Advisory Opinion #148

Parties: Matthew Peterson and Hooper City

Issued: November 21, 2014

TOPIC CATEGORIES:

Exactions on Development
Requirements Imposed on Development

Preserving waterways and protecting against flood damage are within local government authority. The means to carry out that authority are within a local government's reasonable discretion. A setback to protect waterways and prevent flood damage is a reasonable means to protect the public welfare. However, requiring dedication of the same setback area for open space or trails is an exaction that must satisfy rough proportionality analysis. The exaction must be analyzed according to the needs created for open space, not for flood control.

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ADVISORY OPINION

Advisory Opinion Requested by:	Matthew Peterson
Local Government Entity:	Hooper City
Property Owner:	James Aland, et al.
Type of Property:	Proposed Residential Subdivision
Date of this Advisory Opinion:	November 21, 2014
Opinion Authored By:	Elliot R. Lawrence Office of the Property Rights Ombudsman

Issues

May a City require two 100-foot setbacks along both sides of a slough and require dedication of the area within the setbacks for public open space?

Summary of Advisory Opinion

Local governments are authorized to regulate and control watercourses, and may also enact ordinances to promote the public's health, safety, and welfare. A setback intended to preserve a waterway and prevent flood damage is a valid exercise of local government authority. The size and extent of the setback is within the reasonable discretion of a local government, and the approach taken should be valid if it is reasonably debatable to be effective, even if there are other alternatives available.

Although the setback may be a valid land use regulation, dedicating the same area to the public for open space or trails is an exaction that must satisfy rough proportionality analysis. The need for flood control should not be part of the analysis, because that need exists whether the property is developed or not, and any flood control would be provided by the setbacks alone. Instead, the analysis should focus on comparing the impact of the development on needs for open space or trails. If the exaction satisfies rough proportionality analysis, the City may require the dedication.

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 Matthew Peterson on August 21, 2014. A copy of that request was sent via certified mail to Glenn Barrow, Mayor of Hooper, at 5580 W. 4600 South, Hooper, Utah. According to the return receipt, the County received the Request on August 28, 2014.

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 Matthew Peterson, received by the Office of the Property Rights Ombudsman on August 21, 2014.
2. Response from Hooper City, submitted by Brandon R. Richards, Attorney for the City, received September 29, 2014.

Background

Matthew Peterson proposes to subdivide a rectangular 7.5 acre parcel located near the intersection of 5600 South and 4300 West in Hooper.[1] The Parcel is undeveloped. A wide drainage, known as "Howard Slough," runs roughly north-south near the center.[2] The Slough itself is about 20 feet wide, and is nearly parallel to 4300 West (although it meanders somewhat).

When Mr. Peterson approached the Hooper City about developing the Parcel, he was told that the Slough could not be drained or developed, and that the City would require 100-foot setbacks, one on each side of the Slough, for a total width of approximately 200 feet extending through the Parcel.[3] The City's ordinances also require dedication of the area within the setbacks, to be used by the public as open space and trails. In addition to the dedication, Mr. Peterson states that the

[1] The property is owned by James Aland and others.
[2] A slough is a marshy lowland or drainage. Howard Slough provides drainage for nearby properties.
[3] The setbacks would be measured from the center of the Slough.

City would also require installation of chain link fences on either side. Mr. Peterson states that the area required by the City eliminates two building lots.[4]

The City notes that Mr. Peterson has not yet applied for subdivision approval, but it does explain that the easements are required. The City's ordinances require a 100-foot "no-build" setback on either side of Howard Slough (for a total of 200 feet).[5] The property within the setback could either be transferred to the City, or easements for open space accessible by the public could be dedicated. The City states that it requires the setbacks not only to preserve the Slough, but also to protect nearby properties from flood damage.[6] The City states that in the past, flood waters have reached 100 feet beyond the Slough channel.[7]

The City also acknowledges that the easement area may be used as a public trail along the Slough, although there are no current plans for a trail (because no application has been submitted). The City's ordinances require that the setback areas be open for public access, but they also provide that any public areas (including easements on private land) are to be maintained by the City.[8]

Analysis

The City correctly notes that Mr. Peterson has not applied for subdivision approval, and has thus not been subject to the City's setback and easement dedication requirements. However, since these requirements are imposed through the City's ordinances, they will be required no matter who seeks development approval (unless the ordinances are changed). Therefore, this Opinion will evaluate the City's requirements as if they had been imposed on a development application.

The City's ordinances impose two distinct requirements related to development near Howard Slough: (1) A setback along the Slough, and (2) Dedication of property within the setback.[9]

I. The City Has Authority to Restrict Building in Flood Plain Areas.

A. Municipal Authority to Protect Flood Plains and Watercourses.

The City may restrict buildings within an area near Howard Slough in order to promote the general welfare. Cities have broad discretion to enact regulations intended to promote the health, safety, and welfare of the public.

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[4] Mr. Peterson's proposed subdivision does not eliminate the Slough, but preserves a more narrow corridor. He states that the City's required easement eliminates the two lots on either side of the Slough.

[5] *See* HOOPER CITY CODE, §§ 10-2B-2(A) (200-foot "no-build" setback along the Slough); and 10-6-4.2(D)(2)(o) (Preliminary subdivision plats must include 100-foot setback on either side, measured from the center of the Slough). The City specifically designates Howard Slough and Hooper Slough (also located in the City) as eligible for this protection, along with the South Fork of the Weber River.

[6] The City did not state the exact date the ordinances requiring the setbacks were enacted, but it has photographs documenting past flood damage.

[7] The City did not indicate whether the Slough area has been designated as a flood zone under state or federal regulations.

[8] *See* HOOPER CITY CODE, 10-4A-16.2

[9] Either the property within the setback or an easement could be dedicated to the City.

> The municipal legislative body may pass all ordinances and rules, and make all regulations, not repugnant to law, necessary for carrying into effect or discharging all powers and duties conferred by [Chapter 10-8], and as are necessary and proper to provide for the safety and preserve the health, and promote the prosperity, improve the morals, peace and good order, comfort, convenience of the city and its inhabitants, and for the protection of property in the city.

UTAH CODE ANN. § 10-8-84(1). This section grants two distinct types of authority: (1) Power to implement and carry out mandates specifically granted by the Utah Legislature, and (2) The power to act for the general welfare of the public. *See State v. Hutchinson*, 624 P.2d 1116, 1122 (Utah 1980) (Evaluating language nearly identical to § 10-8-84). Protecting property from flood damage is clearly within a city's authority to "provide for the safety" of its inhabitants and "protect property." Furthermore, cities have specific authority over watercourses:

> They [*i.e.*, cities] may control the water and watercourses leading to the city and regulate and control watercourses and mill privileges within the city; provided, that the control may not be exercised to the injury of any right already acquired by actual owners.

Id., § 10-8-16. This is a specific grant of authority over watercourses, and so the City has power and discretion to implement that grant, as well as general authority to promote the public health and welfare. Hooper City has designated Howard Slough as one of the "natural waterways" within the City.[10] The City thus has authority to control and regulate land uses in and along Howard Slough.[11]

Finally, the City has another broad grant of authority to regulate land uses for the good of the public, along with discretion to carry out that authority:

> (1) The purposes of this chapter [*i.e.*, Chapter 10-9a] 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 and its present and future inhabitants and businesses, to protect the tax base, to secure economy in governmental expenditures, to foster the state's agricultural and other industries, to protect both urban and nonurban development, to protect and ensure access to sunlight for solar energy devices, to provide fundamental fairness in land use regulation, and to protect property values
>
> (2) To accomplish the purposes of this chapter, municipalities may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and development agreements that they consider necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and

[10] *Id.* § 10-1A-1 (Definition of "Natural Waterway"). In addition, the Slough provides drainage of storm waters.
[11] S*ee also* UTAH CODE ANN. § 17-8-5.5 (Counties granted authority to protect flood plains within incorporated municipalities as well as within unincorporated areas).

> development agreements governing uses, density, open spaces, structures, buildings, energy efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities, fundamental fairness in land use regulation, considerations of surrounding land uses and the balance of the foregoing purposes with a landowner's private property interests, height and location of vegetation, trees, and landscaping, unless expressly prohibited by law.

Id., § 10-9a-102.

These sections of the Utah Code are more than sufficient justification for the City to impose regulations intended to prevent building in areas subject to flooding.[12] Since a setback is a reasonable means to carry out the City's objectives, there is no reason that the City cannot impose a reasonable setback to preserve a flood plain along Howard Slough.

B. The City Has Discretion to Define the Extent of the Setback.

The City's authority to require a setback from Howard Slough includes discretion to determine the size and extent of the setback. As long as the City's choice for the size of the setback has a reasonable basis, it is not an abuse of discretion, even if there are other alternatives. "Though a municipality may have a myriad of competing choices before it, the selection of one method of solving [a] problem in preference to another is entirely within the discretion of the city; and does not, in and of itself evidence an abuse of discretion." *Bradley v. Payson City*, 2005 UT 16, ¶ 24, 70 P.3d 47, 54 (quotes and alterations from original omitted). As long as the justification for the City's zoning decisions are "reasonably debatable," they should not be disturbed. *Id.*[13]

The City determined that restricting buildings within a 100-foot setback on either side of Howard Slough was needed to preserve the Slough and to protect structures from flood damage. The City states that it has evidence that flood waters have extended to 100 feet from the Slough channel in the past. This Opinion must accept the City at its word, and, since it is reasonably debatable that a 100-foot setback is needed, there does not appear to be any reason to conclude that the setback is an abuse of the City's discretion.[14]

C. Development on The Property is Subject to the City's Setback Rules.

Any development on the property is subject to the City's zoning ordinances, including the setback from Howard Slough. All property is subject to local zoning regulations. *See Western Land Equities v. City of Logan*, 617 P.2d 388, 390 (Utah 1980). As has been discussed, the setback appears to be a reasonable means to promote the legitimate public interests in preserving

[12] *See Call v. West Jordan*, 606 P.2d 217, 219 (Utah 1979) (Citing similar language in predecessor statutes as justifying a city's authority to enact measures related to flood control).
[13] *See also Price Development Co. v. Orem City*, 2000 UT 26, ¶ 19, 995 P.2d 1237, 1245 (Local governments have broad latitude to decide how to perform their functions and address local needs).
[14] This does not mean that the 100-foot setback is ideal. The City may alter the setback (by amending its ordinances) if justified after evaluating its flood control needs.

the Slough and preventing flood damage. Moreover, the setbacks are currently in place, so any development on the property is already subject to them, unless the City's ordinances change.[15]

Without any additional requirements, the required setbacks could be imposed on a building lot. Although no permanent buildings may be erected in setback areas, they may still be used for some activities, including landscaping, gardens, etc.[16] In this respect, the setbacks from Howard Slough are not much different than setbacks required on other residential lots, except they are significantly larger. Most importantly, if the areas (or at least most of the area) remain in private ownership, the owners could exclude others from using the property.[17] However, the requirements differ substantially from other types of setbacks, because they are intended to protect a waterway. That aspect may require extreme limitations on activities, particularly in the area close to the channel.[18] However, even with use and building limitations, a setback could possibly be imposed without severely impacting a building lot.

II. The Dedication is an Exaction, Which Must Satisfy Rough Proportionality Analysis.

Although the setback alone appears to be a valid exercise of the City's authority, requiring dedication of the setback area for the public's use is most likely an invalid exaction. "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 ("*B.A.M. III*"). The City's ordinances not only require a setback from the Slough channel, but also a dedication of the property within the setback (either an easement or the property itself) to the public as a condition of subdivision approval.[19] In order to be valid, municipally-required exactions must satisfy the "rough proportionality" analysis found at § 10-9a-508 of the Utah Code.

> 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.

[15] In other words, Mr. Peterson has not "lost" any potential lots on the Parcel, because any development is subject to the setbacks. Any subdivision plan must be designed to conform to the City's requirements.

[16] There was no information provided which indicated the types of activities that would be permitted within the setback (possibly because the City also requires dedication of the setback area. *See* Section II, *supra*).

[17] The right to exclude others is "perhaps the most fundamental of all property interests." *Lingle v. Chevron, USA*, 544 U.S. 528, 539 (2005).

[18] In all likelihood, Howard Slough would also be regulated as a wetland under State and Federal laws. This would also result in restrictions on uses in and near the Slough.

[19] The setback itself is thus not an exaction, because it would not be *dedicated* to the public. In most cases, the property owner retains control over areas within a setback, even if uses are restricted.

UTAH CODE ANN. § 10-9a-508(1).[20]

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).[21] 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 v. Chevron, USA*, 544 U.S. 528, 536 (*quoting* U.S. CONST. amend. V).[22] 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).

The language of § 10-9a-508 was borrowed directly from the U.S. Supreme Court decisions 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. Development v. Salt Lake County*, 2006 UT 2, ¶ 41, 128 P.3d 1161, 1170 ("*B.A.M. I*")). In those two landmark cases, the U.S. Supreme Court promulgated rules for determining when an exaction may be validly imposed under the federal constitution's Takings Clause.[23] This has come to be known as the *Nollan/Dolan* "rough proportionality" test, and that two-part analysis was codified by the Utah Legislature in § 10-9a-508.

1. An Essential Link Between the Exaction and a Governmental Interest.

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,

[20] The analysis is the same whether the exaction is imposed via an ordinance (*i.e.*, legislatively) or negotiated as part of the development approval process (*i.e*., administratively). *B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2, ¶ 46, 128 P.3d 1170.

[21] "[A] unit of government may not condition the approval of a land-use permit on the owner's relinquishment of a 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.

[22] 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).

[23] *See* U.S. CONST., amend. V. ("nor shall private property be taken for public use, without just compensation"). The Supreme Court has interpreted the Takings Clause as limiting a government's ability to impose conditions on development. Furthermore, "[t]he Utah Constitution reinforces the protection of private property against uncompensated governmental takings . . . ." *B.A.M I.*, 2006 UT 2, ¶ 31, 128 P.3d at 1168. *See also* UTAH CONST. art. I, § 22 ("Private property shall not be taken or damaged for public use without just compensation").

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).[24] 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.

In this matter, the Hooper City determined that the public should have access to the setback areas along Howard Slough, and that those areas should be maintained as open spaces, possibly with public trails.[25] Since the City has an interest in providing open spaces and public recreation, there is an essential link between the dedication and a legitimate governmental interest. Thus, the first half of the analysis is satisfied.

2. Roughly Proportionate in Nature and Extent.

The other half of the rough proportionality test was established by the *Dolan* decision, which reviewed two required dedications: An easement along a creek for flood control, and property for a 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.[26]

[24] 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.
[25] The City would maintain the areas. *See* HOOPER CITY CODE, § 10-4A-16.2
[26] 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.

Rough proportionality analysis was further honed by the Utah Supreme Court in *B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 45, 196 P.3d 601 ("*B.A.M. II*"), the second appeal stemming from the same development project at issue in the earlier decision. In that opinion, the Court explained that rough proportionality analysis "has two aspects: first, the exaction and impact must be related in nature; second, they must be related in extent." *B.A.M. II*, 2008 UT 45, ¶ 9, 196 P.3d at 603. The "nature" aspect focuses on the relationship between the purported 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." *Id.*, 2008 UT 45, ¶ 10, 196 P.3d at 603-04.

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 45, ¶ 11, 196 P.3d at 604. The court continued by holding that "roughly proportional" means "roughly equivalent." 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 a land use.

In the third "*B.A.M.*" decision, Utah's Supreme Court summarized the analysis, firmly tying the exaction to the 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.

B.A.M. III, 2012 UT 26, ¶26, 282 P.3d at 47. In this matter, the focus must remain on the need for open space and trails created by the proposed development, not the City's flood control needs. The setbacks provide adequate flood control. Trails and open space for public recreation do not "solve" any flood control "problem."

The dedication required by the City most likely fails this portion of the analysis. In the first place, it has not been shown that a subdivision on the Parcel creates a need for open space that is "solved" by dedicating a 200-foot wide strip of the property, even if the City maintains it. Thus, the "nature" aspect of the analysis does not appear to be satisfied. Secondly, there is no information concerning whether the cost of dedicating the property is roughly equal to the City's

expense to address the impact caused by a proposed subdivision.[27] If the City can show that development on the Parcel surrounding Howard Slough creates a need for open space and public trails, and that the cost of dedicating a 200-foot strip is roughly equal to the City's expense to address the need, then the exaction would be valid.

Conclusion

The City may require a setback from the channel of Howard Slough, to protect the Slough and also to prevent flood damage to buildings. The extent of the setback is within the City's reasonable discretion, and may be as wide as reasonably needed to protect against flooding. The City states that it has evidence that flood waters have reached 100 feet from the main channel in the past. If that evidence is valid, then a 100 foot setback may be justified.

The City's requirement that the setback area also be dedicated to the public for open space and trails is an exaction that must satisfy rough proportionality analysis. There has been no information submitted that development on the property creates a need that is solved by dedicating the setback area to the public. Moreover, it has not been shown that the City's expense to address the impact attributed to a new development is roughly equal to the cost to comply with the requirement. Unless that is shown, the City's required dedication is not a valid exaction.

Flood control and wetland protection are important interests for the City. It is also clear that development is not practical within a significant portion of the area immediately surrounding the Slough. It may be possible that a combination of a narrow strip of dedicated property with a privately-owned setback may fully meet the needs of the City and allow the additional lots on the Parcel. This would require changes to the City's ordinances, but is a possible suggestion as a compromise.

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[27] The cost to comply with the exaction would be cost of the property. The expense to the government means the expenses needed to address the impact created by the new development. *See B.A.M. III*, 2012 UT 26, ¶ 31, 282 P.3d at 48 (all government expenses may be considered).

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, 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 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:

Mayor Glenn Barrow
Hooper City
5580 West 4600 South
Hooper, Utah 84315

On this _____ Day of November, 2014, 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