

Advisory Opinion #237

Parties: South Valley Large Animal Clinic, Saratoga Springs
Issued: March 9, 2021

TOPIC CATEGORIES:

Exactions on Development

An ordinance mandating that a property owner bury all powerlines in order to obtain a building permit serves a legitimate public purpose and is an enforceable land use regulation. However, this requirement is also an exaction and must satisfy the “rough proportionality test” to withstand an unconstitutional takings challenge as applied to a particular development. In this case, the City required the developer to bury a pre-existing distribution powerline serving the surrounding area, including extensive work on adjacent properties, in connection with the construction of a veterinary clinic.

The City’s requirement to bury powerlines, as applied in this case, requires the developer to pay nearly \$90,000 for off-site improvements alone, in addition to the \$350,000 in on-site costs. This exaction appears unconstitutionally excessive given the limited impact the addition of the clinic to the electric grid will pose, and that the upgrades are to pre-existing lines serving the larger community.

DISCLAIMER

The Office of the Property Rights Ombudsman makes every effort to ensure that the legal analysis of each Advisory Opinion is based on a correct application of statutes and cases in existence when the Opinion was prepared. Over time, however, the analysis of an Advisory Opinion may be altered because of statutory changes or new interpretations issued by appellate courts. Readers should be advised that Advisory Opinions provide general guidance and information on legal protections afforded to private property, but an Opinion should not be considered legal advice. Specific questions should be directed to an attorney to be analyzed according to current laws.



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ADVISORY OPINION

Advisory Opinion Requested By:	South Valley Large Animal Clinic
Local Government Entity:	City of Saratoga Springs
Applicant for Land Use Approval:	Subdivision, building permit for veterinary clinic
Type of Property:	Agricultural
Date of this Advisory Opinion:	March 9, 2021
Opinion Authored By:	Marcie M. Jones, Attorney Office of the Property Rights Ombudsman

ISSUE

Does the City's requirement to bury power lines in conjunction with the Clinic's development proposal constitute an excessive and unconstitutional exaction of the developer's property?

SUMMARY OF ADVISORY OPINION

An ordinance mandating that a property owner bury all powerlines in order to obtain a building permit serves a legitimate public purpose and is an enforceable land use regulation. However, this requirement is also an exaction and must satisfy the "rough proportionality test" to withstand an unconstitutional takings challenge as applied to a particular development. In this case, the City required the developer to bury a pre-existing distribution powerline serving the surrounding area, including extensive work on adjacent properties, in connection with the construction of a veterinary clinic.

The city's requirement to bury powerlines, as applied in this case, requires the developer to pay nearly \$90,000 for off-site improvements alone, in addition to the \$350,000 in on-site costs. This exaction appears unconstitutionally excessive given the limited impact the addition of the clinic to the electric grid will pose, and that the upgrades are to pre-existing lines serving the larger community.

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 Mr. Brent Bateman of Durham Jones & Pinegar representing South Valley Large Animal Clinic on May 27, 2020. A copy of that request was mailed to Mark Christensen, City Manager, City of Saratoga Springs, 1307 N. Commerce Drive, Suite 200, Saratoga Springs, Utah 84045.

EVIDENCE

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

1. Request for an Advisory Opinion was received from Mr. Brent Bateman of Durham Jones & Pinegar representing South Valley Large Animal Clinic on May 27, 2020
2. Response by Maren Barker, Assistant City Attorney, City of Saratoga Springs, July 16, 2020.
3. Response by Brent Bateman, Durham Jones & Pinegar, July 27, 2020.
4. Response by Maren Barker, Assistant City Attorney, City of Saratoga Springs, August 13, 2020.

BACKGROUND

In November, 2018, the City of Saratoga Springs (the "City") issued a building permit to South Valley Large Animal Clinic (the "Clinic") to construct a veterinary hospital on property located at 400 N. Redwood Road, Saratoga Springs (the "Subject Property").

In conjunction with the veterinary hospital construction, the Clinic is required to bury a pre-existing distribution powerline which runs along the eastern edge of the Subject Property adjacent to Redwood Road. The powerline is owned by Rocky Mountain Power and provides electrical distribution to surrounding properties. Because of the size, location, and use of the line, to bury the powerline on the Subject Property, it must also be buried or otherwise adjusted on the neighboring properties to the north and south.

Rocky Mountain Power does not need or desire the lines to be buried, and has enforced their long-standing policy to require whomever requests to bury lines to pay 100% of the cost to bury the lines.

Prior to construction of the veterinary clinic, the Subject Property was used for farming. At that time, there were no buildings on the property. Also, there were no roads, driveways, or public access points to the property. The animal clinic has now been built and is currently in operation. The Clinic and the City have entered into a development agreement which requires the Clinic to bury the powerline, and the Clinic maintains they will still abide by their contractual obligation, but to date, the work has not been completed.

The Clinic is not objecting to burying the powerline on its own property, but challenges the City's requirement to bury the powerline on adjacent properties. The total cost to bury the powerline is estimated to be \$436,948, of which \$88,741 is attributed to off-site work and thus objected to.¹

The Clinic argues that the need to bury and/or accommodate burying the powerline on adjacent property exceeds the impact the veterinary clinic will impose on the community and is thus an unconstitutional exaction and taking of property.

The City argues that it has authority to enact ordinances it deems necessary or appropriate to provide for the health, safety, and welfare, as well as the good order, comfort, convenience, and aesthetics within the community and therefore, the requirement is legal. Furthermore, the City argues that benefits from the exaction do not need to accrue solely to the developer, and also, that because the Clinic agreed to bury the powerlines in a negotiated development agreement, the requirement is legal.

The Clinic has requested this Advisory Opinion to determine whether the City ordinance requiring the burying powerlines constitutes an illegal exaction as applied to the Clinic development.

ANALYSIS

I. The legal standard for development exactions

Saratoga Springs' requirement that the Clinic bury the powerline is a development exaction. A development exaction "is a government-mandated contribution of property imposed as a condition" of development approval.² Exactions arise from the principle that development causes impacts to a community. In order to address and offset these impacts, the community may require dedication of land or construction of public resources such as roadways, sidewalks, and power distribution systems. Such mandatory dedications implicate the Takings Clause of the U.S.

¹ The record includes some ambiguity; however, it appears that burying the powerline will affect a total of seven power poles. Three on-site poles will need to be removed and the line buried. One pole to the north is preferred to be removed to avoid the inefficiency of bringing the lines out of the ground only to rebury them again immediately. If that pole is not removed, changes to the pole will need to be made to accommodate the burial of the lines and conduit added. Three additional power poles on the property to the south will also be affected: one steel pole will be removed, one 55' DE pole installed, and a DE lower circuit installed on a third pole. The Clinic will pay an estimated \$436,947.72 to bury the powerline, including both on-site and off-site work done both by both Rocky Mountain power and prep work by the developer. A total of \$88,740.66 is attributed to the off-site work done by Rocky Mountain Power.

² *B.A.M. Dev., L.L.C. v. Salt Lake County*, (BAM III), 2012 UT 26, ¶16.

Constitution and Article I Section 22 of the Utah Constitution, which both protect private property from governmental taking without just compensation.

Development exactions are legal and appropriate only if they are “roughly proportionate” to the impact the development creates. These principles governing exactions are derived from the U.S. Supreme Court’s landmark decisions in *Nollan v. California Coastal Comm’n*³ and *Dolan v. City of Tigard*⁴ 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:

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). 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 Utah and U.S. Constitutions and is illegal.⁵

An exaction is valid and proportionate only when it offsets the costs of a development’s impact, and no more. An excessive exaction requires a property owner to pay for impacts beyond his own.⁶ A principal objective of the test is to “bar 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.”⁷

The Utah Supreme Court has provided guidance on how to analyze rough proportionality. In *B.A.M. II*, the Court explained that the rough proportionality analysis articulated above “has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent.”⁸ The “nature” aspect focuses on the relationship between the anticipated impact and proposed exaction. The court described the approach “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.”⁹

The “extent” aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost.¹⁰ “The most appropriate measure is cost—specifically, the cost of the exaction and the impact to the developer and the municipality, respectively.” The court explained

³ *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987).

⁴ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁵ *Call v. West Jordan*, 614 P.2d 1257, 1259 (Utah 1980).

⁶ *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899, 903 (Utah 1981).

⁷ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁸ *B.A.M. Development, LLC v. Salt Lake County* (BAM II), 2008 UT 74, at ¶9.

⁹ *Id.* at ¶10.

¹⁰ *Id.* at ¶11

that “roughly proportional” means “roughly equivalent.”¹¹ 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.

Accordingly, even though the City’s Code allows—even directs—the City to require developers to bury powerlines, the City’s requirement that the Clinic specifically construct the off-site powerline improvements must satisfy the rough proportionality test to be valid. The proposed exactions must solve a problem the development creates. Moreover, the costs to the Clinic to construct these improvements must be proportionate to the impacts the development imposes on the City’s ability to provide services.

Finally, 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.”¹²

Accordingly, we analyze the City’s reasons for imposing the exaction to determine “whether [their] findings are constitutionally sufficient to justify the conditions imposed” on construction of the clinic.¹³

II. Off-site powerline improvements are excessive

A. Essential link exists between legitimate governmental interest and exaction

The first part of UTAH CODE § 10-9a-508(1) requires an essential link between a legitimate governmental interest and the exaction imposed. The City Council found that “public health, safety, convenience, and welfare require that electrical distribution and telephone lines be constructed underground in an orderly manner” requiring underground installation of all “electrical, telecommunications cables, substations, lines, wires, poles, and facilities that (a) provide direct service to property being developed; (b) are existing and located within the boundaries of the property being developed . . .”¹⁴ The City maintains that burying powerlines decreases the risk of fires and accidents from downed powerlines and eliminates weather-related outages in addition to providing aesthetic benefits. The City requires that the developer bear all costs and facilitate arrangements with the utility company for such improvements.

Promoting community safety and aesthetics is a valid government interest. “The purposes of [UTAH CODE 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. . . .”¹⁵ Moreover, there is an essential link between the City’s legitimate interest in promoting aesthetics and reducing fire risk and downed powerlines and its requirement that the

¹¹ *Id.* at ¶8.

¹² *See Dolan*, 512 U.S. at 391-92.

¹³ *Id.* at 389.

¹⁴ Saratoga Springs Land Development Code, 19.13.10.

¹⁵ UTAH CODE §10-9a-102.

developer bury the powerlines along an arterial roadway. Accordingly, the *essential link* portion of the rough proportionality test is satisfied.

B. Nature and Extent aspect of the rough proportionality test

The next step in the rough proportionality test requires that “each exaction is roughly proportionate, both in *nature and extent*, to the impact of the proposed development.”¹⁶

The *nature* aspect of the rough proportionality test requires an exaction provide a solution to a problem the proposed development presents. The Clinic constructed a veterinary clinic. City ordinances require that powerlines be buried in conjunction with new development. The Clinic does not dispute the requirement to bury the powerlines on-site which cannot be buried without the off-site improvements. Therefore, the off-site improvements directly provide a solution to the problem the proposed development creates. Therefore, the *nature* aspect of the test is satisfied.¹⁷

However, the exaction appears to exceed the *extent* aspect of the rough proportionality test. The City must “compare the government’s cost of alleviating the development’s impact on infrastructure with the cost to [the developer] of the exaction.”¹⁸ The exaction appears to exceed the impact of the development.

To illustrate the proper *extent* analysis, we have only a single example from the Utah Supreme Court. In the *B.A.M. III*¹⁹ case, 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 the case at hand, the Clinic estimates that the disputed, off-site improvements to bury the powerline and/or make other powerline adjustments on the neighboring properties will cost \$88,741, thus putting a dollar value on the exaction.

The City has the burden to show the required \$88,741 in off-site electrical improvements are proportionate, or equivalent, to the veterinary clinic’s impact on the electrical infrastructure, and therefore valid. Note that “[n]o precise mathematical calculation is required, but the city must

¹⁶ UTAH CODE §10-9a-508(1)(b).

¹⁷ Had the Clinic disputed the requirement to bury the existing distribution powerlines on-site, this analysis may have come to a different conclusion here.

¹⁸ *B.A.M. Dev., L.L.C. v. Salt Lake County*, 2012 UT 26, ¶5, 282 P.3d 41.

¹⁹ *Id.*

make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”²⁰

Rather than estimate the monetary cost to the City of the impact of the Clinic, the City argues that because the undisputed work of burying the on-site powerlines cannot be completed without off-site improvements, it must be proportional. Unfortunately, while it is apparently factually accurate to say the undisputed work cannot be done without the disputed work, this argument does not address the established legal standard.

The City also argues that all benefits derived from the exaction need not accrue solely to the developer. This is also not a factor in the established legal standard (and not argued by the Clinic) and does not factor into our analysis.

In many cases, it is difficult for a local government to provide the cost analysis necessary for the *extent* aspect of the rough proportionality analysis.²¹ Accordingly, in this case, the City does not provide an individualized determination, nor an estimate, of the impact the new veterinary clinic will have on the electrical infrastructure. The City simply states, without explanation, that “. . . the expense of completing these [off-site electrical improvements] is considerably less than the imposition on the community of the Clinic’s development.” Nonetheless, we can use the limited information available to resolve the dispute.

The Clinic is disputing \$88,741 in costs to do off-site work to bury the pre-existing distribution powerline. The disputed improvements are not tied to power requirements or upgrades necessary to serve the Clinic, nor to alleviate its impact on the City’s (or Rocky Mountain Power’s) ability to provide electricity. The affected transmission lines existed before the veterinary hospital was built, carry power to surrounding properties, and will continue to carry power to surrounding properties once buried, but now in an “improved” state. The \$88,741 in off-site work improves an area-wide service, and is not intended to alleviate a burden on the electrical infrastructure construction that the clinic created.

Therefore, requiring the Clinic to construct the off-site improvements exceeds the impact of development, requires the developer to pay for impacts beyond his own, and therefore cannot constitute a valid exaction.

III. Development Agreement does not negate a taking

The City contends that because the Clinic committed to provide for these off-site improvements in a development agreement, the requirement to construct them cannot constitute an illegal exaction. The City argues that “because development agreements are a product of voluntary negotiations, they are not subject to the rough proportionality test.”²²

²⁰ See *Dolan*, 512 U.S. at 391-92.

²¹ 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.

²² Saratoga Springs response dated July 16, 2020.

We disagree. “Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.”²³ The *Nollan/Dolan* “rough proportionality test” ensures preservation of rights guaranteed by the U.S. and Utah Constitutions²⁴ which cannot be contracted away. Even if the development agreement were entered into voluntarily, the local government is constitutionally prohibited from imposing exactions that are disproportionate, without additional consideration.

The City maintains that the City and the Clinic voluntarily entered into a development agreement entitled *Installation of Improvements and Bond Agreement* dated December 5, 2019 wherein the Clinic agreed to install numerous improvements, including “Bury Over Head Power” in return for permission to construct and operate a veterinary clinic. It appears that the development agreement formalizes acceptance of the responsibilities outlined in City ordinances regarding burying powerlines in exchange for a building permit and certificate of occupancy. The development agreement does not appear to provide some additional benefit to the Clinic, such as a density bonus or waiver of impact fee, which would offset the financial burden of the offsite electrical improvements.

Therefore, as analyzed in the preceding sections, requiring the off-site improvements exceeds the impact of development impacts, even though it was agreed to in a development agreement. Based on the very limited information provided, it appears that any provision of the development agreement that requires the off-site improvements discussed herein is unenforceable as an illegal exaction.

CONCLUSION

The U.S. and Utah Constitutions guarantee that private property shall not be taken for public use without just compensation.²⁵ Accordingly, local governments may mandate the contribution of private property as a condition of development approval²⁶ but only if the contribution is “roughly proportionate” to the impact the development creates.²⁷

Saratoga Springs requires that powerlines be buried in connection to any new development. Because of the size, location, and use of the pre-existing on-site distribution powerline, the developer of a veterinary hospital must also bury or significantly adjust the lines on the neighboring properties to the north and south. The cost of the off-site electrical work is estimated to be \$88,471.

A valid exaction must have a close tie to a public burden directly attributable to the impact of the new development. The City has not established that development of the vet clinic will result in a \$88,471 impact to the local electrical system. The money will be spent burying existing,

²³ *Dolan v. City of Tigard*, 512 U.S. 374, 385.

²⁴ See *B.A.M.*, 2006 UT 2.

²⁵ USCS Const. Amend. 5 and Utah Const. Art. 1.

²⁶ *B.A.M. Dev., L.L.C. v. Salt Lake County*; (BAM III), 2012 UT 26, ¶16.

²⁷ UTAH CODE § 10-9a-508(1).

community-serving powerlines, not to accommodate the additional electrical load caused by the clinic. Thus, as the exaction exceeds the proposed development's impact, it is excessive and unconstitutional. The City may require the property owner to dedicate resources only so far as to offset the property owner's own impact.

Jordan Cullimore, Lead Attorney
Office of the Property Rights Ombudsman

NOTE:

This is an advisory opinion as defined in Section 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. Additionally, a civil penalty may also be available if the court finds that the opposing party—if either a land use applicant or a government entity—knowingly and intentionally violated the law governing that cause of action.

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 and civil penalty provisions, found in Section 13-43-206 of the Utah Code, 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.

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 § 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:

Mark Christensen, City Manager
City of Saratoga Springs
1307 North Commerce Drive, Ste. 200
Saratoga Springs, Utah 84045

On this ____ Day of _____, 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