

# Advisory Opinion #32

Parties: Danville Land Investments, LLC and Draper City

Issued: March 12, 2008

## TOPIC CATEGORIES:

D: Exactions on Development

A local government's requirement that Developer construct improvements is an exaction which must satisfy the limitations imposed by the Utah Code; otherwise, it will amount to a regulatory taking, for which compensation may be required. The local government bears the burden of proving that the exaction meets the requirements of the Utah Code. An analysis must consider several factors associated with the cost of the exaction and the impact of the development.

## 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

## ADVISORY OPINION

Advisory Opinion Requested by: Danville Land Investments, LLC  
by Kevin Anderson, Anderson Call,  
Counsel for Property Owners

Local Government Entity: Draper City

Applicant for the Land Use Approval: Danville Land Investments, LLC (Thane Smith)

Project: Residential Subdivision

Date of this Advisory Opinion: March 12, 2008

Opinion Authored By: Brent N. Bateman, Lead Attorney,  
Office of the Property Rights Ombudsman

### Issues

Is the City of Draper required to reimburse Danville Land Investments, LLC for a portion of the construction costs that exceed its proportionate share of the cost of the constructing certain improvements within the development?

### Summary of Advisory Opinion

Draper City has not met its burden under the rough proportionality test in UTAH CODE § 10-9a-508 to show that Danville Land Investments, LLC must pay 100% of the costs of constructing Galena Park Boulevard, the railroad bridge, and the internal trail system. Therefore, Draper cannot require that Danville pay 100% of those costs without reimbursement. Although a properly conducted rough proportionality analysis may show that Danville is entitled to reimbursement of all or a portion of the costs, several factors and circumstances must be considered when determining the amount of such reimbursement.

### 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 § 13-43-205 of the Utah

Code. The opinion is meant to provide an early review, before any duty to exhaust administrative remedies, of significant land use questions so that those involved in a land use application or other specific land use disputes can have an independent review of an issue. It is hoped that such a review can help the parties avoid litigation, resolve differences in a fair and neutral forum, and understand the relevant law. The decision is not binding, but, as explained at the end of this opinion, may have some effect on the long-term cost of resolving such issues in the courts.

The request for this Advisory Opinion was received from Danville Land Investment, LLC (“Danville”) on November 14, 2007. A letter with the request attached was sent via certified mail, return receipt requested, to Draper City Recorder Kathy Montoya, at 1020 E. Pioneer Road, Draper, Utah 84020. The return receipt was delivered and signed on November 20, 2007, indicating that the City had received it. A response was received from the Draper City Attorney on December 12, 2007. Sometime afterward, this Advisory Opinion was placed on temporary hold at the request of Kevin Anderson, attorney for Danville. The Author of this Advisory Opinion met with Kevin Anderson, on January 30, 2008, and this matter was renewed and briefly discussed.

## **Evidence**

The following documents and information with relevance to the issue involved in this advisory opinion were reviewed prior to its completion:

1. Request for an Advisory Opinion dated November 9, 2007 with the Office of the Property Rights Ombudsman by Danville Land Investments, LLC, including exhibits.
2. Response letter from Douglas J. Ahlstrom, Draper City Attorney, dated December 12, 2007, including exhibits.

## **Statutes and Ordinances**

1. Section 10-9a-509 of the Utah Code.
2. Section 10-9a-508 of the Utah Code.
3. Section 11-36-201 of the Utah Code.

## **Background**

Danville Land Investments LLC (“Danville”) is the owner of a 144.65 acre parcel located in Draper City (“Draper”). The parcel located at approximately 12800 South & Galena Park Drive, west of the Union Pacific Railroad tracks, east of the Jordan River Parkway (the “Property”). The Property is zoned RA-2.

On September 8, 2006, Danville submitted a concept plan application for development of the Property. The Concept Plan which was approved with conditions on approximately May 22, 2007. On June 29, 2007, Danville submitted a preliminary plat application, which has since been revised. The development, called the Draper Preserve Subdivision, contemplates approximately

347 residential lots. The development features a collector street located along the east edge of the Property called Galena Park Boulevard. Galena Park Boulevard is an existing City street that presently terminates at the north boundary of the Property, and does not exist adjacent to the Property. On the east, the Property is bounded by a Union Pacific Railroad corridor. The development also contemplates a point at which Galena Park Boulevard would cross the railroad corridor.

According to the Draper City Master Transportation Plan, adopted in 2003, Draper City has master planned Galena Park Boulevard to extend from the north boundary of the Property, across the eastern edge of the Property, and across the railroad corridor. Galena Park Boulevard extends to an interchange with the Bangerter Highway, and is a major access road to the IKEA store and neighboring commercial properties. Draper intends that the road contain three traffic lanes; one traveled lane in each direction and a center two-way left turn lane/median, along with a grade-separated crossing at the railroad tracks. The improvements to Galena Park Boulevard are included in the City's 6-10 Year Improvement Plan, and carry an estimated cost of \$9,127,186.00. The City's Master Plan also features a system of trails that originate outside of the Property, and cross the Property to provide access to the Jordan River Parkway.

The preliminary plat application shows Galena Park Boulevard accessed by the project lots only by three roads within the project. No lots in the proposed development directly front Galena Park Boulevard. The preliminary plat application also shows the trail system.

As a condition of development approval, Draper City has required that Danville, at its sole expense, construct Galena Park Boulevard, construct the bridge across the railroad crossing, and construct the master planned trails throughout the development. Danville objects to these requirements, and indicates that although they are willing to construct these required improvements, the City should reimburse Danville for the portion of the construction costs that exceed its proportionate share of the impact of Danville's development. Draper has refused to participate in such reimbursement.

## **Analysis**

### *A. The City's Requirements are Exactions Under UTAH CODE § 10-9a-508*

The City's requirements that Danville construct a public road, bridge, and system trails at Danville's expense constitute exactions under Utah Law. "Exactions are conditions imposed by governmental entities on developers for the issuance of a building permit or subdivision plat approval." *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 34, 128 P.3d 1161, 1169. Exactions include mandatory dedication of property, as well as fees. *Id.* Draper's requirements are exactions, because they are required before the City will grant approval of a subdivision plat.

In 2005, the Utah Legislature enacted § 10-9a-508 of the Utah Code, which authorizes cities to impose exactions on new development, and also prescribes limits on that authority:

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 § 10-9a-508(1). The Utah Supreme Court observed that the language of this statute was borrowed directly from the U.S. Supreme Court analyses in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). See *B.A.M.*, 2006 UT 2, ¶ 41, 128 P.2d at 1170. In those two cases, the Supreme Court promulgated rules for determining when an exaction is valid under the federal constitution's Takings Clause. This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis is reflected in § 10-9a-508.

The rough proportionality analysis protects private developers from costs that, in all fairness and justice, should be assumed by the public as a whole. The U.S. Supreme Court stated that proportionality "animates" the Takings Clause: "The Fifth Amendment's guarantee . . . 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." *Monterey v. Del Monte Dunes at Monterey, Ltd.* 526 U.S. 687, 703 (1999) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

In *B.A.M.*, Salt Lake County required that developers provide improvements to roads to bring them into compliance with the County's Transportation Master Plan. The Supreme Court held that those requirements are subject to the exactions analysis under UTAH CODE § 10-9a-508, to determine whether the "governmental entity will have an obligation to pay compensation for the exaction." *Id.* at ¶29. See also *Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899, 904 (1981) (holding that municipal services "like water and sewer must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred."). The present case is similar, in that Draper is requiring that Danville make improvements to municipal facilities. Draper's requirement that Danville pay 100% of the cost of the improvements is an exaction that must satisfy both parts of § 10-9a-508(1). If it does not, and if Draper is unwilling to modify its requirement, Draper's requirement will amount to a regulatory taking, and the City will be required to pay compensation to the Developer.

*B. The City's Requirements Satisfy Section 10-9a-508(1)(a), Because There is an Essential Link Between the Requirements and Legitimate Governmental Interests*

The City's requirement that the Danville provide roads to access the Property and park access trails meets the first test of § 10-9a-508, which requires an essential link between the governmental interest and the proposed exaction. See *Nollan*, 483 U.S. at 837; see also *B.A.M.*, 2006 UT 2, ¶ 36, 128 P.3d at 1169. Building and maintaining adequate roadways is a legitimate

government interest. *See Carrier v. Lindquist*, 2001 UT 105, ¶ 18.<sup>1</sup> Building a road sufficient to handle the anticipated amounts of traffic, and a bridge sufficient to help traffic safely avoid being flattened by oncoming railcars, are reasonable means to achieve that interest. Providing access trails to public open space can be considered a legitimate government interest. *See generally Nollan*, 483 U.S. at 836. Providing a trail system to enable the public to access that open space is a reasonable means to achieve that interest. Thus, construction of Galena Park Boulevard, including the bridge across the railroad crossing, and construction of the trail system to access the Jordan River Parkway meets the first prong of § 10-9a-508.

C. *The City's Requirements do not satisfy the "Rough Proportionality" Aspect of § 10-9a-508(1)(b).*

Once an essential link between the government's requirement and a legitimate objective has been established, the analysis turns to whether the exaction is roughly proportional, both in nature and extent, to the impact of the development under § 10-9a-508(1)(b). Thus, if the City's improvement requirements are not proportional to the impact of the subdivision, they are not valid exactions.

The City has required that Danville construct Galena Park Boulevard. The City has determined that it will not reimburse Danville for any portion of the cost of construction of the road, even though Galena Park Boulevard is intended to be a collector road, has very limited access to the development, and is also intended to provide access to nearby commercial areas. The City has also required that Danville construct a bridge over the railroad tracks, upon property that does not presently belong to Danville, and which, according to Danville, is not necessary for use of the development. Finally, the City has required Danville to dedicate property and construct an internal foot and bicycle trail system, originating beyond the Property and leading to the Jordan River Parkway, to be used by residents of the development and non-residents alike.

The government entity has the burden to make "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *B.A.M.*, 2006 UT 2, ¶ 39 (quoting *Dolan*, 512 U.S. at 391). Therefore, Draper City has the burden to prove that requiring Danville to pay 100% of the costs of these improvements is roughly proportional to the impact of the development. The City has not met this burden. There has been no individualized analysis of the impact caused by the subdivision, and how the required dedication is roughly proportionate to that impact. *See Dolan*, 512 U.S. at 386, 391; *see also B.A.M.*, 2006 UT 2, ¶¶ 39-40, 128 P.3d at 1169-70. Without such an individualized analysis, the City's requirement does not meet the rough proportionality test, and is an improper exaction. Because the requirement that Danville pay 100% of the costs of the

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<sup>1</sup> "In order for a government to be effective, it needs the power to establish or relocate public thoroughways, even at the expense of some individual citizens, for the convenience and safety of the general public. . . . In fact, cities are vested with the statutory power to 'lay out, establish, open, alter, widen, narrow, extend, grade, pave or otherwise improve streets, alleys, avenues, boulevards, sidewalks, . . . and may vacate the same . . . by ordinance'. Utah Code Ann. 10-8-8." *Carrier*, 2001 UT 105, ¶ 18, 37 P.2d at 1117.

improvements is an improper exaction, the City's continued imposition of that requirement would amount to a regulatory taking of property without just compensation.<sup>2</sup>

*D. The Rough Proportionality Analysis Requires Examination of Several Factors*

Danville asks that the OPRO find that Danville is entitled to a reimbursement of 93% of the cost of constructing Galena Park Boulevard, 100% of the cost of constructing the railroad bridge, and an unstated percentage of the costs of constructing the trail system. In doing so, Danville suggests that reimbursement be calculated for the road by directly translating the anticipated percentage of use of the road (7% by the development, 93% by other uses) to the anticipated allocation of cost of construction. Danville further asks that costs for construction of the railroad bridge be allocated by determining whether construction of the bridge is unnecessary for development of the parcel -- without regard to the level of anticipated use of the bridge by residents of the development.<sup>3</sup> These two calculation methods proposed by Danville both play a major role in an analysis of rough proportionality, but by themselves are inadequate to properly determine the reimbursement amount. Therefore, this Advisory Opinion does not attempt to establish the proportion of reimbursement.

An analysis of rough proportionality -- a calculation of the proportionate shares of the improvement costs to be borne by the developer and by the public -- requires the consideration of numerous factors, and not simply a direct translation of the percentage of anticipated use to cost.<sup>4</sup> Even in deciding *Dolan*, the U.S. Supreme Court anticipated that any analysis of rough proportionality would involve a close look at the circumstances, and rejected any simple mathematical formula: "No precise mathematical calculation is required for the rough proportionality test, but a city must make some sort of individualized determination that the

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<sup>2</sup> The conclusion of this Advisory Opinion is that the City cannot require that Danville pay 100% of the cost of those improvements. This is not to say that requiring Danville provide the improvements, and bear some portion of the cost, could not be roughly proportional to the impact of the development. Danville acknowledges that it may be obligated to pay some costs of the improvements. If Draper City requires that those improvements be constructed, the public must bear some of the cost, and Danville must be reimbursed.

<sup>3</sup> Danville offers no suggestions on how to calculate damages for the trails.

<sup>4</sup> To illustrate the inadequacy of a direct translation of anticipated use percentage to cost allocation, consider that Danville has acknowledged that Galena Park Boulevard is vital to the traffic flow in the development, and the development will cause at least 680 trips on Galena Park Boulevard. Therefore, in order to build the development, Galena Park Boulevard must be constructed. If Draper City does not want to participate in reimbursement for construction of Galena Park Boulevard, its only option is to require that the Developer construct Galena Park Boulevard at least to standards adequate to safely handle 680 trips. There appears to be no question that such a requirement would be roughly proportional to the impact of the development. This will require that a large percentage of the road work be completed. If Draper then desires that the road be further improved as set forth in its transportation plan, Draper can make additional improvements whenever it deems appropriate. The cost of constructing a road adequate to handle 680 trips is equally unlikely to cost only 7% of the total cost of the road as master planned by the City as it is unlikely to total 100% of the cost of the final road. In order to construct a road sufficient to handle 680 trips, a significant percentage of the road improvements will already be made. The need to build the road, where no immediate need existed before, may be one of the impacts of proposed development to be considered along with the anticipated use of the road.

required dedication is related both in nature and extent to the impact of the proposed development.” *Dolan*, 512 U.S. at 391.<sup>5</sup>

Since the Utah Supreme Court in *B.A.M.* held in 2006 that the rough proportionality test in UTAH CODE § 10-9a-508 applied to all exactions, no Utah Court appellate has had occasion to apply the rough proportionality test.<sup>6</sup> Perhaps the best resource for conducting such a rough proportionality review would be to borrow the review factors set forth in *Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899, 904 (1981), an Utah exaction case that presaged the rough proportionality test. These factors have since been codified in the impact fees statute, UTAH CODE § 11-36-201(5)(b):<sup>7</sup>

(b) In analyzing whether or not the proportionate share of the costs of public facilities are reasonably related to the new development activity, the local political subdivision shall identify, if applicable:

- (i) the cost of existing public facilities;
- (ii) the manner of financing existing public facilities, such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants;
- (iii) the relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing public facilities, by such means as user charges, special assessments, or payment from the proceeds of general taxes;
- (iv) the relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing public facilities in the future;
- (v) the extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developers or owners, by contractual arrangement or otherwise, to provide common facilities, inside or outside the proposed development, that have been provided by the municipality and financed through general taxation or other means, apart from user charges, in other parts of the municipality;

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<sup>5</sup> The Texas Court of Appeals decided case with many similarities to the present case, and determined that factors must be considered in addition to considering the anticipated proportional use of the road. In *Town of Flower Mound v. Stafford Estates*, 71 S.W.3d 18, 30 (Tex. App.) (*affirmed* 135 S.W.3d 620 (Tex. 2004)), the town required that the developer to improve and rebuild a system road next to the proposed development. The developer completed those improvements at its cost, and then sued the town for reimbursement of the costs that exceed the developer’s proportionate share under *Nollan/Dolan*. The Developer urged, as Danville does, that the proper amount of reimbursement should be a direct translation of the percentages of anticipated use if the road to construction costs. *Id.* at 45. The court held that the percentage of use of the road was an important factor, but only part of the analysis. The *Flower Mound* court held that those damages would be offset by the value of special benefits accrued to the developer as a result of the improvements: “the proper measure of damages is the amount paid for the public improvements in excess of the amount roughly proportional to the consequences generated by the development minus any special benefits conferred on the development by the exaction.” *Id.* at 24.

<sup>6</sup> The Court in *B.A.M.* remanded that case to the district court to conduct the rough proportionality review. That review is currently on appeal.

<sup>7</sup> In its request for Advisory Opinion, Danville argues that these factors be used to determine rough proportionality in this case, although it does not do so.

- (vi) extraordinary costs, if any, in servicing the newly developed properties; and
- (vii) the time-price differential inherent in fair comparisons of amounts paid at different times.

These factors apply to calculation of the proportionate share that a developer shall reimburse the city for construction of public improvements through impact fees – basically the reverse of the present situation.<sup>8</sup> These factors examined in making this calculation include consideration of the cost of the facilities and the use of the facilities by the development. Also required is consideration of the use of the facilities by other developments and other users, payments already made for the facilities, credits to the developer for other benefits conferred, extraordinary costs, etc. A determination of rough proportionality could include a review of these factors. As stated above, the burden is on the City to prove that its requirement imposed is roughly proportional to the impact of the development. Therefore, it is appropriate that the City conduct the initial review.<sup>9</sup>

## **Conclusion**

The City of Draper cannot require that Danville pay 100% of the construction costs of Galena Park Boulevard, the railroad bridge, and the internal trail system, without reimbursement. The City has not met its burden to show that this requirement is roughly proportional to the impact of the proposed development.

Should the City of Draper persist in its refusal to conduct such a review, or should the review fail to meet the City's burden to show rough proportionality, the City cannot require that Danville pay for the improvements. If the City continues to require that Danville construct the improvements at its sole expense, a regulatory taking will result to the extent that the Danville paid the public's proportional share of the improvements.

It appears likely that when a rough proportionality review is properly conducted, Danville will be obligated to pay for some costs of the improvements, and the public and/or future developers will be obligated to pay the remainder. In determining the amount to be reimbursed, care should be taken to ensure consideration of all relevant factors appropriate to the project, the improvements, and the impact of the development.

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

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<sup>8</sup> Were the road already constructed, and the developer requesting that the Property access to the road, the developer would no doubt be required to reimburse the City for its costs on constructing the road through impact fees.

<sup>9</sup> The OPRO has not been provided sufficient information to conduct such a review itself.

**NOTE:**

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

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

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

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

## MAILING CERTIFICATE

U.C.A. §13-43-206(10)(b) requires delivery of the attached advisory opinion to the government entity involved in this matter in a manner that complies with U.C.A. §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:

Kathy Montoya  
City Recorder  
1020 E Pioneer Road  
Draper, UT 84020

On this \_\_\_\_\_ Day of March, 2008, 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