Advisory Opinion #134

Parties: Ed Green and Layton City

Issued: November 15, 2013

TOPIC CATEGORIES:

D: Exactions on Development
J: Requirements Imposed Upon Development

A city and a developer are bound to comply with the terms of a valid annexation agreement, even if the required construction is more than the developer's proportionate share of the needed costs for the construction.

An exaction may be imposed by generally-applicable ordinance. A valid exaction must have a close connection to a public burden directly attributable to the impact caused by a development. Promoting the legitimate public interest in beautifying a roadway is not sufficiently connected to the impact of a new development. A required easement intended for roadway beautification does not "solve" a "problem" caused by new development, and is therefore not a valid exaction.

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ADVISORY OPINION

Advisory Opinion Requested by:	Ed Green
Local Government Entity:	Layton City
Applicant for the Land Use Approval:	Green & Green, LC
Type of Property:	Residential Subdivision
Date of this Advisory Opinion:	November 15, 2013
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

May a local government require improvement and dedication of a landscaping easement to improve the appearance of public roadways?

Summary of Advisory Opinion

The Developer remains obligated under the Annexation Agreement to dedicate and construct a portion of the road. Although the Developer believes this undertaking represents more than the Developer's proportionate share of the expense for the road, the Annexation Agreement appears enforceable and cannot be undone. The Developer and the City are both obligated to perform according to the terms of the Agreement.

The City's requirement that the Developer dedicate a Landscaping Easement beyond the road is an exaction, even though imposed by ordinance, and must satisfy rough proportionality analysis. A valid exaction must have a close tie to a public burden directly attributable to the impact of a development. Promoting a public objective, no matter how desirable, that is not directly linked to the development, cannot be a valid exaction. The Landscaping Easement is a laudable public objective, but does not solve a problem that the development creates. Thus, the requirement that an easement be landscaped and dedicated cannot be a valid exaction.

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 Ed Green on July 15, 2013. A copy of that request was sent via certified mail to Thieda Wellman, Layton City Recorder, at 437 North Wasatch Drive, Layton, Utah 84041. The return information indicates that the City received the Request on July 17, 2013.

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, with attachments, submitted by Ed Green, received by the Office of the Property Rights Ombudsman, July 15, 2013.
2. Response submitted on behalf of Layton City by Gary Crane, Layton City Attorney, received July 31, 2013.
3. Reply submitted by Mr. Green, received August 21, 2013.
4. Response from Layton City, received September 25, 2013.

Background

Green & Green, LC, is the owner and developer of approximately 60 acres located near 800 South and 1200 West in Layton. In 2004, Green & Green petitioned to have the property annexed into the City, and an Annexation Agreement was signed in October of 2004.[1] In that Agreement, the developer committed to complete various improvements along with a residential subdivision, including road, water, sewer, and storm drain facilities. Specifically, the Agreement required Green & Green to dedicate and construct a portion of 750 South as an arterial road.[2] The total width of the right-of-way was specified to be 84 feet wide, consisting of a 60-foot

[1] The document was entitled "Agreement for the Annexation and Development of Land Between Layton City and Green & Green, L.C."

[2] 750 South is also designated "Layton Parkway Boulevard." As an arterial road, it is designed to be the primary traffic route through the nearby area, which is primarily residential. The road connects to I-15, and the City plans to eventually connect it to a new highway proposed in western Davis County.

roadway, with 5-foot sidewalks, 4 ½-foot park strips, and 2 ½-foot wide gutters on either side of the roadway.[3]

Green & Green proceeded to develop the subdivision, including the roadway.[4] They object to paying the entire cost of 750 South, because as an arterial road it is intended to handle traffic from throughout the City, and not just the traffic from the subdivision. They also feel that paying transportation impact fees on top of the road construction costs is not fair or proportionate to the impact created by the subdivision. The City notes that roads such as 750 South were not included as part of the City's transportation facilities, and so were not included in its impact fee calculation. The City has indicated a willingness to share in the costs of 750 South, but there is no formal agreement in place.[5]

Green & Green also objects to the City's requirement that a 5-foot wide landscape easement be dedicated on each lot adjoining 750 South, between the sidewalk and the rear fence of each lot.[6] This "Landscaped Easement" would be maintained by a homeowner's association, and would be outside the fenced area of each lot, but the land beneath the easement would be owned by each individual lot owner. Moreover, the subdivision plats indicate utility easements on each lot, outside the 5-foot landscape easement.[7]

The City explains that the Landscape Easement is required by ordinance, and serves as "a buffer to enhance the arterial streetscape and mitigate the impacts of arterial streets adjacent to the rear or side of a lot." LAYTON CITY MUNICIPAL CODE, § 19.16.090(2). The City also notes that the landscaped area provides architectural relief between a solid fence or wall and the street, reduces graffiti, and provides potential storage space for snow removed from sidewalks.[8] The public would have access to and use of the easement area, even though the landscaping would be maintained by a Homeowners Association.

Green & Green feel that this is an improper exaction of their property by the City, and imposes an unfair burden on them as developers, and the owners of the lots burdened by the Easement, because the City required dedication of the Landscape Easement as a condition of subdivision

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[3] The total width of the sidewalk, park strip, and gutter amounts to 12 feet. Since they would be installed on either side of the roadway, the total width is 24 feet, which, when added to the 60 foot road width, results in an 84-foot right-of-way.

[4] The subdivision was developed in phases over several years.

[5] Ed Green, of Green & Green, acknowledges that the City has discussed sharing the road construction costs. The City states that it will revise its transportation impact fee analysis to include arterial roads in the future.

[6] The landscaping requirement moves the rear fence five feet into each lot. The subdivision plats include a dedication of "certain strips designated . . . as open space/park and public utility and drainage easements . . .." *See* Subdivision plats for Robert's Farm No. 6 and Robert's Farm No. 8 (Public Dedication). The easement would encumber each lot abutting 750 South, but the land would remain in the lot owner's name, and would be included as part of the lot area. None of the lots have frontage on 750 South, so the easement will encumber the rear yards.

[7] Utility easements are indicated along all boundaries of each lot. For the lots that adjoin 750 South, the utility easements are placed along the interior boundary of the City's landscape easement, further encumbering the lots. Utility easements are common, and allow utilities to be installed to serve the properties, without interfering with buildings.

[8] Letter from Gary Crane, Layton City Attorney, received by the Office of the Property Rights Ombudsman, July 31, 2013, p. 3.

approval. The usable size of each lot that abuts 750 South has been reduced, and the public may use the portion dedicated to the City.[9] The developers claim that the additional landscaping increases the cost of the development by approximately $50,000.00.[10] The City argues that the dedication is not an exaction, because it is required by ordinance, thus exempting the requirement from "rough proportionality" analysis normally required of exactions. The City also claims that the property owners would still own the land encumbered by the landscape easement, and that the owners would still have use of that property.[11] The City stated that the landscape easement is a validly imposed condition analogous to setback requirements to ensure development in "an orderly, functional, and aesthetically pleasing manner."[12]

Analysis

I. The Road Must be Dedicated and Constructed by the Developer in Accordance with the Annexation Agreement.

The 2004 Annexation Agreement obligates the Developer to dedicate to the City one half (42 feet) of an 84 foot right of way for the 750 South Corridor, and to construct the road: "The street right-of-way dedication for 42 feet . . . along with construction of this street, will be required to be constructed by the Owner." [13] The Annexation Agreement also contains some provisions for payback to the Developer of costs of constructing the street beyond those costs required to directly service the Developer.

The Annexation Agreement appears to duly bind both parties. Green & Green objects to various aspects of the project, including the requirement to dedicate and construct this road for primarily public use, the uncertainty of the payback, inability to front his development on the road, paying road impact fees,[14] etc. Indeed, many of the Developer's objections would require further analysis as potentially illegal exactions if required by the City outside of the Annexation Agreement. However, the Annexation Agreement appears enforceable – entered into voluntarily,[15] duly executed, with good and valuable consideration exchanged. There is no basis

[9] The developers also argue that the easement requirement increases the City's right-of-way by 10 feet (five feet on either side), over and above the 84-foot roadway agreed upon in the annexation agreement. The easement would be for landscaping and would not be used as a walking trail or have other recreational amenities.

[10] This is evidently the cost of the landscaping, and does not reflect the value of the easement itself.

[11] The extent of the owner's use (exclusive of the public's) was not explained.

[12] Letter from Gary Crane, *supra* note 8, at 4.

[13] "Agreement for the Annexation and Development of Land Between Layton City and Green & Green, L.C." (October 25, 2004) at Art. IV, ¶ 5.

[14] Green & Green were charged transportation impact fees in addition to their costs to build 750 South. They suggested that the City's reimbursement obligation could be met through impact fee credits, or payments from impact fee funds. The City explained that arterial roads, such as 750 South, were not included in its capital facilities plan. Because of this, the City could not use transportation impact fees to fund arterial streets. *See* UTAH CODE ANN. § 11-36a-602 (Impact fees may only be expended on public facilities identified in a capital facilities plan). If this is indeed true, the City cannot use impact fee funds to reimburse Green & Green.

[15] The developers question whether the Annexation Agreement was voluntarily, based upon their inability to develop without annexing and inability to meet certain obligations if they did not develop. Although there is no doubt that these considerations highly motivated Green & Green to enter into the Annexation Agreement, they are not indicative of a truly involuntary agreement.

to disturb that agreement. Accordingly, the Developer must dedicate and construct its portion of the right-of-way in accordance with the Agreement, and the City must meet its obligation for reimbursement in accordance with the Agreement. Developer's objections concerning construction of the road presenting an unfair burden upon the Developer does not excuse the Developer's obligation to perform its obligations under the Annexation Agreement.

II. The Landscape Easement is An Exaction, Which Must Satisfy Rough Proportionality Analysis.

A. Rough Proportionality Analysis.

Local governments may require exactions in exchange for development approval, as long as each exaction satisfies the rough proportionality analysis expressed in § 10-9a-508 of the Utah Code. Exactions are a type of property taking, and the rough proportionality test "protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586, 2594 (2013) (citations omitted).[16] The Takings Clause, found in the Fifth Amendment of the U.S. Constitution, "provides that private property shall not 'be taken for public use, without just compensation.'" *Lingle*, 544 U.S. at 536 (*quoting* U.S. CONST. amend. V).[17] The Supreme Court has emphasized that the Takings Clause "was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

In 2005, the Utah Legislature enacted § 10-9a-508 of the Utah Code, adopting the "rough proportionality" test which governs how cities impose exactions on new development:

> (1) A municipality may impose an exaction or exactions on development proposed in a land use application provided that:
> (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 ANN. § 10-9a-508(1).[18] The Utah Supreme Court noted that the language of this statute was borrowed directly from the U.S. Supreme Court analyses in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S 374 (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

[16] "[A] unit of government may not condition the approval of a land-use permit on the owner's relinquishment of portion of his property unless there is a 'nexus' and 'rough proportionality' between government's demand and the effects of the proposed land use." *Koontz*, 133 S.Ct. at 2591.

[17] The Takings Clause of the Federal Constitution is applicable to state actions (including local subdivisions of states) by the language of the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). The Utah Constitution provides similar protection: "Private property shall not be taken or damaged for public use, without just compensation." UTAH CONST., art I, § 22.

[18] There is a corresponding statute applicable to counties found at § 17-27a-509 of the Utah Code.

federal constitution's Takings Clause. This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis was codified in § 10-9a-508.

The first inquiry in the analysis is determining whether there is an essential link between a legitimate governmental interest and the required exaction. This represents the "*Nollan*" part of the analysis, and is perhaps best understood by reviewing the exaction at issue in that case. The Nollans owned a beachfront lot in Ventura County, California. The lot extended to the high-water mark on the beach. They sought approval to tear down a small bungalow on the lot, and build a new, larger home. The California Coastal Commission, which had jurisdiction over coastal areas, imposed a condition on its approval that the Nollans dedicate a public easement across the rear of their lot. The Commission's justification for the easement was that the new home would block the view of the ocean (from the front of the lot), "prevent[ing] the public psychologically from realizing a stretch of coastline exists nearby that they have every right to visit." *Nollan*, 483 U.S. at 828-29 (internal quotations and alterations omitted). The Commission felt that the new home would "burden the public's ability to traverse to and along the shorefront." *Id.*, 483 U.S. at 829.

The Supreme Court criticized the Commission's requirement as an "out-and-out plan of extortion." *Id.*, 483 U.S. at 837. "The Commission could not explain how requiring the Nollans to allow the public access to the *back* of their property would help people in *front* see past the Nollan's bigger home to the beach beyond, or how allowing more access to the beach would reduce congestion." *Town of Flower Mound v. Stafford Estates, LTD.*, 135 S.W.3d 620, 632 (Tex. 2004) (emphasis in original).[19] In other words, there was no essential link between the required access easement across the rear of the lot and the government's interest in guaranteeing the public's view from the front of the lot.

The other half of the test was established by the *Dolan* decision, which reviewed two required dedications: An easement along a creek for flood control, and property for bike path along a roadway. The Supreme Court acknowledged that "[t]he connections between a greenway dedication and flood control, and between a bicycle path and traffic control, were 'obvious.'" *Flower Mound*, 635 S.W.3d at 633 (*discussing Dolan*, 512 U.S. at 387-88). Thus, the requirements satisfied *Nollan*'s "essential link" test. However, the Court noted that the analysis also required consideration of "whether the degree of the exactions demanded by the city's permit conditions [bore] the required relationship to the projected impact of petitioner's proposed development." *Dolan*, 512 U.S. at 388. The Court concluded that a 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.*, 512 U.S. at 391. The term "rough proportionality" was used to describe the acceptable relationship between the exaction and the development's impact.[20]

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[19] In *Flower Mound*, the Texas Supreme Court reviewed the facts in both *Nollan* and *Dolan*, as part of their review of an exaction imposed by a local ordinance.

[20] The Court adopted the "reasonable relationship" approach used by the Utah Supreme Court in *Call v. West Jordan*, 606 P.2d 217 (Utah 1979) (A required dedication "should have some reasonable relationship to the needs created by the subdivision."); *see Dolan*, 512 U.S. at 390-91. However, the U.S. Supreme Court chose the term "rough proportionality" to designate the analysis.

The Utah Supreme Court further developed "rough proportionality" analysis in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74, 196 P.3d 601 ("*BAM II*"), which was the second appeal stemming from the same development project at issue in the earlier decision. *BAM II* broke the *Dolan* rough proportionality relationship into "two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent." *BAM 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 explained 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.[21]

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 74, ¶ 11, 196 P.3d at 604. The court continued by holding that "roughly proportional" means "roughly equivalent." "The *Dolan* analysis, properly applied, asks whether the imposition on the community of a proposed development is roughly equal to the cost being exacted to offset it." *Id.*, 2008 UT 74, ¶ 14, 196 P.3d at 604. 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 the new development.

In the final *BAM* decision, the court elaborated on the how the costs to the local government should be determined. "A proper rough-proportionality analysis must . . . consider the exaction's purpose to define the scope of the relevant governmental costs." *B.A.M. Development, LLC v. Salt Lake County*, 2012 UT 26, ¶ 27, 282 P.3d 41, 47 ("*BAM III*"). This implies that establishing the government's cost to address the impact is more complicated than simply the cost of the required project. Furthermore, the burden on the development must reflect the fair market value of the property being exacted. *Id.*, 2012 UT 26, ¶ 20, 232 P.3d at 45-46.[22]

[21] *See also B.A.M. Development, LLC v. Salt Lake County*, 2012 UT 26, ¶ 26, 282 P.3d 41, 47 ("*BAM III*") ("[N]ot only must the *nature* of an exaction relate to government purpose or need (in that the exaction must alleviate the burdens imposed on infrastructure by the development), but the *extent* of the exaction must also be roughly proportional to the government's need for infrastructure improvements created by the development.") (emphasis in original).

[22] *See also BAM II*, 2008 UT 74, ¶ 11, 196 P.3d at 604. It stands to reason that the costs would also include severance damages to property remaining after a required exaction is dedicated.

B. The Landscape Easement is an Exaction.

The Landscape Easement is an exaction, which must satisfy rough proportionality analysis in order to be valid. "A development exaction is a government-mandated contribution of property imposed as a condition of approving a developer's project." *B.A.M. Development, LLC v. Salt Lake County*, 2012 UT 26, ¶ 16, 282 P.3d 41, 45. "Development exactions may take the form of: (1) mandatory dedications of land . . . (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees and (4) impact fees" *Salt Lake County v. Board of Education*, 808 P.2d 1056, 1058 (Utah 1991)(citations omitted).[23]

The City's Landscaping Easement is a government mandated contribution of property imposed as a condition if approval. The City by ordinance required Green & Green to develop and dedicate the Landscape Easement for the purposes of beautifying an arterial roadway. The easement is a property interest, and the City required it as a condition of approving the subdivision. The easement area will be accessible by the public, and its use is intended to benefit the public.[24] Even though the underlying property will be privately owned, the individual lot owners may not use that property for anything other than landscaping. Lot owners must relinquish control of the Landscape Easement, and may not exclude others from entering and using that portion of the property, depriving the owners of "perhaps the most fundamental of all property interests" *Lingle v. Chevron, USA*, 544 U.S. 528, 539 (2005). Thus the Landscaping easement is a dedication to the public and an exaction imposed by the City. In order to be valid, it must satisfy "rough proportionality" analysis.

The Landscape Easement must satisfy "rough proportionality" analysis regardless of whether it was imposed by a generally applicable ordinance or as part of an individualized administrative approval. The City argues that the "rough proportionality' analysis established by the U.S. Supreme Court does not apply to exactions mandated by legislation, but only to those imposed "administratively" or as part of the approval process. However, the Utah Supreme Court has concluded that exactions imposed by ordinance should be treated no differently than those imposed administratively.

The court was faced with that very question in the first *BAM* decision.[25] In the first installment of that epic series of cases, the exaction in question was required by a local ordinance. After it discussed the *Nollan/Dolan* analysis for exaction, the court recognized that a debate had arisen over whether the analysis applied to exactions imposed by legislative act. *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 42, 128 P.3d 1161, 1170 ("*BAM I*"). The court also observed that while the *BAM I* appeal was pending, the Utah Legislature adopted the

[23] *See also Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013) (Dedication of on-site easement and monetary contribution for off-site improvements determined to be exactions).
[24] It is recognized that the public will probably not be directly occupying the Landscape Easement for recreation or other similar uses, but the City states that the area may be used for snow storage, and is justified to enhance the appearance of the arterial road.
[25] *B.A.M. Development v. Salt Lake County*, 2006 UT 2, 128 P.3d 1161 ("*BAM I*").

Nollan/Dolan rough proportionality analysis into the Utah Code, and that the test was applicable to all exactions.[26] The court concluded that it should apply the same test to the *BAM* exaction:

> Knowing as we do that the legislature intended to apply the rough proportionality test to all exactions, irrespective of their source, commencing on the effective date of *section 17-27a-507*, we are hard pressed to find a reason to assume that the legislative view of the proper scope of the rough proportionality test would have been different before *section 17-27a-507* went into effect.

BAM I, 2006 UT 2, ¶ 46, 128 P.3d at 1170 (emphasis in original). Since the City's Landscape Easement requirement was imposed well after the rough proportionality test was codified by the Utah Legislature, there is no question that the analysis applies.[27]

The property owners' loss of control and inability to exclude others from the Landscape Easement distinguishes the Landscape Easement from setbacks and utility easements commonly imposed by ordinance on building lots.[28] Property owners still enjoy a broad range of uses in setbacks and utility easements, including patios, landscaping, gardens, and even some structures like sheds.[29] More importantly, a property owner may exclude others from a setback area, and may exert a great deal of control over access to a utility easement. Dedication of property to the public is a hallmark of exactions. A setback requirement does not dedicate property for the use by the public. Thus, a distinction exists between a requirement to dedicate an easement to the public for landscaping and a setback requirement.

C. Applying Rough Proportionality Analysis to The Landscape Easement

The Landscape Easement is an exaction, and must satisfy rough proportionality analysis to be valid. The City justifies the easement on aesthetic grounds, arguing that it "provides architectural relief" and a "buffer between the sidewalk and the fence."[30] Promoting community aesthetics is

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[26] *BAM I*, 2006 UT 2, ¶ 46, 128 P.3d at 1170. In 2005, the rough proportionality test was codified at sections 10-9a-508 and 17-27a-507 of the Utah Code.

[27] The City argues that because it was imposed by a legislative act, the Landscape Easement requirement should be subject to general takings analysis, which has more lenient scrutiny. As support, the City cites the U.S. Supreme Court's decision in *Lingle v. Chevron, USA*, 544 U.S. 528 (2005). However, the main thrust of the *Lingle* decision was the Court's abandonment of the theory that a regulation constitutes a taking if it does not "substantially advance" a legitimate government interest. *See Lingle*, 544 U.S. at 544-45. The Court discussed the impact its decision had on the *Nollan* and *Dolan* cases and held that abandoning the "substantially advances" theory "should not be read to disturb these precedents." *Lingle*, 544 U.S. at 548. There is thus no reason to conclude that the *Lingle* decision excuses a legislatively imposed exaction from rough proportionality analysis. In addition, even if the more lenient general takings analysis would be acceptable under the Federal Takings Clause, the Utah Code's requirement that all exactions satisfy rough proportionality analysis also safeguards protections guaranteed to property owners by the Utah Constitution. *See* UTAH CONST. art. I, § 22; *see also BAM I*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. ("The Utah Constitution reinforces the protection of private property against uncompensated governmental takings . . ..").

[28] Based on the subdivision plat, utility easements are not included in the Landscape Easement. The landscaped portion may be included in a required setback, but only if the easement is at least 10 feet wide. LAYTON CITY MUNICIPAL CODE, § 19.16.090(2)(c).

[29] Generally, homes cannot be built in setbacks or utility easements, but other smaller structures are sometimes allowed. If access to an underground utility is needed, the homeowner may be responsible to remove the structure.

[30] Gary Crane Letter, *supra* note 8, at 3.

a valid government interest. "The purposes of [Title 10, chapter 9a] are to provide for the health, safety, and welfare, and promote the prosperity, improve the morals, peace and good order, comfort, convenience, *and aesthetics* of each municipality . . .." UTAH CODE ANN. § 10-9a-102(1)(emphasis added).[31] Moreover, there is an essential link between the City's legitimate interest in promoting the aesthetics of its roadways and its requirement that the developer dedicate a landscaped strip along an arterial roadway. The exaction therefore satisfies the first part of the rough proportionality test.

Turning to the next aspect, it does not appear that the Landscape Easement is a "solution" to a "problem" caused Green & Green's subdivision. The City hopes to improve the aesthetics and appearance of the community, which is a worthy goal.[32] However, Green & Green's subdivision did not cause the aesthetic "problem" the City hopes to address. The goal of improving the appearance of arterial roads, and the proposed means to accomplish that goal exist with or without the Green & Green residential development. In other words, while the City's objective to improve the appearance of its streets is laudable, it is not necessitated because a residential subdivision is being developed. The requirement is not tied to the size or nature of the subdivision—that is, its impact—but is imposed simply because of its location.[33] The only reason this subdivision is required to dedicate the Landscape Easement is because some of its lots happen to border on an arterial road. If the same subdivision were built only one block away, the Easement would not be required. Moreover, if the subdivision had twice as many homes, but still had the same number of lots bordering the arterial road, the Landscape Easement would be unchanged. The Green & Green subdivision thus does not create a burden which the community will bear. *See BAM II*, 2008 UT 74, ¶ 10, 196 P.3d at 603-04. The Landscape Easement is not roughly proportionate in nature to the impact attributable to the development, and so cannot be a valid exaction.[34]

This conclusion is consistent with the Utah Supreme Court's analysis in *BAM III*, which requires a close connection between the exaction and an impact on public infrastructure: "[T]he exaction must alleviate the burdens imposed on infrastructure by the development." *BAM III*, 2012 UT 26, ¶ 26, 282 P.3d at 47. The subdivision did not burden the City's aesthetics, because there is no such thing as an "aesthetic infrastructure."[35] Instead, the City's goal to improve streetscapes led

[31] Title 10, chapter 9a is the Municipal Land Use, Development, and Management Act (MLUDMA).

[32] In the strictest sense, any development changes the appearance of a community, and thus "impacts" aesthetics. However, aesthetics is a fluid term, which is difficult to define. It is also difficult to measure a development's impact on aesthetics, because the concept is highly subjective. What is appropriate for one City would not work in another, and what is currently desired and promoted may change with the whims of fashion or with the next election.

[33] A five-foot landscaped easement is required for any residential subdivision bordering on an arterial street. LAYTON CITY MUNICIPAL CODE, § 19.16.090(2)(b).

[34] Because this Opinion concludes that the Landscape Easement is not proportionate in nature, it is not necessary to compare the developer's expense to comply with the Landscape Easement with the City's cost to assuage the subdivision's impact.

[35] To illustrate, if 750 South were already developed with landscaping along either side of the roadway, the Green & Green subdivision would not change the required level of landscaping. The "infrastructure" (for lack of a better word) would not be impacted. Instead, the subdivision would probably be laid out alongside the landscaped area, with no dedication for a landscape easement. Since the subdivision would not create the need to expand a landscape "infrastructure," it follows that a requirement that it build one would be an improper exaction. A proper exaction

it to require the Easement. In pursuit of its goal to improve aesthetics, the City could have required setbacks, landscaping on private yards and park strips, and even design elements on buildings.[36] In addition, the City could acquire easements or rights-of-way and install landscaping along arterial roads as public improvements. It cannot require the developer alone to bear the cost of this improvement, because, in all fairness and justice, it ought to be borne by the public. *See Armstrong*, 364 U.S. at 49.

Conclusion

"We are in danger of forgetting," warned Justice Oliver Wendell Holmes, "that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The City's desire to improve the appearance of its streets is not enough to warrant its requirement that Green & Green improve and dedicate the Landscape Easement without payment. Local governments may require exactions of developers, but only if a nexus and rough proportionality exist between government's demand and the effects of the proposed land use. Exactions imposed through a legislative act are subject to the same analysis as exactions imposed through an administrative decision.

A valid exaction must be roughly proportionate in nature to the impact attributed to new development. The Utah Supreme Court has interpreted this requirement to mean that the exaction should address or alleviate a burden the community will bear because of the development. Promoting a community goal, such as improving aesthetics, is not a burden created by development. Instead, it is an aspiration that exists whether there is new development or not. Aesthetic improvement, while a laudable goal, is simply not tied to a burden caused by new development, and so a required dedication could not satisfy rough proportionality analysis. The Landscape Easement requirement is therefore not a valid exaction.

The Developer, however, is obligated by the Annexation Agreement to dedicate and construct the road. The Developer must do so under the terms of the Agreement.

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

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must be roughly proportionate to the impact imposed on public infrastructure, not the quality of the service being provided.

That is why this conclusion would not apply to an exaction for a park, even though parks also contribute to a community's aesthetics. A park is a service with a defined infrastructure provided by a local government. The service level for parks is not measured in aesthetic values, but is usually measured in terms of area—infrastructure—such as the number of acres per 1,000 people. In like manner, the service level for roads is not measured in how smoothly traffic flows, but in terms of infrastructure, or miles of roadways; and the service level of a water system is not measured by the quality of the water, but by the wells, treatment facilities, and pipes that comprise the system.

[36] As long as such requirements are reasonable, and are intended to promote the health, safety, and welfare of the City, they are probably valid.

NOTE:

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

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

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

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

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

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:

Thieda Wellman
City Recorder
City of Layton
437 North Wasatch Drive
Layton, UT 84041

On this _____ Day of November, 2013, I caused the attached Advisory Opinion to be delivered to the governmental office by delivering the same to the United States Postal Service, postage prepaid, certified mail, return receipt requested, and addressed to the person shown above.

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Office of the Property Rights Ombudsman