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OFFICE OF THE PROPERTY RIGHTS OMBUDSMAN

FRANCINE A. GIANI
Executive Director

BRENT N. BATEMAN
Lead Attorney, Office of the Property Rights Ombudsman

ADVISORY OPINION

Advisory Opinion Requested By: Mayor Patrick H. Dunlavy, Tooele City

Local Government Entity: Tooele City

Applicant for Land Use Approval: Beehive Storage LLC

Type of Property: Self-Storage Facility

Date of this Advisory Opinion: February 14, 2017

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

ISSUE

Can Tooele City require that Beehive Storage LLC dedicate and improve a 66 foot wide portion of 1280 North Street as a condition of site plan approval for the expansion of the Beehive facility?

SUMMARY OF ADVISORY OPINION

A local government may require an exaction, such as dedication of property or installation of improvements, as a condition of development approval. Such exactions, however, must satisfy the analysis required by UTAH CODE § 10-9a-508. This analysis examines whether the exaction is roughly proportional, in both nature and extent, to the cost of assuaging the impacts of the development activity.

Tooele City's exaction upon Beehive Storage satisfies the "nature" aspect of the analysis. However, the requirement to dedicate and construct the entire 66 foot width of the road appears excessive, and thus fails the "extent" aspect of the test. An appropriate exaction in this matter must be proportionate to the development's relatively minor impacts.

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 Mayor Patrick H. Dunlavy, on behalf of Tooele City, on October 3, 2016. A copy of that request was sent via certified mail to Mr. Douglas F. White, 636 East South Temple St., Salt Lake City, Utah 84102.

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 Mayor Patrick H. Dunlavy, on behalf of Tooele City, on October 3, 2016.
2. Response submitted by Mr. Douglas F. White, Attorney for Beehive Storage, LLC, on October 28, 2016.

BACKGROUND

Since 1996, Beehive Storage LLC ("Beehive") has been the owner and operator of a self-storage facility (the "Facility") located at 1498 North Pine Canyon Road in Tooele City. Because configuration of the parcel and adjoining roads are material to this Advisory Opinion, an approximate representation appears here. The Facility currently consists of multiple structures for indoor self-storage, plus a gravel pad for outdoor boat and RV storage. The only entrance or exit from the Facility is located in the northwest corner and connects to Pine Canyon Road (2000 N). The property east of the Facility is undeveloped. To the south, three parcels adjoin the Facility, two containing commercial buildings, and one smaller parcel owned by Beehive. The street



known as 1280 North runs south of the adjacent businesses and dead-ends at the smaller Beehive parcel.

Beehive recently submitted a site plan application to Tooele City for expansion of the Facility. The site plan shows several new indoor storage buildings located upon the area currently used as outside storage, and the outside storage relocated to the south upon the immediately adjacent Beehive parcel.

Tooele City's Right-of-way Master Plan shows 1280 North Street continuing through the smaller Beehive parcel to reach the undeveloped properties to the east. Tooele City has informed Beehive that in order to receive site plan approval for the expansion of its storage Facility, Beehive will need to dedicate 66 feet of the property and construct the entire width of 1280 North in the expansion area, including asphalt, curb, gutter, and sidewalk. Tooele City argues that this dedication and construction of the road is a permissible and proportionate exaction upon which it may condition approval of the site plan. Beehive objects to the requirement that it dedicate and build this portion of 1280 North. Beehive argues that the exaction is unneeded and disproportionate because the entire adjacent Beehive parcel will be fenced for security, and thus no vehicles or traffic will enter or exit the property from 1280 North. In addition, Beehive argues that Tooele City has no authority in its ordinances to require dedication and construction of this road.

ANALYSIS

I. Development Exactions and the “Rough Proportionality” Test

Tooele City's requirement, that Beehive dedicate and improve 1280 North, is an exaction. An exaction is a government-mandated contribution of property imposed as a condition of development approval. *B.A.M. Dev., L.L.C. v. Salt Lake County, (BAM III)*, 2012 UT 26, ¶16. Exactions arise from the principle that development causes impacts to a community. In order to assuage those impacts, the community can exact from the developer property or improvements for dedication to the public.

Exactions are legal and appropriate if they are roughly proportionate to the impact that the development creates. The Utah Code 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). 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 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and has become known as the “rough proportionality test.” See *B.A.M. Dev., L.L.C. v. Salt Lake County, (BAM I)*, 2006 UT 2, ¶8. If the exaction meets this test, it is valid. If the exaction fails this test, it violates the protections

guaranteed by the Takings Clauses of the Utah and U.S. Constitutions.¹ *Call v. West Jordan*, 614 P.2d 1257, 1259 (Utah 1980). Thus this test “bar[s] 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). An exaction helps pay the costs of the development’s impact. An excessive exaction requires the developer to pay for impacts beyond its own. *Banberry Development Corporation v. South Jordan City*, 631 P.2d 899, 903 (Utah 1981).

The rough proportionality analysis was honed in Utah by *B.A.M. Development, LLC v. Salt Lake County (BAM II)*, 2008 UT 74. In that opinion, the Utah Supreme 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.” *Id.* at ¶9. 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.* at ¶10.

The “extent” aspect of the rough proportionality analysis measures the impact against the proposed exaction in terms of cost. *Id.* at ¶11 (“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.” *Id.* at ¶8. 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 assuage the impact attributable to a land use. Despite the test for equivalency, mathematical precision is not required. *Id.* at ¶12, n.4.

In the third “B.A.M.” decision, the Utah Supreme Court summarized the analysis, firmly tying the exaction to the 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.

BAM III, 2012 UT 26, ¶26. Accordingly, Tooele City’s requirement that Beehive dedicate the land and build the improvements on 1280 North, imposed as a condition of site plan approval, is an exaction that must satisfy the rough proportionality test. Tooele City may impose the exaction “so long as there is a ‘nexus’ [or link] and ‘rough proportionality’ between the property that the government demands and the social costs of the applicant’s proposal.” *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586, 2595 (2013). Tooele’s exaction must solve a problem that Beehive’s development activity creates. And the costs to Beehive to dedicate 66

¹ The Takings Clause of the Federal Constitution is found in the Fifth Amendment, and is made applicable to the states by the Fourteenth Amendment. *See Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). In addition, “[t]he Utah Constitution reinforces the protection of private property against uncompensated governmental takings in article I, section 22, Utah Constitution.” *B.A.M. I*, 2006 UT 2, ¶31.

feet of property and to build and improve 1280 North must be proportionate to the impacts that the development imposes upon the community.

II. The 1280 North Exaction

Beehive argues that Tooele City cannot impose *any* exaction to improve 1280 North because Tooele City does not have an ordinance specifically allowing it to do so. Exactions are authorized by state law. UTAH CODE § 10-9a-508(1). Thus where impacts arise, exactions may be imposed. In addition, Beehive argues that the City may not exact for 1280 North because the City does not have an Impact Fee for roads. This exaction is a dedication of property and improvements, so the Impact Fee Act does not apply. *See* UTAH CODE § 11-36a-102(8). Although all impact fees are exactions, not all exactions are impact fees.

Conversely, the City argues that the exaction is justified and proportionate because the road is shown on the Tooele City Right-of-way Master Plan, and that the exaction meets Tooele City's minimum road right-of-way and improvement standard. Both of those facts may be true, and a road in that location and of that size may be badly needed by Tooele City. But the amount that may be exacted from this developer depends upon the impact of the development, not the need or desire for a certain improvement by the City. The City may plan for and intend that a certain road be established, but they can only impose an exaction that is roughly proportionate to the impact created by the development activity. Even if a requirement is imposed by ordinance, a city can only require that the developer pay its proportionate share. *See BAM I*, 2006 UT 2, ¶46 (“[T]he legislature intended to apply the rough proportionality test to all exactions, irrespective of their source.”). An excessive exaction imposed by ordinance is still excessive. If the desired road will cost more than the developer's share, then the City will need to find other ways to pay for the remainder of the road.

A. *The Exaction Promotes a Legitimate Government Interest*

Tooele City has a legitimate governmental interest in safe and efficient traffic flow for vehicles and pedestrians. Constructing new roads is a reasonable means of accomplishing the City's objectives. *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. Thus the *essential link* portion of the rough proportionality test is satisfied. UTAH CODE § 10-9a-508(1)(a).

B. *The Exaction Satisfies the Nature Portion of the Analysis*

The *nature* aspect of the rough proportionality test asks whether the exaction provides a solution to a problem created by the development activity. Beehive plans to expand both its indoor and its outdoor storage capacity. This should cause an increase in traffic accessing the Facility. Therefore, Beehive's development will certainly have an impact on Tooele City traffic. Traffic in and out of the Beehive Facility will empty onto Pine Canyon Road. Thus that location will receive the bulk of the direct impacts. Nevertheless, the expansion of the Beehive Facility will increase traffic in the general area. Some traffic to and from the Facility is likely to make its way to 1280 North. In addition, although current plans call for security fencing and no point of access to 1280 North, it cannot be said that improvements that abut a road have zero impact upon it,

even if access to that road is not directly available. Access plans could change. Access may be needed by emergency vehicles. The sidewalk and street could be affected by conditions on the abutting property. In any event, the Facility expansion will impact roads in the area. This problem could be solved by dedicating and improving nearby roadways. *See Dolan*, 512 U.S. at 395 (“[d]edications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use.”). Since there is a problem, and the exaction could provide the solution, the *nature* portion of the rough proportionality test is satisfied.

C. *The Requirements Do Not Satisfy the Extent Portion of the Analysis*

The *extent* portion of the exaction analysis compares the city’s cost to the property owner’s cost. These two costs should be roughly equivalent. Generally, greater impact justifies a greater exaction. Where the impact is small, the exaction should likewise be small.

Tooele City has asked that Beehive dedicate the entire width of a 66 foot wide collector road along Beehive’s approximately 282 foot southern boundary. In addition, Beehive is required to pay for and construct all improvements, including asphalt, curb, gutter, and sidewalk, for the full width. The only show of rough proportionality provided by the City includes bare statements that the requirement meets Tooele’s established standards, and that the exaction is equivalent to the cost of mitigating the burdens of the development. Because Tooele City has not provided the required analysis,² the City has not satisfied the *extent* aspect of the rough proportionality test.

Nevertheless, even without a complete analysis,³ the exaction appears excessive. A commonly imposed road exaction for typical traffic impacts (where homes or businesses will directly access that road) consists of dedication and construction of a half-width of a road along the frontage of the property. This half-width frontage exaction is common practice and generally accepted as roughly proportionate to a typical road impact.⁴ An abutting half-width generally does not require one developer to provide improvements that others should provide --- *i.e.*, the opposite abutting landowner typically provides the other half-width. This typical half-width road exaction, in response to typical impacts, may be useful as a yardstick of rough proportionality where a full analysis of costs is neither provided nor practical.⁵

Tooele’s exaction requiring Beehive to dedicate to the public the full width of a 66 foot road, and to construct the full width of the road, represents a far greater dedication than the typical dedication illustrated by this example. At the same time, Beehive appears to bring a much

² The City bears the burden of showing that its proposed exaction satisfies the rough proportionality test. *See Dolan*, 512 U.S. at 391.

³ 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.

⁴ General acceptance of a half-width dedication as a roughly proportionate exaction is based upon the observation of OPRO staff. This need not be proven for purposes of this Advisory Opinion, as the half-width exaction is only illustrative and serves here as a guideline. Circumstances certainly do arise where a greater or smaller exaction would be appropriate and needed depending on a greater or smaller level of impact.

⁵ Referring to this generally accepted half-width exaction is not meant to adopt a *de facto* rule nor to endorse this as an acceptable or legal exaction. It simply provides a useful measure of proportionate exactions, when a full analysis is not provided, in order to promote settlement of disputes.

smaller than typical impact. Traffic will not directly access 1280 North from the Facility,⁶ and only a fractional percentage of the traffic increase to the Facility will directly impact 1280 North. No construction other than a gravel storage pad is slated to take place adjacent to 1280 North. Moreover, although traffic to the Facility will increase, daily traffic to a storage facility will not be as heavy as many other commercial uses. Impacts will arise, but they will be small.

Accordingly, if a typical and generally accepted exaction has any value in determining whether an exaction is excessive, this exaction appears to carry far greater costs while at the same time carrying lower impacts. Therefore, this appears to be a case of an excessive exaction. Beehive is creating some impact, and some exaction providing for 1280 North is appropriate. However, asking Beehive to dedicate and improve the entire width of a 66 foot collector road that Beehive will not directly access and which is some distance away from the entrance is not roughly proportionate. Moreover, 1280 North will be heavily and primarily used by other developments, including the property across the street to the south and the large vacant area to the east, which stands especially to benefit from 1280 North. Once developed, other properties' use of 1280 North will be exponentially heavier than Beehive's. Beehive, and its relatively small impact, should not be required to bear the burden of dedicating and constructing the entire road.

CONCLUSION

Some exaction for 1280 North appears appropriate, because Beehive's expansion of its Facility will impact Tooele City. But Beehive's impact upon 1280 North will be light and small compared to adjoining property owners that will benefit greatly. Tooele's exaction must be reduced significantly in order to bring it within the rough proportionality test, and this into compliance with the current law.

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

⁶ Tooele City implies that access from the Facility onto 1280 North will be necessary, and perhaps required, because of the difficulty in maneuvering large vehicles upon the property. Developer argues that there will be no difficulty in accessing the existing exit, and that Tooele City has not shown any legal justification that would allow the City to require addition of an access onto 1280 North, except perhaps for emergency vehicle access. We likewise can find no justification for Tooele City to require Beehive to change or to add to the Facility access.

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

On this _____ Day of February, 2017, I caused the attached Advisory Opinion to be delivered via the United States Postal Service, postage prepaid, and certified mail, return receipt requested, and addressed to the person shown below.

Douglas F. White, Attorney
630 E. South Temple Street
Salt Lake City, Utah 84102

Office of the Property Rights Ombudsman