Burdens on New Development and Impact Fees

CHAPTER 8

1. Imposing Conditions and Exactions on Administrative Development Approvals

We consider these issues of conditions and exactions here in a separate chapter because the issues involved overlap several areas of land use law, such as:

- **Subdivisions.** When a subdivision is approved, what requirements can be placed on the developer or property owner as conditions of the approval?
- **Conditional Uses.** When a conditional use permit is approved, are there limits to what the local officials can demand in order to make the use compatible with the zone and neighborhood?
- **Variances.** When a property owner seeks a variance, can the land use appeals authority impose requirements and conditions on the variance? How are those additional burdens limited?
- **Other Situations.** When a property owner seeks access to a state road; when any special approvals are required that allow for conditions; when a homeowner seeks to connect to utilities and is told there are conditions to do so; and in other similar situations.

Note that we are discussing administrative applications here. As explained in Chapter 3 and 5, local governments have much broader discretion when making legislative decisions such as approving annexations or amending the zoning map or other land use regulations. The rules are much different in those situations, and if a property owner does not agree to proposed conditions of annexation, for example, the city or county can just refuse to annex the property.

It's not quite that simple, but conditions imposed on a legislative approval are much different than for an administrative approval, where the property owner is entitled to approval of the application if it complies with the ordinances in place when a complete application is submitted, and the application fees are paid.[1] There is no such "vested rights" entitlement to approval when a legislative decision is required.[2]

What can the government require a property owner/applicant to do in order to get an administrative permit or approval?

The United States Supreme Court has laid down guidelines for conditions to help ensure that government does not go too far in burdening land use. The Court is involved because these issues raise constitutional concerns involving the taking of private property without the payment of just compensation.[3]

The Utah State Legislature wrote these standards into statute by enacting language which reads:

> A municipality (or county or local district) may impose an exaction or exactions on development proposed in a land use application if:
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> 1. an essential link exists between a legitimate governmental interest and each exaction; and
> 2. each exaction is roughly proportionate, in both nature and extent, to the impact of the proposed development.[4]
>
> The basic issues are:
>
> 1. Does the proposed condition or requirement advance some legitimate government function? Is it the kind of issue that local planners should even be involved with? Does it relate to an issue that is within the jurisdiction of local land use controls?
> 2. Does the proposed condition or requirement solve some problem created by the development or mitigate some negative aspect of the proposed land use?
> 3. Is there a roughly proportionate balance between the problem and the cure? Is the condition or requirement "overkill" or does it fairly balance the duty imposed on the applicant and the burdens the proposed development places on community resources?
> 4. Is there a less intrusive way to solve the problem? Does the proposed condition address the issue, but in a manner that limits very significant property rights or impose a heavy burden when some other, less intrusive option would also solve the problem without imposing such a harsh burden?

Who Can Impose Conditions?

Case Law — Nollan v. California Coastal Commission[5]

A prime example of an illegal condition was brought to light in the story of the Nollan family, who owned property near Santa Barbara, California. They went to get a permit to demolish their beachside bungalow and replace it with a larger house. The California Coastal Commission is given statutory authority to comment on the building permit.

When the Nollans went to the commission, they were told they would have to deed an easement for public access to their beach to the State of California. Nollan objected. He objected all the way to the United States Supreme Court, which agreed that the commission had gotten a little carried away. The court

The California Coastal Commission illegally demanded that the Nollan family give away easements for public access to this beach in order to get a building permit. Photo courtesy Prof. Daniel Mandelker, Washington University in St. Louis School of Law.4

held the purpose of the commission was to preserve access to the beach, but that charter did not include a mandate to demand easement for access across the beach. The commission was operating outside its authority and was attempting to solve problems it was not created to solve. The requirement to "exact" the easement was therefore a "taking" of private property without the payment of just compensation.

What Conditions Can Be Imposed?

Case Law — Dolan v. Tigard, Oregon[6]

In another case, Florence Dolan wished to expand her hardware store in Tigard, Oregon. The City of Tigard required her to dedicate land to the city for a bike path, but Florence could not understand why. She saw no connection between her expanding a hardware store and the city's worthy desire for a bike path. (It may be that in all her years of selling plumbing supplies, no one had ever taken a toilet home on a bicycle!).

The photo above is of Florence Dolan's hardware store in Tigard, Oregon, which she wanted to expand. Her refusal to accept the conditions imposed by the city lead to her victory before the U.S. Supreme Court, which held the disproportionate conditions imposed on Ms. Dolan constituted a "taking". Photo courtesy Prof. Daniel Mandelker, Washington University in St. Louis School of Law.

The city's condition was struck down by the court because Tigard had not shown that the bike path solved any problem that Florence had created. The Court also faulted the city for demanding that Florence deed part of her land to the city as a condition of development.

Rough proportionality or rough equivalence[7]

Even if the bike path the city demanded of Florence Dolan was necessitated by the occasional cycling handyman, the court also stated that showing some vague relationship was not enough. Government entities must show, by an individualized analysis in each case, that the dedications and exactions imposed on development are roughly in balance. In other words, that the conditions generally impose a burden on private property sufficient to offset generally the burdens created by the development and not significantly more.[8] Note that the wording is "rough" proportionality. Exact precision in the balancing of the burdens is not required.[9]

Above is the bike path as it now exists behind Florence Dolan's new hardware store. The U.S. Supreme Court said, while the city could restrict development along the creek, it could not require the creek to be deeded to the city as a condition of development.

For example, if a homeowner has an adult child who wishes to build a home near the parents and the family decides to divide a two-acre lot into two one-acre lots to allow for that second home, then it would be appropriate to require them to provide the normal amenities for that new lot. If the roads in the area are 60 feet wide in single family neighborhoods, then it could be required that the road in front of the new lot be widened to become 60 feet and that the property owner dedicate the land, if needed, to accomplish that. This width has already been established by the community as the normally required road width for single-family occupancies.

But if the community has a plan that an arterial highway be built along the roadway where this lot split is occurring, it is often tempting to require the homeowners to dedicate enough land for the future four-lane highway. This would be inappropriate and illegal since the proposed home is not creating the need for a four-lane highway.

If the proposal was to build a truck stop, then maybe the four-lane road would be justified. Traffic studies might be required by the local land use regulations to establish what street improvements would be necessary to offset the increased traffic demands. But the property owner can only be required to solve problems in a manner that is "roughly proportionate" to the burdens his development is creating.[10]

Least intrusive solution

Lastly, it needs to be considered that even if the goal of the condition is an appropriate goal, and even if it solves a problem the proposed land use creates or aggravates, and even if the condition is roughly equal to the problem it is meant to solve, there is still one more issue to consider.

There are some particularly sacred rights that the courts have recognized for all property owners. For example, in the case of Florence Dolan, the city also attempted to force her to dedicate to the city the land under an environmentally sensitive creek that ran along her property. The goal was to create a public parkway, which had no connection to Dolan's store, but the city claimed that the dedication of the land was necessary to protect it as a floodway.

There is no doubt the city has a duty to protect floodways, but the same result could have been reached by simply limiting her ability to build along the creek. By making her keep it clear for the storm water that her expanded parking area was going to create, the city could solve the flooding problem. There was no legal justification for

the city's attempt to grab the title to the land along the creek in order to use it for a city park when building development restrictions would have adequately protected the flood plain.

The city had raised an appropriate issue, but the wrong solution was imposed. Stating that the right to exclude others from her property was a sacred, protected right, the U.S. Supreme Court struck down the dedication requirements as too intrusive.[11] Utah courts have held that local land use processes cannot impose conditions, impact fees, dedications, and other burdens on development to solve problems the specific development did not create.[12] For example, a city could require the property owner to install curb and gutter along the front of the property as a condition for approval of a lot split, but not force the property owner to cure an existing storm water problem up the street above his property which was caused by the lack of curb and gutter in front of someone else's lot.

Other examples of inappropriate burdens and conditions, in the opinion of this author:

- A subdivider may be required to meet a city-wide standard for open space, but that does not mean he can be required to convey title to the open space to the city.
- Those developing land on hillsides cannot be required to install trails across private property when those developing land in other parts of the city have no requirement to dedicate trails.
- A property owner cannot be required to pay an impact fee calculated in part on the cost of certain water mains while also having to build those same water mains completely at his expense.
- If a development's water demands can be accommodated by an 8-inch water main, local officials cannot demand that a 12-inch main be provided to provide for other potential development in the area. The city should pay the cost of upsizing the water lines for the needed future capacity.

However, it is important to note:

- Developers can volunteer public improvements if they wish to.

- There are sometimes legitimate trade-offs where the community gives bonuses in density and additional lots in return for voluntary public improvements.

To summarize, legal and appropriate conditions and exactions on development must meet four tests:

1. advance a legitimate public purpose and be within the scope of the government entity to impose,
2. address some burden created by the development,
3. be roughly proportionate to the burden imposed on the development, and
4. solve the problem in the manner which is least intrusive on protected property rights.

Tips for participants

This corner of land use activity is a busy place to be. Local governments continually seek to accommodate development and all the changes it involves without adding new tax burdens on the existing population. A developer is a tempting target. They are usually from out of town. They are here to make money and supposedly have some to share. They are promoting a change and are considered the root cause of some of the problems the municipality faces, so requiring them to solve some problems seems only fair.

As far as it goes, of course, there are fair and logical justifications for imposing burdens on development. The problem comes from the fact that sometimes the locals get a little carried away and impose disproportionate burdens that are out of balance. As a practical matter, however, there is often not an easy way for the landowner to fight the imposition of burdens on his proposals.

Any appeal of the burdens imposed is going to take time, and landowners don't usually have time. They usually have more money than time, and if they don't get moving, they could miss their development opportunity. Those who make their living in the development business also have a valuable ongoing relationship with the building official, the zoning administrator, and planning commissioners. They worry about whining too much or fighting back against unfair requirements because they need to work with local officials and there are always other issues where a developer needs

cooperation. Where local officials have so many ways to regulate development, those who are regulated have learned that it does not pay to kick up too much of a fuss.

If you are getting started in the development business, when you attempt to get approval for your first project you need to be very pessimistic about the cost and time involved in the process.

In Chapter 15, we discuss appeals. Perhaps there might be some method among those outlined that could fit a given situation and allow an appeal of disproportionate burdens in a manner that resolves the issue without taking too much time or resulting in long-standing hostilities. This is an area the Property Rights Ombudsman is hired to assist with, so do not hesitate to call. Often the OPRO is just the place to get resolution to a disagreement with the local government so the project can proceed. See Chapter 13.

2. Impact Fees

Impact fees are imposed on each house, business, or other development based on the expected cost of public facilities to service that unit of development. They are general and usually apply community wide. They are set by ordinance, based on a community capital improvements plan, and can usually be easily predicted and calculated. Counties, cities, towns, special districts (government utilities), and even private utility companies can set impact fees. They all must follow the same basic rules, however.[13]

Impact fees can only be assessed for capital expansion projects related to water, wastewater, storm water, municipal power, roads, parks, recreation, open space, trails, police and fire stations, and environmental mitigation.[14]

Under state statute, a local government entity also must follow precise procedures to enact an impact fee ordinance.[15] If those specific statutory requirements are not followed, then a fee can be attacked and invalidated on that basis alone.

In two 1999 Utah Supreme Court cases, the Home Builders of Utah challenged the formalities associated with the imposition of impact fees. The court held that municipalities must first disclose the basis upon which impact fees are imposed to anyone who challenges the reasonableness of the fees.[16] The person opposing the fees must then demonstrate, using the same quality of professional analysis as the local

Local government continually strains to meet the utility requirements of new growth while battling the decay of old infrastructure. Impact fees are a major source of revenue in handling the expansion, but not the replacement, of facilities.

government must use to impose a fee, a failure by the governmental entity to comply with the constitutional standard of reasonableness.[17] This burden is logical when it is understood that impact fees are imposed by ordinance, and therefore the courts will uphold them as long as (1) they comply with state law and (2) it is reasonably debatable that they advance some public interest.[18]

The court also held the conditions required by case law and statute to make an impact fee legal need not be specifically analyzed by each city council member or commissioner before the fee is imposed. Decision makers may rely on the expertise of others in setting fees. If, in a later appeal, it is determined that the fees meet the statutory legal guidelines, then they will be upheld based on the merits of the analysis and not whether the elected officials completely understood that analysis.

Whether the fees are reasonable is not a matter of mathematical exactness. Such precise equality is neither feasible nor constitutionally vital.[19]

Among the impact fee requirements are:

1. a comprehensive review of the expected growth in the community, the needed public facilities to accommodate that growth, and the cost of those facilities;
2. reasonable calculation of the cost to provide adequate facilities for each house, business, or other component of the expected growth;
3. a fair apportionment of how the cost of those facilities is to be imposed on growth. There is no requirement that all of the incremental cost be borne by impact fees, although that may be the preferred option chosen by the governing body of the entity imposing the fees;
4. the capital facilities plan need not be created in its full formality if the entity imposing the fee has fewer residents or serves a population of 5,000 or less. These smaller entities must simply base their impact fees on a "reasonable plan;"
5. strict notice rules must be followed as the impact fee structure is set up;
6. accounting of the receipt and expenditure of the fees must be as outlined in the statute, and the funds must be kept separate from other monies; and
7. impact fees can only be imposed to accommodate new growth. The proceeds cannot be used to cure pre-existing deficiencies.[20]

In an earlier case, the court held that the presumption of constitutionality applies to a municipality's establishment of impact fees. In order to avoid the impact fee, that presumption must be attacked by competent, credible evidence that the fees are unreasonable.[21]

Impact fees can be appealed in a variety of ways. One can go to court, ask for an appeal to the governing body of the entity that imposes the fees, or even demand arbitration of the amount, procedures, or accounting related to impact fees.[22] It gets a little complicated, but at least all the rules are in the same place in the statute. Take a breath, plow through them, and you should be able to figure it out. Be sure to read the applicable sections about appeals.[23]

Of all the different aspects of land use management about which a citizen may wish to get information, impact fees are among the easiest to analyze. Since there are specific requirements that must be met to impose them, there is a defined, public paper

trail that can be reviewed and scrutinized. The stakes are too high, generally, for the local utility or government entity to play fast and loose with the documentation. If you would like to see it, simply make the request and you will usually be satisfied with the analysis that was used to justify the fees.

If the documents are not available, there is trouble in the heartland because some serious accountability errors have been made. Impact fees may not always seem fair, but the analysis to support them must be made available for you to make that judgment on your own. If there is no documentation to support them, they are void and unenforceable.[24]

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1 Utah Code Ann. §10-9a-509 (municipalities); Utah Code Ann. §17-27a-508 (counties); 17B-1-120 (Local Districts).

2 See generally *Bradley v. Payson City*, 2003 UT 16, ¶26, 55 P.3rd 47 (Utah 2003)(The vested rights codified in the statute cited in note 1 refer to land use applications, which are administrative issues. and not land use regulations, which are legislative.)

3 U.S. Const. amend. V

4 Utah Code Ann. §10-9a-508 (municipalities); Utah Code Ann. §17-27a-507 (counties); 17B-1-120 (Local Districts).

5 See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, (1987)

6 See *Dolan v. City of Tigard*, 512 U.S. 374, (1994)

7 *B.A.M. Dev., L.L.C. v. Salt Lake Cty.*, 2008 UT 74, ¶ 8, 196 P.3d 601, 603 (The term "rough equivalence" is preferred to "rough proportionality" by the Utah Supreme Court) .

8 *Dolan,* as cited in *BAM Development*, supra, ¶9.

9 *BAM Development* , supra, note 4.

10 *BAM Development at* ¶13.

11 See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (holding that the power to exclude someone from your property is one of the most treasured property rights).

12 *BAM Development at* ¶10 .

13 Utah Code Ann. §§11-36-101 – 705.

14 Utah Code Ann. 11-36a-102(17) (The use of impact fees is limited to projects included in the definition of "public facilities").

15 Utah Code Ann. §11-36-201(1).

16 See generally *Home Builders Ass'n of Utah v. City of Am. Fork*, 1999 UT 7, ¶ 18, 973 P.2d 425,.

17 See generally *Home Builders Ass'n v. City of N. Logan*, 1999 UT 63, ¶¶ 17-19, 983 P.2d 561, 565–66.

18 *Home Builders v. City of North Logan* at ¶¶15-16.

19 *Banberry v. South Jordan*, 631 P.2d 899, 904 (Utah 1981).

20 See, generally, the Utah Impact Fees Act, Utah Code Ann. §11-36-101 et. seq.

21 *Home Builders v. City of North Logan at* ¶¶17-19.

22 Utah Code Ann. §11-36-701 et seq.

23 Id.

24 Utah Code Ann. §11-36-201.