

Land Use Law Update: Recent OPRO Advisory Opinions

Office of the Property Rights Ombudsman
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The Office of the Property Rights Ombudsman

Supports local agencies and citizens by providing:

- **Information and education** to explain land use law and legal processes.
- **Mediation** of eminent domain and land use disputes.
- Research on specific issues of land use law, and prepare **Advisory Opinions** that attempts to resolve the dispute in accordance with the prevailing law



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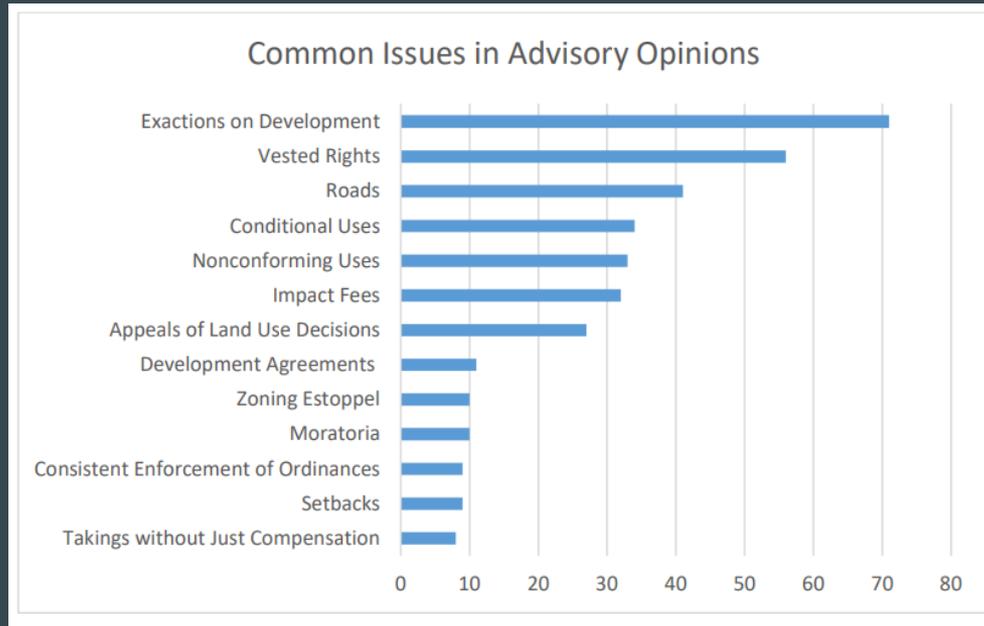
- Advisory Opinions are not binding on the parties, and are admissible in court as *evidence*.
- However, Advisory Opinions apply existing law to specific facts and attempt to predict how Utah courts would likely resolve the dispute;
- Written by attorneys that are charged by statute to be experts in the area of land use law, Advisory Opinions can be persuasive on questions of law that have not yet been addressed by Utah courts in a particular way.



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Common Themes and Trends in OPRO Advisory Opinions

- Exactions on Development (consistently the prevailing topic for AO's)



Call, Craig (2022) "Adventures in Land Use Dispute Resolution: Utah's Innovative Program to Provide "Free" Legal Advice to Local Government, Neighbors, and Property Owners," *Journal of Comparative Urban Law and Policy*: Vol. 5 : Iss. 1 , Article 30, 375-399.

Common Themes and Trends in OPRO Advisory Opinions

Another reoccurring issue in recent opinions:

- Disputed Property Rights/Interests in the Land Use Approval Process

Recent OPRO opinions on Exactions (including impact fees)

- **AO 300 (Dec 2024): Edge Homes / Lehi City** (charge on development for public fiber conduit system was lawful exaction)
- **AO 302 (Jan 2025): South Nephi, LLC / Nephi City** (city could not require looped power system where ambiguous standard allowed for less restrictive means)
- **AO 303 (March 2025): Allen / West Haven** (storm water impact fee based on parcel size was unlawful)
- **AO 304 (March 2025): Trust / American Fork** (unlawful to impose road exaction at rezone stage without proposal for development)
- **AO 307 (July 2025): Butler / Millcreek** (no new impact from replacement dwelling to justify right-of-way dedication)

AO 300 (Dec 2024): Edge Homes / Lehi City

- City charges all new development for installation of city-owned conduit system for fiber optic cable that not only houses some of city's own services but is also open to any internet provider;
- Planned subdivision development had its own plans for a contracted internet provider to service the development;
- Developer claimed they had no need for the city's conduit, and that providing high-speed internet services is not a necessary utility service for life/safety/habitability, and charging for it was an illegal exaction;



AO 300 (Dec 2024): Edge Homes / Lehi City

OPRO opinion:

- Cities have authority to act for the general welfare, and have discretion in the types of services it offers; Conduit and boxes that connect development to a city-wide system to provide public and private services is a legitimate use of authority
- The conduit connections provide some demonstrable benefit to the development itself, as it is open to any internet provider to service the development; the development activity creates a need for extensions to the city-wide system;
- OPRO concluded conduit charge on new development was a lawful exaction



AO 302 (Jan 2025): South Nephi, LLC / Nephi City

- City has its own power company, and City code provides that “[t]he developer shall pay the cost of electric system extensions and streetlights, installed by the city, to service the subdivision.”
- In prior developments, the City had installed a “looped” power system, which entails two sources of power going into the subdivision to provide a “backup” source that avoids or reduces power outages;
- City approved a commercial subdivision plat and initial estimate for electrical costs that reflected a single-sourced system, and later determined this was in error and provided updated (and more costly) final estimate that reflected a looped system like it had done in other developments;
- Developer determined that the subdivision could be adequately serviced with single-sourced system, and that the City was “upsizing” by charging for a looped system, or was possibly asking developer to offset the impact of other development;

AO 302 (Jan 2025): South Nephi, LLC / Nephi City

OPRO opinion:

- Developer's engineer produced report that the development would be adequately serviced with a single-source system; City produced engineering report that evaluated the benefits of a looped-power over a single-source system, concluded it was recommended as a better service (but did not discredit developer engineer's conclusions)
- Cities have the authority to establish the "level of service" of the utilities/services it provides – but it does so through legislative enactment;
- The City's codified standard only stated that developers would "pay the cost of electric system extensions . . . to service the subdivision." This language is ambiguous, as it plausibly means either extending *in-kind* the type of facilities in place (City prior practice) or else plausibly means only an extension that will adequately "service" the development.
- OPRO concluded that whereas looped power was not expressly stated in the City's standards, and a single-source system otherwise adequately services the development, the ambiguous standard needed to be interpreted to favor the developer's proposal, and City could not require additional costs for a looped-power system.

AO 303 (March 2025): Allen / West Haven

- City hired consultant to prepare an Impact Fee Facilities Plan and Impact Fee Analysis for the City's impact fee ordinance;
- The City followed the recommendations of the report, including the adoption of a storm water facilities impact fee that charged a fee amount that was calculated on the size of the parcel seeking to develop within the service area.
- Husband and wife sought building permit for single-family residence on a 3-acre parcel, which amounted to "hardscaping" only about 3% of the lot's area with the new improvements, but were assessed a storm water impact fee over \$12,000.
- OPRO opined that the City's impact fee, as applied, was an unlawful exaction because it disregards the actual intensity and scope of the proposed development and the expected disruption to natural water flow, and as a result imposes a condition that is not roughly proportionate to the actual impact of development.

AO 304 (March 2025): Trust / American Fork

- 24-acre property near UTA Front Runner American Fork Station was split-zoned and partially within the Transit Oriented Development (TOD) zone. Owner sought to rezone entire property TOD in anticipation of future development but did not have any actual development proposal.
- The City's master plan anticipated a 5-lane arterial highway running through the property, and the Planning Commission recommended approval on the condition of a 100-foot right-of-way dedication for the future highway.
- OPRO opined that such a condition violates the rough proportionality test because merely rezoning property without any proposed development does not present a development impact needing to be offset by exaction, and that even if proposed, requiring a single development to solely bear the burden of dedication for a road providing regional or system-wide benefits also likely violates the test

AO 307 (July 2025): Butler / Millcreek

- Owner of single-family dwelling on corner lot sought building permit to tear down and rebuild new home on the foundation.
- New home proposed enlarged garage, and new second story with additional and new rooms. Footprint of the new structure increased by 117 feet but overall square feet would increase 1,600 square feet.
- Property fronts an existing, substandard, minor collector. City conditioned approval on the owner dedicating property to widen road to current standard and installing improvements.
- City argued that the project was a “substantial addition,” and that if everyone improved the roadway when they make substantial improvements to their property, the City would have better facilities to service them;
- OPRO opined that replacing a single-family home with a single-family home, even if larger, creates no new impact to warrant additional exactions to address a single-family use.

Recent OPRO opinions involving Disputed Property Rights in the Land Use Approval Process

- **AO 239 (May 2021): Harbut / Big Water Town** (disputed property interests could be compelling countervailing public interest basis for denying development)
- **AO 256 (May 2022): Packer / Centerville** (city rightfully approved subdivision where ordinance only required that disputed easement be shown on plat)
- **AO 280 (Dec 2023): Leick / MSD** (code required factual finding that property had legal access; MSD could consider the existence of a dispute as evidence)
- **AO 301 (Jan 2025): Andersen / Rockville Town** (substantial evidence for prescriptive public road for purpose of meeting access requirements)
- **AO 309 (Aug 2025): Dickson / Wasatch County** (county wrongfully revoked building permit after issuance where neighbor disputed access)

AO 239 (May 2021): Harbut / Big Water Town

“Utah law has not directly addressed a municipality’s obligation as to consideration of private property disputes raised in response to a land use proposal. However, this concept that land use approval is not the appropriate venue for quiet title claims has been well articulated in some other states. *See, e.g., Borough of Braddock v. Allegheny County Planning Department*, 687 A.2d 407 (Pa. Cmwlth. 1996) (a zoning board is an inappropriate vehicle to deal with complex issues of title, which the opposing parties should resolve by a quiet title action); *see also, Cybulski v. Planning & Zoning Comm’n*, 43 Conn. App. 105, 110, 682 A.2d 1073, 1076 (1996) (planning commission does not have the authority to determine whether a claimed right-of-way is a public highway, since that conclusion can be made only by a judicial authority in a quiet title action).”

AO 239 (May 2021): Harbut / Big Water Town

“... municipality is bound by the terms and standards of applicable land use regulations and shall comply with mandatory provisions of those regulations. The land use authority substantively reviews a complete application and takes final action to approve or deny the application according to those standards. An applicant is typically entitled to approval of a land use application if the application conforms to the requirements of the applicable land use regulations, land use decisions, and development standards; however, even a compliant application may not be entitled to approval if ‘the land use authority, on the record, formally finds that a compelling, countervailing public interest would be jeopardized by approving the application.’” Utah Code Ann. § 10-9a-509(1)(a)(ii)(A).

“We believe that a ‘compelling, countervailing public interest’ is akin to the ‘compelling state interest’ so often discussed by the courts as pertaining to fundamental rights, including private property rights. Therefore, in certain cases, it may be appropriate for a municipality to deny a complete land use application if it reasonably presents constitutional taking issues.”

AO 239 (May 2021): Harbut / Big Water Town

- “... where the existence of certain private rights are raised in opposition to proposed development, turning to the land use authority to resolve disputed property interests places the municipality in the impermissible position of adjudicating private rights; this is a role fulfilled only by the court as the sole authority to quiet title in real property. Therefore, where there is a legitimate factual dispute as to a land use applicant’s right to what is proposed, or whether the proposal will materially affect the private property interests of another person, a municipality may choose to deny the application until a court or the involved parties resolve any takings concerns inherent in approval of the development.”

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Questions?

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Thank you!