Opinion #66

Parties: Hylan Harper and City of South Jordan

Issued: April 7, 2009

TOPIC CATEGORIES:
D: Exactions on Development
R(ii): Other Topics (Subdivision Plat Approval)

Developers may be required to construct and dedicate streets and sidewalks if the cost to the developer is roughly equal to the impact of the development on local services. Based on decisions from other jurisdictions, it appears that a detailed analysis is not required, and some sort of reasonably reliable analysis is sufficient. It is suggested that local governments follow the general guidelines of the Utah Impact Fee Act to determine both the impacts of development and dedication costs.

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ADVISORY OPINION

Advisory Opinion Requested by:	Hylan Harper
Local Government Entity:	South Jordan City
Applicant for the Land Use Approval:	Hylan Harper
Project:	Residential Subdivision
Date of this Advisory Opinion:	April 7, 2009
Opinion Authored By:	Elliot R. Lawrence, Attorney, Office of the Property Rights Ombudsman

Issues

May a City require dedication of property and construction of a roadway, curb, gutter and sidewalk as a condition of approval for a two-lot subdivision?

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. That test requires some sort of individualized determination showing that the proposed exaction is roughly proportional to the impact of the new development. The Utah Supreme Court has interpreted the term "rough proportionality" as meaning "rough equality" between the costs to the local government to assuage the impact and the costs to the property owner to comply with the exaction.

The impact of a new development may be measured by applying the same principles and guidelines used to calculate impact fees. An extensive analysis specific to the property is not necessarily required for each new development, but the local government is obligated to show some sort of determination comparing the costs of the impact against the property owner's compliance costs. The calculations may be based upon any reliable data as long as the determination is fair and accurate. A determination made by a local government should be afforded a level of deference if it is based on reliable data. In like manner, the costs to the

property owner must also be based on reliable data and market value, reflecting the current state of the property to be dedicated, and not speculation based on non-economic factors.

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 Hylan Harper on December 15, 2008. A letter with the request attached was sent via certified mail, return receipt requested, Anna M. West, South Jordan City Recorder, 1600 South Towne Center Drive, South Jordan, Utah 84095. Ms. West's name was listed on the State's Governmental Immunity Database, as the contact person for the City. On January 26, 2009, Ryan W. Loose, Assistant City Attorney, responded by proposing that the parties attempt to mediate the dispute. On Februray 2, 2009, the parties met at the South Jordan City Offices to mediate. At that time, Mr. Harper, through his attorney, Justin Baer, submitted a "Mediation Brief," further explaining his position. Following the mediation, the parties returned to preparations for the Advisory Opinion. On February 26, 2009, the City submitted a response. A copy was also delivered to Mr. Harper. On March 16, 2009, Mr. Baer submitted a reply.

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 December 15, 2008 with the Office of the Property Rights Ombudsman by Hylan Harper, with attachments.
2. Proposal that the Parties Mediate the dispute, received January 26, 2009.
3. Mediation Brief, submitted at February 2, 2009 mediation.[1]
4. South Jordan's response, received February 26, 2009.
5. Hylan Harper's reply, received March 16, 2009.

Background

[1] As a rule, communications made as part of a mediation are not disclosed or made public. However, the Mediation Brief prepared by Mr. Harper's attorney does not contain information that is not already made known in other submissions. For this reason, it is included as part of the materials reviewed for this Opinion.

Hylan Harper owns a one acre parcel along 2200 West in South Jordan. It is located across the street from the Salt Lake County Equestrian Center, and is bordered on the rear by an irrigation canal. The property has been used for agricultural purposes, and has no buildings. The parcel is rather narrow and irregularly shaped due to the canal, which limits the useable area, but it may be divided into two residential lots. Mr. Harper proposed such a subdivision, creating two lots of approximately 17,000 square feet. Because they are narrow, the lots are much wider than other similarly-sized lots. One lot is approximately 153 feet wide, and the other is approximately 215 feet wide. According to the City, most similarly-situated lots are 90 to 100 feet wide. Mr. Harper's present plans are to construct a home on one lot, and leave the other for future development or sale.

Mr. Harper applied for a two-lot subdivision. The City informed him that, as a condition of approval, he would need to dedicate a portion of his property to widen 2200 West and install a curb, gutter, and sidewalk. The dedication would widen 2200 West to a total of 66 feet, plus the curb and sidewalk. The road is paved to the edge of the Equestrian Park, which has a curb and sidewalk, but is only partially paved on the opposite side, where the property is located. The dedication and paving would allow three lanes on the road (two travel lanes and a turning lane). The City notes that its standard for new "minor collector" roads, such as 2200 West, is 71 feet. However, the City also recognizes that its former street width standard was 66 feet wide, and that most of 2200 West is already built to that width. Thus, the City does not require that 2200 West be built to 71 feet, but only to 66 feet, which is less than its standard.

Mr. Harper's property boundary extends into the 2200 West roadway, although not to the halfway point. In all, the City requires about 28 feet of Mr. Harper's property for the dedication, which includes the curb and sidewalk. The City notes that the dedication is actually less than what could have been required.[2] Mr. Harper states that the dedication would require about .30 acres, from the total parcel area of 1.06 acres. A portion of the property to be dedicated is paved and used as part of the roadway. Mr. Harper would not be required to replace the asphalt. The "shoulder" of the road, approximately 10 feet in width, is also part of Mr. Harper's property. The City maintains that roadway and shoulder have been used extensively for public travel, and should therefore be a "roadway by dedication," as provided in § 72-5-104 of the Utah Code.[3] According to the City, this roadway portion accounts for about .14 acres, or roughly one-half of the total dedication.

The dedication includes a curb, gutter, and sidewalk, which will be owned and maintained by the City, but installed by Mr. Harper. The City notes that it will not only assume ownership of the sidewalk and gutter, but will also assume responsibility for maintenance and any liability for accidents.

[2] If Mr. Harper's property had extended further into the roadway, he would have been required to dedicate at least 33 feet (or possibly 35.5 feet) just for the roadway, in addition to the curb, gutter, and sidewalk.

[3] As provided in that statute, private land that has been used as a roadway by the general public for a continuous period of at least ten years is considered to be dedicated to public use. Mr. Harper acknowledges that the paved portion has been dedicated as a public right-of-way, but disputes that any other portion has been dedicated by public use. The shoulder or roadway portion of the property is not included as part of the buildable areas of his lots.

Mr. Harper estimates the total cost of the dedication and improvements to be about $144,000.00. This includes the value of the property dedicated, based on the tax assessment determined by Salt Lake County, plus the cost of constructing the improvements. The City estimates the approximate cost of the improvements to be $69,000.00. The City maintains that Mr. Harper has overstated the value of the property, because he has not provided any appraisal, and because he failed to consider that a large portion of the property should be considered dedicated by use.

The City cites to its own ordinances, which state that all property owners must "take into account proposed streets and street widths indicated in the city transportation plan" when planning development.[4] In addition, developers "shall be required to dedicate and improve . . . any street or portion thereof, which is planned in or necessitated by the development and that is rationally related to the development's impact on the city's transportation plan."[5] The City also notes that Mr. Harper did not consult with its staff prior to purchasing the property. According to the City, had Mr. Harper discussed his proposed plans with City staff, he would have been aware of the dedication requirement, and could have taken the requirement into account prior to purchasing the property.

Mr. Harper states that the subdivision will have no impact on the City's transportation needs, and so the City is not justified in requiring any dedication. Mr. Harper also disputes that any portion of his property has been dedicated to the public by use other than the paved portion in the 2200 West roadway. The City states that there is an impact on its transportation system, and that even a single home still uses public roads for access. Those roads need to be built and maintained at a width adequate to provide that access as well as safe travel. Furthermore, curbs, gutters, and sidewalks serve properties, enhancing their value by improving access and appearance, and by diverting stormwater from the property. The City contends that this service justifies the dedication.

Analysis

I. Exactions of Property

"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 ("*B.A.M. I*")[6] 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.

[4] SOUTH JORDAN CITY CODE, § 16.04.170
[5] *Id.*
[6] *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.")

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).[7] 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. I*, 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.[8] This has come to be known as the *Nollan/Dolan* "rough proportionality" test, which has been codified at UTAH CODE § 10-9a-508. 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 "rough proportionality test" ensures the preservation of rights guaranteed by the Federal and Utah Constitutions. *See B.A.M. I*, 2006 UT 2, ¶ 41. 128 P.3d at 1170. In order to be valid, the requirements imposed by the City must satisfy that analysis.

The Utah Supreme Court further honed the "rough proportionality" rule in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 ("*B.A.M. II*"), which was a second appeal stemming from the same development project at issue in the earlier decision.[9] 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." *B.A.M. II*, 2008 UT 74, ¶ 9, 196 P.3d at 603. The "nature" aspect focuses on the relationship between the purported impact and proposed exaction. The court stated 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 74, ¶ 10, 196 P.3d at 603-04.

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

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

[8] *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. I*, 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.")

[9] The original *B.A.M. II* opinion was issued in July 2008 (*See B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 45), but it was superceded by an amended opinion issued in October of that year. This Opinion will cite to the amended *B.A.M. II* decision, found at 2008 UT 74, 196 P.3d 601.

> 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 74, ¶ 11, 196 P.3d at 604. 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.

II. Determining if the Required Exactions are Valid.

A. There is an Essential Link Between the Dedications and Legitimate Government Interests.

Requiring dedication of property for and construction of 2200 West, plus a curb, gutter, and sidewalk satisfies the first aspect of the *Nollan/Dolan* rough proportionality test. Building and maintaining adequate roadways is a legitimate government interest, as is the construction and maintenance of sidewalks. UTAH CODE § 10-8-8; *see also Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117.[10] Widening roads is a reasonable means to promote that interest. *Id.* Requiring Mr. Harper to dedicate a portion of his property to widen a road, and install a curb, gutter, and sidewalk promotes the City's legitimate objectives, so the first prong of § 10-9a-508(1) is satisfied.[11]

B. Rough Proportionality Between the Exactions and the Impacts of the Development.

The second aspect of the "rough proportionality" test requires an "individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 392. As noted above, the Utah Supreme Court has interpreted the "rough proportionality" test to mean a two-part analysis. First, each exaction must be related in nature to an impact attributable to the development. *B.A.M. II*, 2008 UT 74, ¶ 9-10, 196 P.3d at 603-04. Second, there must be "rough equivalence" of the costs to "assuage" the impacts caused by a new development, and the expense borne by the property owner to satisfy the development condition. *See B.A.M. II*, 2008 UT 74, ¶ 11, 196 P.3d at 604. The court noted that

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[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 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. Furthermore, "[d]edications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use." *Dolan*, 512 U.S. at 395.

[11] Note that the first prong of the exaction test in § 10-9a-508 requires an essential link between the exaction and a legitimate government interest. This first prong does not, however, require an essential link between the exaction and the approval sought. *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.

"exact equality between the factors is unnecessary" *Id.*, 2008 UT 74, ¶ 12, n.4, 196 P.3d at 604, n.4 (*quoting Dolan*, 512 U.S. at 391).[12] A complete analysis, therefore, requires that both the impacts and the costs be measured and compared.

C. Measuring the Impacts of Development

There is little guidance on how to measure the impacts attributable to a development, or the compliance costs borne by a property owner. The *Dolan* decision requires an "individualized determination," but it does not elaborate further. The dispute between B.A.M. Development and Salt Lake County has so far spawned four appellate decisions, none of which explains how to determine the costs of assuaging an impact so that those costs can be compared to the financial burden placed upon the property owner.[13]

The most recent *B.A.M.* decision stated that the property owner's cost is the value of the property that is dedicated.[14] The value of the property should be determined by a competent appraisal, which should reflect the actual condition and current market value of the property to be dedicated, including the existence of any easements or other conflicting claims. The value of property is not necessarily uniform throughout the entire parcel. The portion to be dedicated may therefore have a significantly different value than the remainder, depending upon the particular circumstances of the parcel. In addition, although not expressly stated in the *B.A.M. II* opinion, it would be consistent with that decision to also include reasonable construction costs of required public improvements.[15]

The cost to a local government to assuage the impact of development is also difficult to measure. The impact may be read more broadly than just that which directly arises from the development itself, such as the number of vehicle trips to and from a development. A review of the *Dolan* decision helps illustrate this point. In *Dolan*, the Supreme Court looked to state court decisions to develop its own standard of review for exactions. These decisions fell into three general

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[12] The court also quoted *Banberry v. South Jordan City*, 631 P.2d 899, 904 (Utah 1981): "Precise mathematical equality is neither feasible nor constitutionally vital." (other citation omitted)).

[13] *B.A.M. Development, LLC v. Salt Lake County*, 2004 UT App 34, 87 P.3d 710; *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, 128 P.3d 1161, *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 45, 2008 Utah LEXIS 100, *amended opinion at* 2008 UT 74, 196 P.3d 601.

[14] Like Mr. Harper's situation, the *B.A.M.* saga arose from a required dedication of property for a roadway. Originally, Salt Lake County required dedication of a 40-foot strip for a road (measured from the center line of the roadway). A year later, however, the county then enlarged the dedication to 53 feet. The developer did not object to the original 40-foot requirement, but did object to the additional 13 feet, which would require alteration to the planned subdivision, possibly reducing the total number of lots on the parcel. *B.A.M. Development, LLC v. Salt Lake County*, 2004 UT App 34, ¶ 2, n.1, 87 P.3d 710, n. 1. The property boundary extended to the center line of the roadway, so most of the dedication was already being used for traffic (the roadway had been used for many years). *See* Brief of Petitioner and Cross-Respondent, *B.A.M. Development LLC v. Salt Lake County*, Docket No. 20040365 (Brief filed with the Utah Supreme Court for the first *B.A.M.* appeal), at 5. This portion would most likely have been considered dedicated by public use, pursuant to § 72-5-104 of the Utah Code.

[15] *See e.g., Town of Flower Mound v. Stafford*, 135 S.W.3d 620 (Tex. 2003) (requirement that developer improve an existing road, but not dedicate property, was held to be an exaction subject to rough proportionality analysis); *see also St. John's River Water Management District v. Coy*, 2009 Fla. App. LEXIS 91 (requiring wetland mitigation on property located over four miles from a development held to be an exaction subject to rough proportionality analysis).

categories. The first required only "generalized statements as to the necessary connection between the required dedication and the proposed development." *Dolan*, 512 U.S. at 389. The Court rejected this approach as too lax to protect property owners' rights. *Id.* The second approach consisted of "a very exacting correspondence . . . if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need," the exaction would not be valid. *Id.*, 512 U.S. at 389-90 (citations omitted). The Court rejected this approach as too strict.[16]

The Court eventually settled on an intermediate approach, which was not too strict, but not too lax. The Court adopted language used by the Utah Supreme Court, which had held "'that the dedication should have some reasonable relationship to the needs created by the [development.]'" *Id.*, (*quoting Call v. City of West Jordan*, 606 P.2d 217, 220 (Utah 1979)).[17] This intermediate approach was deemed "the reasonable relationship test," and was considered to be "closer to the federal constitutional norm" than the other tests. *Id.* The Court christened its approach "rough proportionality," which it described as follows: "No precise mathematical calculation is required, but the [local government] 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.*

There are a few reported cases that have analyzed whether specific dedications are roughly proportional to the impacts of developments. Those cases provide helpful guidance as to how the impacts due to a development may be measured. The Washington Supreme Court evaluated a property dedication question not long after the *Dolan* decision. In *Sparks v. Douglas County*, 904 P.2d 738 (Wash. 1995), the court upheld a requirement that a property developer dedicate property to expand existing rights-of-way, so that the roads would comply with the county's width standards. The development consisted of four small subdivisions of four lots apiece, which were located on different roads. The county required different dedications widening at least four streets. The county prepared a report showing that the roads did not meet the county's standards and were far too narrow.[18] One specific concern was access by public safety vehicles. The property owner objected to the condition, because he felt that the traffic impact attributable to the subdivisions was too small to justify widening the roads.

The Washington Court of Appeals agreed with the property owner, holding that "there was no evidence that the residential development . . . would have an adverse impact which would necessitate widening the adjacent roads." *Id.*, 904 P.2d at 741. The state's supreme court reversed, however, noting that the strict rule adopted by the court of appeals had been rejected by *Dolan*.[19] The court held that the dedication requirements were roughly proportional to the

[16] *Dolan*, 512 U.S. at 390. "We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved." *See generally Ocean Harbor House Homeowners Ass'n v. California Coastal Comm'n*, 77 Cal. Rptr. 3d 432, 442-43 (2008), for a discussion and analysis of the *Nollan* and *Dolan* decisions.

[17] In *B.A.M. II*, the Utah Supreme Court seems to have overlooked the fact that the *Dolan* rule was derived largely from *Call v. West Jordan*. .

[18] *Sparks*, 904 P.2d at 740. Two streets were 45 feet wide, one was 25 feet, and the last was only 15 feet wide. The county's road standards called for widths of 60 to 80 feet, plus sidewalks.

[19] *Sparks*, 904 P.2d at 743. The court of appeals had issued its decision about a year before the *Dolan* opinion was written. *See Sparks v. Douglas County*, 863 P.2d 142 (Wash. Ct. App. 1993).

impacts of the subdivisions. The court found that the county's studies were sufficient to be considered the kind of individualized determinations required by *Dolan*.[20]

In *Ocean Harbor House Homeowners Association v. California Coastal Commission*, 77 Cal. Rptr. 3d 432 (Cal. Ct. App. 2008), the California Court of Appeal evaluated a mitigation fee that had been imposed as a condition of approval for a new seawall. The wall was necessary to protect an existing building from erosion, but about one acre of public beach would be lost. The California Coastal Commission granted approval for the seawall, on the condition that the property owners pay a mitigation fee to offset the loss of the beach. Three methods to calculate the fee (*i.e.*, the measure of the impact) were considered. The first method based the fee on the cost to replace an acre of sand; the second on the cost to purchase one acre of comparable beach property; and the third used the recreational value of one acre of beach. The Commission adopted the third method, and the total mitigation fee was calculated to be about $5 million, compared to about $1 million each for the other two approaches. *Ocean Harbor House*, 77 Cal. Rptr. 3d at 437-38.

The California Court of Appeal upheld the fee as a proper exaction under the *Nollan/Dolan* analysis. The court held that the recreation-based fee properly measured the impact caused by the loss of the beach due to the seawall. Simply replacing the lost beach area by another parcel somewhere else (or by somehow replacing the sand) didn't adequately address the economic and recreational loss caused by the construction. Basing the mitigation fee on recreational loss was an appropriate measure of the impact of the loss. Thus, the fee was roughly proportional to the impact of the proposed seawall. *Id.*, 77 Cal. Rptr. 3d at 449-450.[21]

The Texas Supreme Court also considered the measure of a development's impact in *Town of Flower Mound v. Stafford Estates L.P.*, 135 S.W.3d 620 (Tex. 2004).[22] In that case, a developer was required to improve an existing road in order to obtain approval for a subdivision. The developer was not required to dedicate any property, but it was required to rebuild the road so that it could handle a greater traffic load. The town argued that the road improvement was necessary due to the impact of the subdivision. The developer maintained that since the new subdivision would only increase traffic on that road by 18%, the requirement that the road be rebuilt was an unfair burden.

Ultimately, the court held that the town had not made the kind of individualized determination required by *Dolan*. However, the court did agree that the town could consider the impacts on all of its roadways, not just the road which the developer was expected to rebuild.

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[20] *Sparks*, 904 P.2d at 745-46. In the *B.A.M. II* decision, the Utah Supreme Court cited to *Sparks*, as part of the reasoning supporting its interpretation of the rough proportionality rule.

[21] The Commission used data assessing the recreational value of beaches in southern California, even though the seawall was located farther north in Monterey. The California Court of Appeal found that the data was nevertheless applicable, and accepted the fee calculation as constituting an individualized determination of the seawall's impact. *Ocean Harbor House*, 77 Cal. Rptr. 3d at 449.

[22] In *Dolan*, the U.S. Supreme Court cited to a Texas decision as supportive of the "reasonable relationship" test that evolved into the "rough proportionality" analysis. *Dolan*, 512 U.S. at 390-91 (*quoting College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807 (Tex. 1984)).

> We agree that the Town can take the development's full impact into account and is not limited to considering the impact on [the] Road. But in so doing, the Town is nonetheless required to measure that impact in a meaningful, though not precisely mathematical way, and must show how the impact, thus measured, is roughly proportional in nature and extent to the required improvements.

Id., 135 S.W.3d at 644. The Texas court also rejected the town's assertion that "requiring each developer to improve abutting roadways is roughly proportional to the impact of all developments on all roadways, and that this system of reciprocal subdivision exactions meets the requirement of rough proportionality." *Id.* (internal quotes omitted). The court rejected that approach as unfounded. "The argument that it is fair for everyone to 'kick in a little something' cannot be assessed in the abstract." *Id.*, 135 S.W.3d at 645 (quotes in original).[23]

These cases demonstrate how a development's impact ought to be measured. A local government may consider a development's full impact on local services. The calculation does not need to be limited to only those impacts directly attributable to the development activity.[24] As demonstrated by the seawall in *Ocean Harbor House* or the subdivision in *Flower Mound*, development does not occur in a vacuum. Property development, even on a small scale, impacts local services.[25] To the extent that the impact may be measured, its costs may be borne by the development which caused it, if the burden on the property owner is roughly equivalent to the costs of the impact, both in nature and extent.[26]

Although *Dolan* allows a local government to consider the full impact of development on local services, the exaction must still be justified by some kind of individualized determination.[27] Fortunately, the Utah Supreme Court has provided some guidance on how to gauge the impact of

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[23] This is an example of the "lax" approach rejected in *Dolan*. *See Dolan*, 512 U.S. at 389, *see also* note 16 and associated discussion, *supra*.

[24] Such a strict analysis was expressly rejected in *Dolan*. *See Dolan*, 512 U.S. at 389-90; *see also* note 16, *supra*.

[25] It cannot be said that a small property development has "no impact" due to its scale. Any development activity will cause an impact. If it is true that one new home has zero impact, then two hundred homes in a subdivision will also have zero impact. That assumption would stymie all development, because local governments would not be able to provide new infrastructure for all new construction. Admittedly, a single home would have *less* impact than two-hundred lot subdivision, and that lesser impact would result in a smaller exaction.

[26] *B.A.M. II*, 2008 UT 74, ¶¶ 10-12, 196 P.3d at 603-04.

[27] The exactions evaluated in both *Dolan* and *Flower Mound* were rejected not because they weren't roughly proportional to the impact of the respective developments, but because the local governments failed to make the kind of individualized determinations necessary to justify the exactions. For example, one of the exactions at issue in *Dolan* was dedication of property for a pedestrian/bicycle path. The Court agreed that the path might offset some of the traffic increase attributed to the development. However, a finding "that the bicycle pathway system *could* offset some of the traffic demand is a far cry from a finding that the . . . system *will*, or is *likely to*, offset some of the traffic demand. *Dolan*, 512 U.S. at 395. (emphasis in original, quotations omitted). On the other hand, the exactions reviewed in *Sparks* and *Ocean Harbor House* were upheld, because individualized determinations supported the exactions. *See e.g. Sparks*, 904 P.2d at 745. ("[L]ocal governments must make some effort to quantify its findings to support its permit conditions.") Those two opinions seemed somewhat deferential to the governmental entities' findings. *See also Cottonwood Heights Citizen's Ass'n v. Bd. of Commissioners*, 593 P.2d 138, 140 (Utah 1979) (local governments are given wide latitude to make factual and policy decisions which are entitled to a presumption of correctness and validity); *Carrier v. Salt Lake County*, 2004 UT 98, ¶ 28, 104 P.3d 1208, 1216 (zoning agencies granted broad discretion in policy and factual decisions, and interpretations of zoning ordinances also entitled to a degree of deference).

a development. In *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899 (Utah 1981), the court stated that fees and exactions "must not require newly developed properties to bear more than their equitable share of the capital costs in relation to the benefits conferred." *Id.*, 631 P.2d at 903. This rule is essentially the same as that adopted in *Dolan* and *B.A.M. II*, and requires that a local government

> should determine the relative burdens previously borne and yet to be borne by those properties in comparison with the other properties in the municipality as a whole; the fee [or exaction] in question should not exceed the amount sufficient to equalize the relative burdens of newly developed properties.

Id.[28]

The *Banberry* decision identified several important factors relevant to a decision

> determining the relative burden already borne and yet to be borne by newly developed properties. . . . (1) the cost of existing capital facilities; (2) the manner of financing existing capital facilities . . . (3) the relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities . . . (4) the relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing capital facilities in the future; (5) the extent to which the newly developed properties are entitled to a credit because the municipality is required their developer or owners . . . to provide common facilities . . . that have been provided by the municipality and financed through general taxation or other means . . . in other parts of the municipality; (6) extraordinary costs, if any, in servicing the newly developed properties; and (7) the time-price differential inherent in fair comparisons of amounts paid at different times.

Id., 631 P.2d at 903-04. These factors were eventually codified into the Impact Fees Act, and are critical to the analysis of how "the proportionate share of the costs of public facilities are reasonably related to . . . new development activity." UTAH CODE ANN. § 11-36-201(5)(c).[29]

The factors expressed in *Banberry* are not exclusive, and "should not be read as limiting the ability of [local governments] to deal with differing circumstances." *Home Builders Association of Utah v. American Fork*¸ 1999 UT 7, ¶ 6, 973 P.2d 425, 427. The factors are the means to accomplish the goal of determining if a particular exaction is roughly proportional, both in nature and extent, to the impact of the development. This should not be interpreted as requiring the same type of involved analysis used when determining impact fees, only that the *Banberry*

[28] The court applied the same analysis to what is now known as "impact fees." *Banberry*, 631 P.2d at 905. The court noted that the required dedications could be fulfilled by payment of fees or by dedication of land. *Id.*, (*citing Call v. West Jordan*, 614 P.2d 1257, 1258 (Utah 1980)).

[29] *See also* UTAH CODE ANN. § 11-36-201(5)(a), which requires analysis of specific impacts on public facilities caused by new development, the relationship between the impacts and the development activity, and the proportionate share of costs to public facilities that are related to the development.

factors and impact fee analysis are helpful guides for a local government when balancing the costs of assuaging an impact against the burden placed upon a property owner. Other information may be equally relevant to the analysis, including studies which project the anticipated use of public facilities, etc.

D. The Exactions Required of Mr. Harper

This Opinion cannot determine if the required dedications are roughly proportional to the impacts of Mr. Harper's proposed subdivision. There is very little data which quantifies either the impact on the City's facilities or the burden upon Mr. Harper. A more individualized determination of the relative costs and burdens may or may not warrant the dedications.[30] If the exactions are justified, the City may impose them as conditions of approval. If they are not justified (or are only partially justified), the City may either drop the conditions altogether, modify them, or reimburse Mr. Harper as appropriate.[31]

It cannot be said that Mr. Harper's subdivision has zero impact on the City's services. Any development will impact public services and infrastructure. That does not mean, however, that any development, no matter how small, will warrant dedication and construction of roads or sidewalks. The City must undertake an individualized determination showing how its required exactions are roughly proportional to the impacts of the development. That determination should take into account not only the dedications are reasonably related to the needs created by the subdivision, but also the unique characteristics of the parcel.[32]

The principles and guidelines used to determine impact fees should be generally followed to determine the measure of the impacts created by Mr. Harper's subdivision. The individualized determination does need to be the same sort of extensive analysis required when impact fees are adopted, but the criteria used in the Impact Fees Act can serve as a guide. The conclusions reached by the City are entitled to deference, as long as they are based on reasonably reliable data, and are applicable to the unique characteristics of the subdivision.

The costs to Mr. Harper are the reasonable costs of the property to be dedicated and the costs of constructing the improvements. That cost should be based on accurate appraisals, which reflect the current status of the property as well as the fair market value of the property to be dedicated. Non-economic factors, such as personal attachment to the property, or personal animus toward the City, should not be considered in determining the market value.

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[30] The City is actually asking for two dedications: A portion of property for the 2200 West roadway, and a curb, gutter, and sidewalk. The two are adjacent, of course, and are closely related in purpose. However, they serve different interests, and address different impacts (*i.e.*, vehicular traffic vs. pedestrian traffic, access vs. aesthetics, and traffic flow vs. storm water management).

[31] An exaction is not an "either/or" proposition. The "rough proportionality" analysis required of *Dolan*, *B.A.M. II*, and the Utah Code does not prohibit "partial" exactions, where the impacts warrant only part of the required exaction or dedication. In that case, the local government may need to bear some of the cost of the public improvement. This Opinion does not attempt an analysis of the dedications required by the City, and therefore does not state that those dedications are or are not fully or partially justified.

[32] For example, the parcel is extremely long and narrow. Constructing a curb, gutter, and sidewalk on such a long parcel is an unusual burden not imposed on other parcels.

Conclusion

Local governments may require dedication of property or payment of fees as conditions of development approval. In order to be valid, such exactions must satisfy § 10-9a-508 of the Utah Code, which codifies the *Nollan/Dolan* rough proportionality analysis. First, an essential link must exist between each exaction and a legitimate government interest. Second, the exaction must be roughly proportionate, both in nature and extent, to the impact of a proposed development. If the exaction satisfies both of these criteria, it is valid. Otherwise, the exaction is an improper taking of private property.

The Utah Supreme Court held that "roughly proportionate" means "roughly equal." A local government must therefore demonstrate that the cost of assuaging the impact is roughly equal to the cost to comply with the exaction. Cases from other jurisdictions provide some guidance as to the kind of individualized determination necessary to justify an exaction. There must be some effort to not only study the impacts caused by development, but quantify those impacts in terms of public cost. Those cases appear to be deferential to the determinations made by government entities.

As a way to measure the impacts of new development and the allocation of costs due to that impact, local governments may follow the same guidelines used to determine impact fees. Those guidelines, have been used for several years, and are designed to accomplish the type of rough proportionality analysis anticipated by *Dolan* and *B.A.M. II*. This does not mean that a local government must strictly follow the extensive impact fee analysis each time an exaction is required of new development. However, adapting general impact fee analysis principals as a guide satisfies the requirement of an individualized determination showing that the proposed exaction is roughly proportional to the impact of the new development.

Due to a lack of data, this Opinion cannot determine whether the property dedications proposed as conditions on Mr. Harper's subdivision are valid or not. The City is obligated to present some sort of individualized determination that the dedications are roughly proportional to the impacts of the development. The City must use trustworthy data, as long as the information used can be rationally applied to make a fair and accurate measure of the impacts and costs involved. The City may use generalized studies or surveys from other cities, as long as the information is reasonably reliable and applicable to the particular situation being studied. In like manner, the costs and burden upon the property owner must be based on reliable information and current market value, and not on speculative data or non-economic factors personal to the property owner.

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:

Anna M. West City Recorder
South Jordan City
1600 West Towne Center Drive
South Jordan, UT 84095

On this _____ Day of April, 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