

# Advisory Opinion 241

Parties: Troy Green / Weber County

Issued: July 16, 2021

## TOPIC CATEGORIES:

### Exactions on Development

The County's requirement to dedicate a 33-foot wide strip of land for a future right-of-way to serve future development does not solve a problem created by the property owner's development proposal. The property owner's amended plat simply merges two parcels without changing the use of the land or increasing the use's intensity. Requiring the dedication would force the property owners to offset impacts beyond their own. The requirement therefore fails the applicable rough proportionality test, and is unlawful. Accordingly, the County may not impose the requirement as a condition of amended plat approval.

#### 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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# State of Utah Department of Commerce

## OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

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### ADVISORY OPINION

Advisory Opinion Requested By: Troy Green

Local Government Entity: Weber County

Applicant for Land Use Approval: Troy & Victoria Green

Type of Property: Residential

Date of this Advisory Opinion: July 16, 2021

Opinion Authored By: Jordan S. Cullimore  
Office of the Property Rights Ombudsman

### ISSUE

Is Weber County's requirement to dedicate to the County a 33-foot wide strip of land for a future road as a condition of approval for an amended plat application a legal exaction?

### SUMMARY OF ADVISORY OPINION

The County's requirement to dedicate a 33-foot wide strip of land for a future right-of-way to serve future development does not solve a problem created by the Greens' development proposal. The Greens' amended plat simply merges two parcels without changing the use of the land or increasing the use's intensity. Requiring the dedication would force the Greens' to offset impacts beyond their own. The requirement therefore fails the applicable rough proportionality test, and is unlawful. Accordingly, the County may not impose the requirement as a condition of amended plat approval.

### 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 Title 13, Chapter 43, Section 205 of the Utah Code. 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 Troy Green, on September 23, 2020. A copy of that request was sent via certified mail to Ricky D. Hatch, Weber County Clerk/Auditor, 2380 Washington Blvd., STE 320, Ogden, Utah.

## EVIDENCE

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

1. Request for an Advisory Opinion submitted by Troy Green on September 23, 2020.
2. Response submitted by Scott Perkes, Planner for Weber County, received on October 21, 2020.
3. Reply submitted by Zane Froerer, Attorney for Troy Green, received April 6, 2021.
4. Reply submitted by Scott Perkes, Planner for Weber County, received May 3, 2021.

## BACKGROUND

Troy and Victoria Green's home sits on an approximately 5-acre lot located at 7522 East 1400 North in Huntsville, Utah. Recently, the Greens submitted an application to the Weber County Planning Division to combine their 5-acre lot with an adjacent 0.88-acre strip of land that the Greens already own and have already been using as part of their property. The purpose of the proposed merger was to make the property large enough to qualify for tax treatment as a "greenbelt" parcel.<sup>1</sup> The Greens' did not propose to change the use of the property.

The County approved, with conditions, the Greens' amended plat application to combine the parcels in a public Administrative Review Meeting on September 2, 2020. Among the conditions the County imposed was a requirement to dedicate a 33-foot right-of-way along the full length of the eastern boundary of the proposed lot for a future roadway that would eventually provide access to adjacent, undeveloped land. The dedication would comprise approximately 0.6 acre and would provide for a half-width of the future roadway. The County's condition only requires dedication of the land, and does not require installation of any improvements for the road.

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<sup>1</sup> See generally Utah Code Chapter 59-2, Part 5. The Utah Farmland Assessment Act, referred to as the "greenbelt law" is a law that "allows qualifying agricultural property to be assessed and taxed based upon its productive capabilities instead of the prevailing market value." "Utah Farmland Assessment Act," *Utah County Assessor*, July 15, 2021, available at <https://www.utahcounty.gov/dept/assess/new/Greenbelt.html>.

The Greens view the County’s requirement to dedicate 0.6 acre of the Greens’ land for a roadway as an excessive, and therefore unlawful, exaction. The County disagrees. Consequently, Mr. Green submitted a Request for Advisory Opinion to this office asking us to determine whether the County’s exaction is lawful, in order to resolve the dispute.

## ANALYSIS

### I. Development Exactions Must Satisfy the “Rough Proportionality” Test to be Lawful

The County requirement to dedicate land for a roadway as a condition of amended plat approval is a development exaction. Utah law defines development exactions as “conditions imposed by governmental entities on developers for the issuance of [development approval]” that “typically require the permanent surrender of private property for public use.”<sup>2</sup>

Exactions implicate the Takings Clause of the U.S. Constitution and Article I Section 22 of the Utah Constitution, which protect private property from governmental taking without just compensation. The standard for measuring whether an exaction imposed by a county is lawful is found at Utah Code § 17-27A-507(1):

A county 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.

This standard lays out a two-part “rough proportionality” test for determining whether an imposed exaction appropriately offsets the impacts of a development proposal. If the proposed exaction satisfies the legal test, the exaction is a proper exercise of the local government’s police power to regulate for health, safety, and welfare.<sup>3</sup> If, however, the exaction lacks an essential link to a legitimate government interest, or is disproportionate to the impact of the proposed development, the exaction is excessive and an unlawful taking of property without compensation.<sup>4</sup> 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.”<sup>5</sup>

This test was originally established in the U.S. Supreme Court decisions of *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Utah

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<sup>2</sup> *B.A.M. Dev., LLC v. Salt Lake County* (BAM I), 2006 UT 2, ¶ 34.

<sup>3</sup> See Shelley Ross Saxer, *Exactions and Impact Fees*, 7 Brigham-Kanner Property Rights Conf. J. 77, 83 (2018) (“Insisting that landowners internalized the negative externalities of their conduct is a hallmark of responsible land-use policy....”).

<sup>4</sup> See *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899, 903 (Utah 1981).

<sup>5</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Supreme Court has also provided additional guidance on how to apply this test to a given situation in *B.A.M. Development, LLC v. Salt Lake County* (BAM II), 2008 UT 74.

In BAM II, the court explained that the second part of the test—the rough proportionality analysis—has two aspects: “first, the exaction and impact must be related in nature; second, they must be related in extent.”<sup>6</sup> The “nature” aspect of rough proportionality focuses on the relationship between the anticipated impact and the 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.”<sup>7</sup>

The “extent” aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost.<sup>8</sup> (“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 that “roughly proportional” means “roughly equivalent.”<sup>9</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.

In a third “B.A.M.” decision, the Utah Supreme Court summarized the entire analysis, firmly tying a proposed exaction to infrastructure needs *created by the development*:

[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.<sup>10</sup>

Accordingly, the County’s requirement that the Greens dedicate thirty-three feet of land for a future right-of-way must satisfy all parts of the rough proportionality test to be lawful.

Finally, the City possesses the burden to show the proposed exaction is proportionate to the development’s impacts.<sup>11</sup> “*No 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>12</sup>

Accordingly, we will analyze the County’s reasons for imposing the dedication requirement to determine “whether [their] findings are constitutionally sufficient to justify the conditions imposed” on the Greens’ amended plat application.<sup>13</sup>

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<sup>6</sup> *Id.* at ¶ 9.

<sup>7</sup> *Id.* at ¶ 10.

<sup>8</sup> *Id.* at ¶ 11.

<sup>9</sup> *Id.* at ¶ 8.

<sup>10</sup> *B.A.M. Development, LLC v. Salt Lake County*, 2012 UT 26.

<sup>11</sup> *See Dolan*, 512 U.S. at 391-92.

<sup>12</sup> *Id.* at 391 (emphasis added).

<sup>13</sup> *Id.* at 389.

## **II. An Essential Link Exists between the County’s Proposed Exaction and a Legitimate Government Interest**

The first part of Utah Code section § 17-27A-507(1) requires an essential link between a legitimate governmental interest and the imposed exaction. In this case, the County’s legitimate governmental interest is safe and efficient access and traffic flow. Constructing new roadways is a vital component in accomplishing this objective.<sup>14</sup> Requiring roads to serve proposed development satisfies this interest. Accordingly, the County’s dedication requirement complies with the first part of the rough proportionality test.

## **III. The County’s Dedication Requirement Fails the Nature Aspect of the Rough Proportionality Analysis**

Next, we turn to the second requirement under Utah Code § 17-27A-507(1)—that the proposed exaction be “roughly proportionate...to the impact of the proposed development.”<sup>15</sup> As described above, this part of the test requires the County, on a case-by-case basis, to “make some sort of individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development.”<sup>16</sup>

### *A. The Nature Aspect of Rough Proportionality*

The nature aspect of the rough proportionality analysis requires that the proposed exaction solve a problem, or impact, created by the proposed development. In this case, and for reasons explained below, the County’s requirement to dedicate land for a future right-of-way to access adjacent land fails this aspect of the analysis. When a proposed exaction fails to meet any portion of the rough proportionality test, the exaction is unlawful.

The County, in its submission to our office, states that the purpose of the dedication requirement is to “preserve the area for a future road” for future development. The County states the area of the Greens’ land “represents a future north-south road alignment to provide adequate access near a quarter-section line for adjacent, undeveloped property.”

Nowhere here does the County assert the Greens are changing the use of their land to a more intense use or creating additional impact on County services to the lot. In fact, it appears undisputed that the use of the land is not changing at all. Moreover, the county has nowhere indicated the 33-foot right-of-way is needed to provide access to *Mr. Green’s* development or address an impact created by the amended plat proposal. The dedication requirement here will prospectively offset the impact of some future development proposal with impacts unrelated to the Greens’ current application.

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<sup>14</sup> See *Carrier v. Lindquist*, 2001 UT 105, ¶ 18, 37 P.3d 1112, 1117 (“In order for a government to be effective, it needs the power to establish or relocate public thoroughways . . . for the convenience and safety of the general public.”) See also Utah Code § 10-8-8.

<sup>15</sup> Utah Code § 17-27A-507(1)(b).

<sup>16</sup> *Dolan*, 512 U.S. at 391.

To satisfy the nature aspect of the rough proportionality analysis, the County would need to show the dedication requirement is addressing a problem created by the Greens' development proposal. The County has failed to make this showing.

Because the Greens' amended plat does not create any new traffic impacts that would need to be addressed by land dedications for roads, it would be improper for the County to impose a dedication requirement for right-of-way to ostensibly offset such impacts. Finally, the dedication requirement would require the Greens to offset impacts beyond their own, which is also improper.<sup>17</sup>

The County cites Weber County Code § 106-2-1(a) as support for its dedication requirement. This provision states, in relevant part that the street arrangement in subdivisions "must be such as to cause no unnecessary hardship to owners of adjoining property when they plat their own land and seek to provide for convenient access to it."

The Greens have not proposed new street arrangements as part of the amended plat. No one has indicated the Greens need new streets for access to their property. The County is requiring a through connection to benefit *adjacent*, undeveloped land.<sup>18</sup> There is no indication here that the adjacent property owner currently has legal access through the Greens' land. Accordingly, if the Greens decline to provide access to that land for whatever reason, it would not cause unnecessary hardship to the adjacent landowners who have lost nothing.<sup>19</sup> The County may not require, as an exaction, that the Greens' dedicate right of way to serve adjacent, undeveloped land simply because the adjacent land does not currently have access.<sup>20</sup> This is not an impact created by the Greens' development proposal.

The County also cites Weber County Code § 106-2-2(a) to support its position that the Greens must dedicate the 33-foot right-of-way. This provision states that County may require public dedication of streets for major or loop road access in "mountain land subdivisions". Even if the local code allows the County to require dedication generally, if the requirement violates constitutional principles when applied to a specific development proposal, as it does here, then the County may not impose the requirement.<sup>21</sup>

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<sup>17</sup> See *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899, 903 (Utah 1981).

<sup>18</sup> The County, in its submission, states that an adjacent owner of 196.56 acres of undeveloped property located immediately to the north of the Greens' property will need the future roadway for his development. Again, this is an impact created by the adjacent owner's future development whenever it develops, and not by the Greens.

<sup>19</sup> Nothing here would prevent the landowners from negotiating for access to the undeveloped land.

<sup>20</sup> This is not to say that the County may not plan for future corridors, limit development in those areas, and acquire land for future rights-of-way. It is simply to say that when the development proposal at issue doesn't warrant acquisition by exaction, as is the case here, the County, or the adjacent landowner seeking access, must potentially negotiate and pay for the land when they are ready to acquire it. See generally Utah Code Chapter 72-5, Part 4.

<sup>21</sup> See generally *B.A.M. Dev., LLC v. Salt Lake County* (BAM I), 2006 UT 2 (Noting that exactions resulting from a legislative scheme, as well as those imposed administratively, are subject to the rough proportionality test.)

*B. Unnecessary to Consider Extent Aspect of Rough Proportionality*

Since the County's requirement to dedicate thirty-three feet of the Greens' land for a future right-of-way does not satisfy the nature aspect of the rough proportionality analysis, the requirement fails the entire rough proportionality test and the County may not legally impose it. Accordingly, we do not need to consider the extent aspect of the test in this case.

**CONCLUSION**

The County's requirement to dedicate thirty-three feet of land for a future right-of-way to serve future development does not solve a problem created by the Greens' development proposal and it would require the Greens' to offset impacts beyond their own. The requirement therefore fails the rough proportionality test, and is unlawful. Accordingly, the County may not require the Greens to dedicate the 33-foot right-of-way as a condition of amended plat approval.



Jordan S. 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:

Ricky D. Hatch, County Clerk/Auditor  
Weber county  
2380 Washington Blvd., Suite 320  
Ogden, Utah 84401

On this \_\_\_ Day of \_\_\_\_\_, 2021, 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