

# Advisory Opinion #245

Parties: D.R. Horton, Saratoga Springs City

Issued: November 16, 2021

## TOPIC CATEGORIES:

**Exactions on Development**

**Requirements Imposed on Development**

**Subdivision Plat Approval**

The Developer may only be responsible for providing that portion of the impact they impose, which in this case appears to be at most approximately 49% of the cost of the traffic signal, even though parties agree the development is the “but-for” trigger that now makes the signal necessary

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### ADVISORY OPINION

Advisory Opinion Requested By: D.R. Horton Utah  
Local Government Entity: Saratoga Springs City  
Applicant for Land Use Approval: D.R. Horton Utah  
Type of Property: Residential  
Date of this Advisory Opinion: November 16, 2021  
Opinion Authored By: Marcie M. Jones, Attorney  
Office of the Property Rights Ombudsman

### ISSUE

Does the city's requirement that a developer of a residential subdivision bear 100% of the cost to install a traffic signal on an adjacent regional roadway constitute an illegal exaction where the parties agree that the development triggers a need for the improvement but will be responsible for at most 42% of the traffic?

### SUMMARY OF ADVISORY OPINION

Government-mandated contributions of property as a condition of development approval are exactions. To be legal, an exaction must provide a solution to a problem that particular development creates, and must be roughly proportionate to the actual impact of the development. This protection is provided to property owners under both the U.S. and Utah Constitutions.

In the case at hand, the city is requiring the developer to install and bear the full cost of installing a traffic signal on an adjacent regional roadway in conjunction with the development of a residential subdivision. The parties agree that the development triggers the need for the traffic signal, however, the traffic study indicates that the neighborhood will provide only approximately 40% of its use.

The developer may only be responsible for providing for that portion of the impact they impose, which in this case appears to be at most approximately 40% of cost of the traffic signal, even though parties agree the development is the "but-for" trigger that now makes the signal necessary.

## **REVIEW**

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

A Request for an Advisory Opinion was received from Brent Bateman, Esq. representing D.R. Horton Utah on March 22, 2021. A copy of that request was sent via certified mail to Mark Christensen, City Manager, 1307 North Commerce Drive, Suite 200, Saratoga Springs, Utah, 84045 on March 23, 2021.

## **EVIDENCE**

The Ombudsman's Office reviewed the following relevant documents and information prior to completing this Advisory Opinion:

1. Brent N. Bateman, Esq. representing D.R. Horton Utah on March 22, 2021 including traffic study dated August 21, 2020 by Hales Engineering.
2. Reply submitted by Fredric Donaldson, Assistant City Attorney, Saratoga Springs City on July 23, 2021. Submission includes Exhibits A – G.
3. Reply submitted by Brent N. Bateman, Esq. on August 30, 2021.
4. Reply submitted by Fredric Donaldson on September 24, 2021.
5. Reply submitted by Brent N. Bateman, Esq. on October 21, 2021.

## **BACKGROUND**

D.R. Horton (the “Developer”) is developing Northshore, a new residential subdivision, in Saratoga Springs City (the “City”). The new subdivision is adjacent to existing residential development, vacant land expected to be developed in the future, and the intersection of Saratoga Road and Lazaret Avenue (2300 West & 500 North). Saratoga Road runs north-south and is a major regional highway connecting Saratoga Springs to Lehi and communities to the north in Salt Lake County. Lazaret Avenue runs east-west and while currently only serves the immediately adjacent neighborhood, will provide a primary traffic route for both existing, proposed, and eventual developments in the future.

Both the highly-detailed Northshore Traffic Impact Study dated April 3, 2020 (“Traffic Study”) and the Saratoga Springs Northshore Sensitivity Analysis cited by D.R. Horton (“Sensitivity Analysis”) show that the Northshore development triggers the need for a traffic signal at this intersection. The Study and Analysis demonstrate that roads are operating at acceptable levels of service in the current condition, but will require mitigation measures including the disputed traffic signal once Northshore begins to be populated. Further, the Study shows that Northshore will

account for approximately 42% of the traffic at the traffic signal when it is first installed and a smaller percentage if and when the adjacent vacant land builds out.

Saratoga Springs argues that because development of the subdivision necessitates the installation of the signal, D.R. Horton should bear the burden of its cost. To the contrary, D.R. Horton argues that Northshore traffic will account for only a portion of the signal users, so it should bear only a portion of the cost.

D.R. Horton has therefore submitted a Request for Advisory Opinion to determine whether the City's requirement that they bear 100% of the cost to install this traffic signal is a lawful exaction.

## ANALYSIS

### **I. The cost to install the traffic signal is an exaction which must satisfy the Rough Proportionality Test to be lawful**

Requiring D.R. Horton to install the off-site traffic signal as a condition of subdivision plat approval is an exaction. An exaction is defined as “a government-mandated contribution of property imposed as a condition” of development approval.<sup>1</sup> The term “exaction” may include any condition on development, including the payment of money, installation of specific improvements, donation of property, and/or providing public improvements.<sup>2</sup>

Development exactions are legal and appropriate only if they are “roughly proportionate” to the impact the development creates. For instance, the municipality may require the construction of public improvements such as traffic signals, roadways, sidewalks, flood control measures, walking trails, and sewer lines to offset the impacts on the community made by the new development. An excessive exaction requires a property owner to pay for impacts beyond its own.<sup>3</sup> A municipality may not “forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>4</sup>

Exactions implicate the Takings Clause of the U.S. Constitution and Article I Section 22 of the Utah Constitution, which both protect private property from governmental taking without just compensation.

The principles governing exactions are outlined in the U.S. Supreme Court's landmark decisions in *Nollan v. California Coastal Comm'n*<sup>5</sup> and *Dolan v. City of Tigard*<sup>6</sup> which the Utah Legislature has distilled and codified in UTAH CODE § 10-9a-508(1). The analysis has been termed the “rough proportionality test,” and provides:

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

<sup>2</sup> *Koontz v. St. Johns River Water*, 133 S. Ct. 2586 (2013).

<sup>3</sup> *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899, 903 (Utah 1981).

<sup>4</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>5</sup> *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

<sup>6</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

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.<sup>7</sup>

If a proposed exaction satisfies this test, and is otherwise legal, it is valid. If the exaction fails the test, it violates protections guaranteed by the Takings Clauses of the U.S. and Utah Constitutions and is illegal.<sup>8</sup>

Accordingly, the City’s requirement that D.R. Horton install a traffic signal as a condition of development approval is an exaction that must satisfy the rough proportionality test. The City may impose the exaction “so long as there is a ‘nexus’ [or link] and ‘rough proportionality’ between the property that the government demands and the social costs of the applicant’s proposal.”<sup>9</sup> The City’s exaction must solve a problem that the proposed D.R. Horton development creates. Further, the cost to D.R. Horton must be proportionate to the impacts the development imposes upon the community.

The City has the burden to show the proposed exactions are proportionate, or equivalent, to the development’s impacts and therefore valid. Note that “[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>10</sup>

*A. Essential link exists between traffic signal requirement and legitimate governmental interest*

The first part of UTAH CODE § 10-9a-508(1) requires an essential link between a legitimate governmental interest and the exaction imposed. Saratoga Spring’s legitimate government interest in this case is effective traffic control measures which are adequate to meet the needs of the community. Cities have broad discretion to enact regulations intended to promote the health, safety, and welfare of the public. For instance:

The municipal legislative body may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by [applicable state law], and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, convenience of the city and its inhabitants, and for the protection of property in the city.<sup>11</sup>

This section grants two distinct types of authority: (1) Power to implement and carry out mandates specifically granted by the Utah Legislature, and (2) The power to act for the general welfare of

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<sup>7</sup> UTAH CODE § 10-9a-508(1) (emphasis added).

<sup>8</sup> *Call v. West Jordan*, 614 P.2d 1257, 1259 (Utah 1980).

<sup>9</sup> *Koontz*, 133 S.Ct. 2586, 2595 (2013).

<sup>10</sup> *See Dolan*, 512 U.S. at 391-92.

<sup>11</sup> UTAH CODE § 10-8-84(1).

the public.<sup>12</sup> Requiring safe and effective traffic control measures is therefore clearly within a city's authority granted under this section.

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

*B. City may only require D.R. Horton to pay proportional share of traffic signal*

The second aspect of the test established at UTAH CODE § 10-9a-508(1) requires the exaction be roughly proportionate in that “each exaction is roughly proportionate, both in *nature and extent*, to the impact of the proposed development.”<sup>13</sup> Utah courts have adopted the method of looking at the exaction and impact in terms of a solution and problem, respectively.<sup>14</sup> The impact is the problem, or the burden *that the community will bear* because of the development. If the exaction addresses the problem, the nature component is satisfied.<sup>15</sup>

Both parties agree that development of the subdivision triggers the need for this traffic signal, therefore the *nature* aspect of the test has been satisfied.

The *extent* aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost.<sup>16</sup> The court explained that “roughly proportional” means “roughly equivalent.”<sup>17</sup> Thus, in order to be valid, the cost of an exaction must be roughly equivalent to the cost that a local government would incur to mitigate impacts attributable to development.

The Utah Supreme Court has given us an illustration of the proper *extent* analysis. In *B.A.M. Development, LLC v. Salt Lake County*<sup>18</sup> (as the second in a series of three cases, “B.A.M. II”), the Court held that requiring the dedication of 13 feet of right of way for the expansion of an adjacent roadway as a condition of approval of a fifteen-acre residential subdivision was a legal exaction. In that case, the value of the dedicated property was estimated at \$83,997, while road-widening projects in the vicinity intended to alleviate generalized increased traffic cost an estimated \$6,748,700. Traffic engineers further estimated that increased traffic from the planned subdivision represented 5% of the total traffic increase. Simple algebra concludes that the impact of the proposed development was therefore 5% of the total \$6,748,700 in road improvement projects, which is \$337,500. As the developer's total cost for the additional 13 feet dedication was \$83,997, the Court concluded that the exaction was less than the impact and did not violate the extent aspect of the rough-proportionality standard.

In most cases, it is difficult or impossible for a local government to provide the cost analysis necessary for the *extent* aspect of the rough proportionality analysis in the way it was provided for in *B.A.M. II*.<sup>19</sup> Accordingly, in this case, the City does not provide an individualized financial

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<sup>12</sup> See *State v. Hutchinson*, 624 P.2d 1116, 1122 (Utah 1980) (evaluating language nearly identical to § 10-8-84).

<sup>13</sup> UTAH CODE § 10-9a-508(1).

<sup>14</sup> *BAM II*, 2008 UT 74 at ¶10.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at ¶11.

<sup>17</sup> *Id.* at ¶8.

<sup>18</sup> *Id.*

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

determination, rather they make the logical argument that these roads were operating at acceptable levels of service before the D.R. Horton project, but will require mitigation measures including the traffic signal once construction is underway. The City logically argues that because the Northshore development is 100% responsible for triggering the need for the signal, D.R. Horton should bear 100% of the burden of its cost. Framed this way, it appears that the impact may be equivalent to the exaction.

The City, however, misframes the issue. The Traffic Study relied on for the project estimates that D.R. Horton will only account for 42% of traffic using the traffic signal in question. As the adjacent vacant land is built out, the percentage will go lower. The City's solution does not satisfy the extent aspect of the rough proportionality test because it requires the developer to solve the City's problem caused not only by traffic generated from its development proposal, but also by the other 58% of traffic flowing through the proposed signal. While the addition of the Northshore development is the triggering event that finally exceeds the threshold to make a signal on the regional corridor necessary at this time, the City may only require D.R. Horton to pay for at most 42% of the cost of its installation, in proportion to its impact. The other 58% of the traffic necessitating the signal is a burden caused by that 58%. The City may offset that impact through prior exactions, prior or future impact fees, and other measures intended to capture the proportionate contribution of those causing their share of that impact on public improvements that serve more than one development.<sup>20</sup>

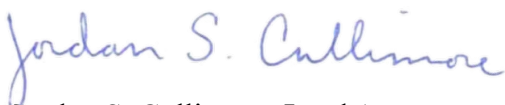
It follows that requiring D.R. Horton to bear 100% of the cost to install the traffic signal in question requires the developer to offset impacts beyond its own. Therefore, the requirement to install and bear the full cost of the traffic signal cannot constitute a valid exaction.

## CONCLUSION

A government-mandated contribution of property as a condition of development approval is an exaction. To be legal, an exaction must provide a solution to a problem that particular development creates, and must be roughly proportionate to the actual impact of the development. This protection is provided to property owners under both the U.S. and Utah Constitutions.

In the case at hand, the city is requiring the developer to install and bear the cost of a traffic signal on an adjacent regional roadway in conjunction with the development of a residential subdivision. The parties agree that the development triggers the need for the traffic signal, however, the traffic study indicates that the neighborhood will provide only approximately 40% of its use.

The City may only make the developer responsible for providing for that portion of the impact they impose, which in this case appears to be approximately 40% of the traffic moving through the signal.



Jordan S. Cullimore, Lead Attorney  
Office of the Property Rights Ombudsman

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<sup>20</sup> Often referred to as "system improvements".

**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.**

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

**The Advisory Opinion process is an alternative dispute resolution process. Advisory Opinions are intended to assist parties to resolve disputes and avoid litigation. All of the statutory procedures in place for Advisory Opinions, as well as the internal policies of the Office of the Property Rights Ombudsman, are designed to maximize the opportunity to resolve disputes in a friendly and mutually beneficial manner. The Advisory Opinion attorney fees provisions, found in § 13-43-206, are also designed to encourage dispute resolution. By statute they are awarded in very narrow circumstances, and even if those circumstances are met, the judge maintains discretion regarding whether to award them.**