THE UTAH LAND USE INSTITUTE

LAND DEVELOPMENT DEDICATIONS/EXACTIONS

By

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A. What are Dedications/Exactions For Land Development?

Dedications/exactions occur in the land use regulation process when a municipality, county, or district require that real property, water rights, water shares, or money be dedicated as a pre-condition for approval of new development.[2] From the public perspective it is a dedication from the developer or landowner perspective it is an exaction. Whether labeled as a dedication or exaction it is the very same thing.

The authority to require dedications/exactions is the state of Utah's police powers to promote the health, safety, and welfare of residents dedicated to municipalities and counties in the Land Use Development Management and Development Act, ("**LUDMA**") Title 10 Chapter 17 for municipalities and Title 17 Chapter 27a for counties of the Utah Code. For special districts created under Title 17B of the Utah Code authority is found in Utah Code Ann. § 17B-1-120. For special service districts under Title 17D the authority comes through the delegated LUDMA authority of the municipality or county which created and controls the district. to address the impact of new growth on existing infrastructure or otherwise address the demands of the new growth. While payment of money may be a dedication/exaction, in Utah most monetary payments to address the impact of new development is considered to be an Impact Fee. Impact Fess are regulated in Title 11, Chapter 36 of the Utah Code. Dedications/exactions are not.

B. Constitutional Limits on Dedications/Exactions

Limitations on dedications/exactions are rooted in the United States Constitution's prohibition against taking of private property without payment of just compensation. See United States Constitution, Amendment 5, "*…nor shall private property be taken for public use, without just compensation*."[3]

C. The Nollan/Dolan Essential Nexus/Rough Proportionality Test

Two United States Supreme Court decisions on dedications/exactions, seven years apart, created the template for Constitutional limits on dedications/exactions. *Nollan v.*

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[2] In Utah, dedications/exactions for money are regulated as Impact Fees Under Title 11, Chapter 38 of the Utah Code.

[3] The Utah Constitution has a similar provision in Article 1, Section 22 "*Private Property shall not be taken or damaged for public use without just compensation*."

California Coastal Commission[4] and *Dolan v. City of Tigard*,[5] define the federal constitutional limits of exactions, a third extended these limits to Impact Fees in *Koontz v. St. John's River Water Management District*.[6]

Of course, requirements of the United States Constitution are effective regardless of state law. Not surprisingly, Utah has adopted the Nollan/Dolan test in the enabling law for land use regulation by both municipalities and counties, Title 10 Chapter 9a and Tile 17 Chapter 27a of the Utah Code.

1. Nollan Essential Nexus Requirement

Nollan Beach House Before & After

In *Nollan,* Patrick Nollan owned a beach house with a very desirable private beach in Faia Beach, Ventura County, California. He wanted to replace the small beach house with a new

[4] 483 U.S. 825 (1987).

[5] 512 U.S. 364 (1994).

[6] 570 U.S. 595 (2013).

larger one. In order to do so Mr. Nollan needed a permit from the California Coastal Commission to tear down and build a new beach house. While the Commission approved the project, it conditioned the approval on Nollan granting easement over the private beach for public access. Mr. Nollan, who was an assistant Los Angeles City Attorney, believed the dedication of the easement constituted an uncompensated taking of his property. He appealed the appeal finally ended up at the United States Supreme Court. The Court, not surprisingly, ruled that there was no "essential nexus" (connection) of legitimate governmental interest between the exaction of a public easement to access the beach and the impact created by the rebuilding and enlarging the beach house. Thus, the first prong of the Nollan/Dolan Test was created.

This first prong examines the nexus between the impact of the development and the exaction by the government. *Nollan* stresses that the government may exact to offset development impacts, but such exactions must relate to the impacts created by the development. The government cannot twist a land-use approval process into an excuse to capture and take, without compensation, an interest unrelated to the impact of the development.

2. Dolan Rough Proportionality Requirement

Dolan Hardware Store in Tigard, Oregon

In *Dolan v. City of Tigard*, the owner of a plumbing supply store appealed exactions the City required in approving a building permit to add on to the store.[7] In *Dolan*, the Court added a second prong to the *Nollan* test. The new prong requires a "rough proportionality" between the

[7] *Dolan v. City of Tigard*, 512 U.S. 374 (1994)

exaction and the impact of development. In *Dolan,* the City had required a bike path easement as a condition of approval of expansion of the store. Although the easement had a nexus to the impact of the larger store, i.e. a larger store attracting more shoppers and increasing traffic which could be mitigated by bicycle access, the Court found that the exaction was out of proportion to the extent to the impact of the larger store. The Court held that the exaction must be roughly proportionate to the impact of development. If essential nexus and rough proportionality are not present the exaction is a taking.[8]

The court concluded that the City of Tigard had failed to show the required proportionality. Interestingly, the burden of proof with respect to the second prong of the analysis, the relationship of the exaction to the burden imposed, is placed upon the government, not the property owner. No precise mathematical calculation is required, but the government must make some sort of individualized determination to quantify how the required dedication is relative both in nature and extent to the impact of the proposed development. Conclusory statements will not suffice.

3. *Koontz v St John's Water Management District*

In 2013 the United States Supreme Court once again addressed exactions in its opinion in *Koontz v St John's Water Management District.*[9] In 1972, Coy Koontz, Sr. purchased 14.9 acres of undeveloped land near a highway east of Orlando. The state of Florida had classified a large portion of the land as wetlands, and Koontz was therefore required to obtain a development permit from the St. Johns Water Management District (District) under Florida's Warren S. Henderson Wetlands Protection Act (Henderson Act), which had jurisdiction over his property. Under the Henderson Act, the state requires that landowners "provide 'reasonable assurance' that proposed construction on wetlands is 'not contrary to the public interest.'" Furthermore, the landowner must select a form of mitigation that "offset[s] the adverse effects" of the development.

Koontz owned 14.9 acres of undeveloped land near Orlando, Florida, a large portion of which had been classified as wetlands. Before it could be developed, Florida law required Koontz to obtain a development permit from the St. John's Water Management District. Koontz applied for a development permit in 1994. To offset any adverse effects of his proposed development, Koontz offered to place 11 of his acres in a conservation easement. The District, however, considered this insufficient and refused to approve construction unless Koontz either deeded at

[8] Id.

[9] 570 U.S. 595 (2013).

least 13.9 acres into a conservation easement or pay for improvements to District-owned land several miles away.[10]

Koontz filed suit in state court, claiming he was entitled to "monetary damages" due to the District's "unreasonable exercise of . . . police power constituting a taking without just compensation."[11] The Florida Circuit Court found that Koontz had not exhausted all his administrative remedies and granted the District's motion to dismiss. After the Florida Supreme Court affirmed, the United States Supreme Court granted certiorari.

First, the Supreme Court addressed whether a permit denial could be subject to the *Nollan-Dolan* "nexus" and "rough proportionality" test. The Court grounded its reasoning in the unconstitutional conditions doctrine, citing previous decisions holding that "the government may not deny a benefit to a person because he exercises a constitutional right." Applied to land-use permitting, the Court noted that "*Nollan* and *Dolan* 'involve a special application' of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land use permits." The Court further explained that "[e]xtortionate demands" from local governments "frustrate" landowners' rights under the Fifth Amendment and are therefore prohibited by the unconstitutional conditions doctrine. On this point, the Court was particularly concerned about local governments attempting to "evade" the *Nollan/Dolan* test via a language formality, reasoning that granting a permit with a condition attached is no different than withholding a permit until a certain condition is met. Therefore, the Court held that the *Nollan/Dolan* "nexus" and "rough proportionality" test does apply in the context of permit denials, and that "[a] contrary rule would be . . . untenable."

In the Court's opinion, the demand for money did "operate upon . . . an identified property interest" because it required that the property owner make the payment. The Court found it appropriate to apply the *Nollan/Dolan* test to a demand for money that links to a "specific parcel of real property" due to the "risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue." Court also declined to elaborate on the theoretical distinctions between a tax and a taking because it "had little trouble distinguishing between the two" in the facts of the case. Thus, monetary exactions are subject to constitutional protections in *Nollan/Dolan.*

[10] 570 U.S. at 602.

[11] *Koontz,* 133 S. Ct. at 2592. (quoting FLA. STAT. § 373.414(1) (2013)).

D. Key Utah Dedication/Exaction Case Law

Both before, during, and after the United States Supreme Court was, at its own leisurely pace, defining United States Constitutional limits on dedications/exactions Utah courts were engaged in determining the legality of dedication/exaction and impact fees.

1. *Call v West Jordan*

The first significant decision in Utah addressing the legality of impact fees and exactions was *Call v. City of West Jordan.*[12] The Court specifically held that the power to enact an ordinance imposing exactions or impact fees was implicit in the statutory grant of authority "to preserve the health, safety and good order of the city," the power to "regulate … the location and use" of structures and facilities, and the power to enact a comprehensive plan to provide for "transportation, water, sewage, schools, parks and other public requirements."

In *Call*, a developer challenged a municipal ordinance that required a subdivider to either dedicate 7% of the proposed subdivision land or pay the equivalent value of the land in cash to "public use" to benefit city residents in "flood control and/or parks and recreational facilities."[13]The developer challenged the ordinance on four separate grounds: (1) The power to require exaction or impact fees was not within the city's granted powers; (2) the exaction or impact fee would benefit the city as a whole not the subdivision itself; (3) the imposition of the exaction or impact fee was an unconstitutional taking without just compensation; and (4) the exaction or impact fee was an illegal tax. The Utah Supreme Court rejected each of these arguments. *Id.* The court held that the city's authority included the power to impose imposition of a development fee to promote the health, safety and welfare of city residents.[14] *Id.*,

The court held that the amount of the exaction or impact fee was "within the prerogative of the City Council to determine, and so long as it is within reasonable limits, so that it cannot be characterized as capricious or arbitrary, the court will not interfere therewith."[15] On rehearing, the court held that the reasonableness of the dedication or cash requirement is a question of fact and that the exaction or impact fee need not inure to the exclusive benefit of the subdivision; so

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[12] *Call v. City of West Jordan,* 614 P.2d 1257 (Utah 1980).

[13] There are actually three separate Utah Supreme Court opinions as *Call* went back and forth between the trial and Appellate Court. In the second of the three *Call* opinions, (614 P.2d 1257 (Utah 1980)), the court on rehearing augmented its first decision by requiring that the development must generate the needs on which the land/fee exaction is based and that, in response, the

[14] *Id*

[15] *Id.*at 221.

long as the dedication has "some reasonable relationship to the deeds created by the subdivision" it would not be an unconstitutional taking. *Id.* at 220.

After noting that all beneficiaries of public water or sewer systems should bear the burden of the systems, the court held that "[t]he 'fair contribution' of the [fee-paying] party should not exceed 'the expense thereof met by other.' *Id.* (quoting *Home Builders Assn. v. Provo City, 503* P.2d 451 (Utah 1972)). In order to comply with this standard "a municipal fee related to service like water and sewer must not require newly developed properties to bear more than their **equitable share of the capital costs in relation to the benefits** conferred." *Id.* (Emphasis added.) In other words, the municipality must equally burden all the service recipients, present and future, in proportion to the benefit received. In balancing those relative burdens, the court articulated seven factors which must be considered:

(1) the cost of existing capital facilities;

(2) the manner of financing existing capital facilities (such as user charges, special assessments, bonded indebtedness, general taxes or federal grants);

(3) the relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities (by such means as user charges, special assessments, or payment from the proceeds of general taxes); the relative extent to which the newly developed properties in the municipality will contribute to the cost of existing capital facilities in the future; 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 fees) in other parts of the municipality;

(4) extraordinary costs, if any, in servicing the newly developed properties; and

(5) the time-price differential inherent in fair comparisons of amounts paid at different times. *Id.* at 904 (citations omitted).

In later decisions, the court clarified that the exaction must have a 'demonstrable benefit" to the subdivision. *Call v. City of West Jordan,* 614 P.2d 1257, 1259 (Utah 1980), and that "[r]easonableness obviously holds the municipality to a higher standard of rationality than that its actions not be arbitrary or capricious."

2. Banberry v South Jordan

As if the three supreme court opinions were not enough, West Jordan was involved in yet another seminal dedication/exaction case. In *Banberry Development Corp. v. South Jordan City,* 631 P.2d 899, 905 (Utah 1981). the Utah Supreme Court held that the "constitutional standards of reasonableness" govern the validity **and amount** of subdivision exactions and impact fees. In *Banberry,* the subdividers challenged the validity of an ordinance imposing a water connection fee and a park improvement fee, the payment of which was a condition of final plat approval. The subdividers argued that the fees "constituted an unlawful tax and an unconstitutional taking" and were discriminatory. *Id.* at 901. The court responded to the challenges by following precedent, including *Call,* stating the previous decisions had resolved the "legality of water connection and park improvement fees ... [h]owever, these decisions leave open the question of reasonableness of any individual charge or land dedication required." *Id.*

The *Banberry* court stated that these factors do not require "[p]recise mathematical equality," and a municipality must have the 'flexibility necessary to deal realistically with questions not susceptible of exact measurement." *Id.* Citing the established principal that a municipality's exercise of its legislative powers is entitled to a presumption of a constitutionality, the court placed the burden of proving the unreasonableness of an exaction or fee on the developer, provided the municipality has met its obligation to disclose the bases for the calculations. *Id.*

The holding in *Banberry* was expanded in *Lafferty v. Payson City.* In *Lafferty,* a developer challenged the validity of an "impact fee" imposed as a condition to the issuance of a building permit. The impact fee was imposed to raise additional revenue to offset rising costs for municipal services and only applied to new residential development. The developer also challenged the validity of connection fees for electricity, sewer and water. The *Lafferty* court held that the building permit fee was an illegal tax because it was paid into the City's general fund and was not earmarked for a specific purpose.[16] With regard to the connection fees, the court held that **all** of the *Banberry* factors must be applied to determine the reasonableness, reasoning that the ultimate objective "is to assure that municipal fees pertaining to newly developed properties do not require them to bear more than their

There have been few reported decisions in Utah since the 1995 enactment of the Impact Fees Act. None are terribly significant, but several are worth noting. In *Whitener v. City of Lindon,*[17] the Utah Supreme Court addressed a landowner's challenges to a city ordinance involving the city's secondary irrigation water system, which the city installed to reduce demands on its culinary water system. The court held: (1) the ordinance, which

[16] *Id.* at 378

[17] 943 P.2d 226 (Utah 1997).

required landowners with shares of stock in a mutual irrigation company to transfer a certain number of shares to the city for an optional connection to the secondary system, did not effect an unconstitutional taking in violation of the Utah Constitution; (2) the city's procedures in terminating the landowner's connection to the system after he was mistakenly connected did not violate his due process rights; and (3) the ordinance did not violate the uniform operation of the laws provision in the Utah Constitution despite the fact that it allowed residents without shares of stock in a mutual water company to purchase the optional connection by paying cash.

In *Home Builders Assoc. v City of American Fork*[18] American Fork's fees, including a water connection fee, were challenged by the Home Builders Association on the grounds that the City Council was not aware of the factors enunciated in *Banberry Dev. v. South Jordan City.*[19] The trial court granted summary judgment to the homebuilders. The supreme court reversed and remanded, observing that fact gathering and analysis in creating impact fees could be delegated to staff.

In *Home Builders Assoc. v. City of North Logan,*[20] a water connection fee and other fees of North Logan were challenged by the Home Builders Association. The challengers, however, failed to meet their burden in demonstrating how the challenged fees failed to comply with the factors enunciated in *Banberry,* thus dismissal was upheld.

3. **The BAM Trilogy**

The recent advancement of exactions jurisprudence is almost entirely due to a dispute between B.A.M. Development L.L.C. and Salt Lake County. The genesis of the dispute is an exaction of an additional 13 feet for widening of 3500 South after B.A.M. had agreed to a 40-foot dedication. B.A.M. challenged the additional 13-foot exaction to the courts. The grounds of the appeal was that the exaction was unconstitutional under *Nollan/Dolan* analysis.

The Utah Court of Appeals reversed the district court's decision and in a split decision held that the requirement for the 13 additional feet was a exaction subject to the *Nollan/Dolan* test of (1) legitimate government interest and (2) a rough proportionality between the impact and the exaction. However, Judge Gregory Orme wrote a lengthy dissent and the Utah

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[18] 973 P.2d 425 (Utah 1999).

[19] 631 P.2d 899 (Utah 1981).

[20] *Home Builders Ass'n v. City of North Logan*, 983 P2d 561, 1999 UT 63.

Supreme Court granted a petition of certiorari to review the case. The Supreme Court affirmed the Court of Appeals and directed a *Nollan/Dolan* review be made.

Most recently and following the *Nollan/Dolan* review by the district court the Utah Supreme Court ruled on a dispute between B.A.M. and the County. In the 2008 opinion, the Court criticized the use of the term proportionality and opined that equivalent should have been used. The Court then applied the *Nollan/Dolan* test and determined that the essential nexus of a legitimate governmental interest prong was met, but that the rough proportionality, or in the court's parlance, rough equivalency had not been met as the cost to B.A.M. was not equivalent to the cost of the County to be roughly equivalent and the cost to B.A.M. and the County of the exaction must be roughly equivalent.

In a footnote, the Court threw a "wild card" into the mix when it observed that if widening 3500 South was a UDOT rather than a County responsibility, the County would have no right to require any exaction. What this footnote will do to exactions in the future is not known.

E. Utah Statutes Regulating Dedications/Exactions

While Impact Fees have a much more robust statutory regulatory framework, dedications/exactions are also regulated by statutes which largely mirror the Nolan/Dolan rough proportionality test. These constitutional principles are codified in Utah statutes. Both the Municipal and County Land Use and Development Acts, Title 10 Chapter 9a and Title 17 Chapter 27a contain nearly language on water dedications:

1. Municipal Exaction Statute

UCA § 10-9a-508 (2023)

Exactions- Exaction for water interest –Requirement to Offer original property owner property acquired by exaction.

(1) A municipality may impose an exaction or exactions on development proposed in a land use application, including, subject to Subsection (3), an exaction for a water interest, 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.

(2) If a land use authority imposes an exaction for another governmental entity:

(a) the governmental entity shall request the exaction; and

(b) the land use authority shall transfer the exaction to the governmental entity for which it was exacted.

(3) (a)

(i) Subject to the requirements of this Subsection (3) a municipality shall base an exaction for a culinary water interest on the culinary water authority's established calculations of projected water interest requirements.

(ii) Except as described in Subsection (3)(a)(iii) a culinary water authority shall bases and exaction for culinary water interest on:

(A) consideration of the system-wide minimum sizing standards established by the culinary water authority by the Division of Drinking Water pursuant to Section 19-4-114; and

(B) the number of equivalent residential connections associated with the culinary water demand for each specific development proposed in the development's land use application, applying lower exactions for developments with lower equivalent residential connections as demonstrated by a least five years of usage data for like land uses within the municipality.

(iii) A municipality may impose an exaction for a culinary water interest that results in less water being exacted than would otherwise be exacted under Subsection (3)(a)(ii) if the municipality, at the municipality's sole discretion, determines there is good cause to do so.

(iv) A municipality shall make public the methodology used to comply with Subsection (3)(a)(ii)(B). A land use applicant may appeal to the municipality's governing body and exaction calculation used by the municipality under Subsection(3)(a)(ii) A land use applicant may present data and other information that illustrates a need for an exaction recalculation and the municipality's governing body shall respond with due process.

(v) Upon an applicant's request, the culinary water authority shall provide the applicant with the basis for the culinary water authority's calculations under subsection (3)(a)(ii) on which an exaction for a water interest is based.

(b) A municipality may not impose an exaction for a water interest if the culinary water authority's existing available water interests exceed the water interests needed to meet the reasonable future water requirement of the public, as determined under Subsection 73-1-4(2)(f).

(4)

(a) If a municipality plans to dispose of surplus real property that was acquired under this section and has been owned by the municipality for less than 15 years, the municipality shall first offer to reconvey the property, without receiving additional consideration, to the person who granted the property to the municipality.

(b) A person to whom a municipality offers to reconvey property under Subsection (4)(a) has 90 days to accept or reject the municipality's offer.

(c) If a person to whom a municipality offers to reconvey property declines the offer, the municipality may offer the property for sale.

(d) Subsection (4)(a) does not apply to the disposal of property acquired by exaction by a community reinvestment agency.

(5) (a) A municipality may not, as part of an infrastructure improvement, require the installation of pavement on a residential roadway at a width in excess of 32 feet.

(b) Subsection (5)(a) does not apply if a municipality requires the installation of pavement in excess of 32 feet:

(i) in a vehicle turnaround area;

(ii) in a cul-de-sac;

(iii) to address specific traffic flow constraints at an intersection, mid-block crossings, or other areas;

(iv) to address an applicable general or master plan improvement, including transportation, bicycle lanes, trails, or other similar improvements that are not included within an impact fee area;

(v) to address traffic flow constraints for service to or abutting higher density developments or uses that generate higher traffic volumes, including community centers, schools, and other similar uses;

(vi) as needed for the installation or location of a utility which is maintained by the municipality and is considered a transmission line or requires additional roadway width;

(vii) for third-party utility lines that have an easement preventing the installation of utilities maintained by the municipality within the roadway;

(viii) for utilities over 12 feet in depth;

(ix) for roadways with a design speed that exceeds 25 miles per hour;

(x) as needed for flood and stormwater routing;

(xi) as needed to meet fire code requirements for parking and hydrants; or

(xii) as needed to accommodate street parking.

(c) Nothing in this section shall be construed to prevent a municipality from approving a road cross section with a pavement width less than 32 feet.

(d) (iv) A member of the panel assembled by the municipality under Subsection (5)(d)(ii) may not have an interest in the application that is the subject of the appeal.

(v) The land use applicant shall pay:

(A) 50% of the cost of the panel; and

(B) the municipality's published appeal fee.

(vi) The decision of the panel is a final decision, subject to a petition for review under Subsection (5)(d)(vii).

(vii) Pursuant to Section 10-9a-801, a land use applicant or the municipality may file a petition for review of the decision with the district court within 30 days after the date that the decision is final.

2. County Exaction Statute (2023)

17-27a-507 Exactions -- Exaction for water interest -- Requirement to offer to original owner property acquired by exaction.

(1) A county may impose an exaction or exactions on development proposed in a land use application, including, subject to Subsection (3), an exaction for a water interest, 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.

(2) If a land use authority imposes an exaction for another governmental entity:

(a) the governmental entity shall request the exaction; and

(b) the land use authority shall transfer the exaction to the governmental entity for which it was exacted.

(3) (a)

(i) Subject to the requirements of this Subsection (3) a county, or , if appliable the county's culinary water authority shall base an exaction for a culinary water interest on the culinary water authority's established calculations of projected water interest requirements.

(ii) Except as described in Subsection (3)(a)(iii) a culinary water authority shall bases and exaction for culinary water interest on:

(C) consideration of the system-wide minimum sizing standards established by the culinary water authority by the Division of Drinking Water pursuant to Section 19-4-114; and

(D) the number of equivalent residential connections associated with the culinary water demand for each specific development proposed in the development's land use application, applying lower exactions for developments with lower equivalent residential connections as demonstrated by a least five years of usage data for like land uses within the municipality.

(iii) A county or county culinary water authority may impose an exaction for a culinary water interest that results in less water being exacted than would otherwise be exacted under Subsection (3)(a)(ii) if the municipality, at the municipality's sole discretion, determines there is good cause to do so.

(iv) A county or county culinary water authority shall make public the methodology used to comply with Subsection (3)(a)(ii)(B). A land use applicant may appeal to the municipality's governing body and exaction calculation used by the county or the county's culinary water authority under Subsection(3)(a)(ii) A land use applicant may present data and other information that illustrates a need for an exaction recalculation and the municipality's governing body shall respond with due process.

(v) Upon an applicant's request, the culinary water authority shall provide the applicant with the basis for the culinary water authority's calculations under subsection (3)(a)(ii) on which an exaction for a water interest is based.

(b) A county or its culinary water authority may not impose an exaction for a water interest if the culinary water authority's existing available water interests exceed the water interests needed to meet the reasonable future water requirement of the public, as determined under Subsection 73-1-4(2)(f).

(b) A county or its culinary water authority may not impose an exaction for a water interest if the culinary water authority's existing available water interests exceed the water interests needed to meet the reasonable future water requirement of the public, as determined under Subsection 73-1-4(2)(f).

(4)

(a) If a county plans to dispose of surplus real property under Section 17-50-312 that was acquired under this section and has been owned by the county for less than 15 years, the county shall first offer to reconvey the property, without receiving additional consideration, to the person who granted the property to the county.

(b) A person to whom a county offers to reconvey property under Subsection (4)(a) has 90 days to accept or reject the county's offer.

(c) If a person to whom a county offers to reconvey property declines the offer, the county may offer the property for sale.

(d) Subsection (4)(a) does not apply to the disposal of property acquired by exaction by a community development or urban renewal agency.

3. Special District Exaction Statute (2023)

17B-1-120 Exactions -- Exaction for water interest -- Requirement to offer to original owner property acquired by exaction.

(1) A special district may impose an exaction on a service received by an applicant, including, subject to Subsection (2), an exaction for a water interest if:

(a) the special district establishes that a legitimate special district interest makes the exaction essential; and

(b) the exaction is roughly proportionate, both in nature and extent, to the impact of the proposed

service on the special district.

(2) (a)

(i) Subject to the requirements in this Subsection (2), a special district shall base an exaction for a water interest on the culinary water authority's established calculations of projected water interest requirements.

(ii) Except as described in Subsection (3)(a)(iii) a culinary water authority shall base an exaction for culinary water interest on:

(A) consideration of the system-wide minimum sizing standards established by the culinary water authority by the Division of Drinking Water pursuant to Section 19-4-114; and

(B) the number of equivalent residential connections associated with the culinary water demand for each specific development proposed in the development's land use application, applying lower exactions for developments with lower equivalent residential connections as demonstrated by a least five years of usage data for like land uses within the special district.

(iii) A special district may impose an exaction for a culinary water interest that results in less water being exacted than would otherwise be exacted under Subsection (3)(a)(ii) if the municipality, at the municipality's sole discretion, determines there is good cause to do so.

(iv) A special district shall make public the methodology used to comply with Subsection (3)(a)(ii)(B). A land use applicant may appeal to the municipality's

governing body and exaction calculation used by the county or the county's culinary water authority under Subsection(3)(a)(ii) A land use applicant may present data and other information that illustrates a need for an exaction recalculation and the municipality's governing body shall respond with due process.

(v) Upon an applicant's request, the culinary water authority shall provide the applicant with the basis for the culinary water authority's calculations under subsection (3)(a)(ii) on which an exaction for a water interest is based.

4. Statutory Takeaways

The takeaways from these statutes are first, there must be a need for the water right/share exacted. If there is no need there can be no dedication/exaction of water rights/shares. The need will most likely be determined by the forty-year planning horizon in Utah Code § 73-1-4. Second, the Nollan/Dolan test is codified. The dedication/exaction must meet the Nollan/Dolan Test of a legitimate governmental interest makes the exaction essential and there is rough proportionality between the exaction and the impact of development.

F. Limits on the Amount of Water Exacted/Dedicate

1. Exactions/ Dedications of Water for Indoor Domestic Use.

In recent years the focus of much dispute over water dedications/exactions has focused on how much water for indoor domestic use per an Equivalent Residential Connection ("**ERC**") may be exacted.[21] For many decades, the Utah Division of Drinking Water ("**DDW**") has required source and storage sizing regulations for culinary water systems. For example, DDW requires average day indoor water sourcing requirements to provide an average 400 gallons per day ("**gpd**") per ERC, which over a year's time equals 146,000 gallons per year, or approximately 0.45 acre-feet per year. Utah Administrative Code Rules 309-510-1 through 309-510-9. The 0.45 acre-feet per unit for indoor use was the de facto standard.

[21] DDW defines "Equivalent Residential Connection" in Rule 309-110-4 Definitions as "a term used to evaluate service connections to consumers other than the typical residential domicile. Public water system management is expected to review annual metered drinking water volumes delivered to non-residential connections and estimate the equivalent number of residential connections that these represent based upon the average of annual metered drinking water volumes delivered to true single family residential connections. This information is utilized in evaluation of the system's source and storage capacities (refer to R309-510)."

a. Studies discrediting the 0.45 acre-feet per ERC Standard

Beginning clear back in 2009 studies began to reveal that literally no domestic unit requires 0.45 acre-feet for indoor domestic use. The 0.45 standard was first seriously questioned in 2009, when the Utah Division of Water Resources ("**UDWRe**") released a survey tracking actual water use in 17 Utah communities. The "2009 Residential Water Use" survey, found that actual indoor use per household ranged from 142 gpd (Blanding City) to 227gpd (Taylorsville City).[22] The average for all 17 Utah cities surveyed was 173 gpd, which is less than half (1/2) th3 400 gpd used to justify a 0.45-acre-foot standard.

The 2009 Survey led to other state studies and audits of required standards for domestic indoor use. Two Utah Legislative Audits of state water standards, both confirm the UDWRe conclusion that the 0.45 af/400 gpd standard is too high for single family dwellings. In fact, one Audit, "A Review of the Division of Drinking Water's Minimum Source Sizing Requirements"[23] by the Utah Legislative Auditor in December 2014, explicitly reached the following conclusion:

> [the average day indoor requirement [imposed by the Division of Drinking Water Regulations] of at least 400 gpd per connection appears excessive for three reasons: First, research suggests the average Utah resident uses less water than the state requirement. Second, water use data from Salt Lake City also shows residential use is less than the state requirement. Third, engineers who design municipal water systems provided us with data suggesting the state requirement is excessive. Collectively, these points appear to warrant a formal review of and reduction to the state average day indoor requirement.[24]

In fact, DDW, in a 2017 report to the Utah Legislature, admitted "that its source sizing and storage standards may not be the most effective means of ensuring the reliability of Utah's public water systems," and that "the standards that apply to indoor water use appear to be too high for most water systems."[25]

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[22] The Study can be found at https://water.utah.gov/wp-content/uploads/2019/08/2009-Residential-Water-Use.pdf.

[23] The December 2014 Audit can be found at https://le.utah.gov/audit/14_13rpt.pdf.

[24] Id at pg. 9.

[25] An In-depth Follow-up of The Division of Drinking Water's Minimum Source Sizing Requirement" December 2017, located at https://le.utah.gov/audit/17_16rpt.pdf

b. The 0.45 Standard Arose from Drinking Water Rules

The 0.45 standard was never a product of the Utah State Engineer, who has the statutory authority to administer and apportion all water in Utah; nor does this requirement accurately estimate actual indoor water use. In 2018 then State Engineer, Kent Jones, P.E. issue a Memorandum stating the 0.45 af standard, it is only to be used "when there is no evidence that it should be different." (Memorandum of Kent L. Jones, PE, State Engineer, dated December 28, 2018.)[26] In this same Memorandum, State Engineer Jones also states that indoor water use of "70 gallons per person per day may be a more reasonable indoor domestic use in Utah.... or 0.28 acre-feet/year... "

c. Statutory Requirement to Adopt System Source and Storage Standards

In the 2018 General Legislative Session, the Utah Legislature passed H.B. 303, which amended the Safe Drinking Water Act found in Title 19 Chapter 4 of the Utah Code. Specifically, a portion of Utah Code §19-4-104 was amended and new §19-4-114 was created. This change requires the Director of the Division of Drinking Water to "establish system-specific source and storage minimum sizing requirements for a community water system serving a population of more than 3300 based on at least the most recent three years of a community water system 's actual water use data."[27]

To establish the system-specific source and storage requirements, the City as "[a] community water system serving a population of more than 3300, was required to provide the information necessary to establish the system-specific standards by no later than March 1, 2019. A community water system serving a population of between 500 and no more than 3,300 was required to provide the information necessary to establish system-specific standards described in this Subsection by no later than March 1, 2023. By October 1, 2023, the Director was required to establish system-specific source and storage minimum sizing requirements for a community water system serving a population of between 500 and no more than 3,300. For systems serving less than 500 people there are no requirements to create system-specific standards.[28]

2. Limitation of Exactions/Dedications of Water for Outdoor Use

Dedications/exactions are often required for outdoor water use. This is particularly true for residential developments where the residents will have lawns, gardens, trees, and shrubs. Thus far, outdoor water dedications/exactions have typically followed the irrigation duty standards adopted by the State Engineer. The duty standards are the amount of water necessary to raise alfalfa in various regions of the state. Duties range from 3 acre-feet per acre of irrigated land in Cache Valley

[26] See Appendix A.

[27] See Appendix B.

[28] Id.

to 6 acre-feet per acre in and around St George. This range is due to the varying climates in Utah. Obviously, the growing season is longer, drier, and hotter in St George than in Logan. Thus, more irrigation water is used each year.[29]

However, irrigation duties and outdoor residential water use is not an "apples to apples" comparison. First, irrigation duties are based on flood irrigation, e.g., water flowing down furrows in fields. This is a very inefficient method and has largely been supplanted by irrigation sprinkling systems. Second, alfalfa is a thirsty crop. Most outdoor water irrigation in residential neighborhoods requires less water than alfalfa. Third, the combination of drip irrigation and other efficient irrigation methods reduces outdoor residential water use even further.

Similarly, it is typical in ordinances imposing exactions/dedications for outdoor use to require that all land not under a street, driveway, or building, be counted to determine outdoor irrigation acreage. The current trend to employ xeriscaping to reduce water use runs counter to such requirements.

G. Conclusion

If there is a trend, it is to limit water exactions/dedications to actual water demand or to make sure the water dedication/exaction is roughly proportional to the anticipated demand. This is a positive or negative trend according to your perspective. The development community have an obvious desire to limit water dedications/exactions. However, public water suppliers justifiably worry whether the lower exaction/dedication amounts will be sufficient in light of drought, water priority, and other limiting factors. Determining the proper dedication/exaction is far from an exact science.

The biggest mistake a local government can make when it comes to exactions/dedications is to fall into the trap of "that's how we have always done it" which is not a safe harbor. The law governing exactions/dedications is deeply rooted in the Constitution of the United States. Thus, local governments are wise to keep a close eye on their exactions/dedications.

[29] See Duty Map in Appendix C.