

# ALL ABOUT EXACTIONS: Making Rough Proportionality Smooth

## I. What is an Exaction?

- a. An Exaction is a government-mandated contribution of property required as a condition of development approval
- b. Exactions may be in the form of:
  - i. Land
  - ii. Construction of Public Improvements
  - iii. Money
  - iv. Impact Fees
- c. Exactions are a type of Taking, and are governed by the Takings Clause
  - i. Federal Constitution: Fifth Amendment
  - ii. Utah Constitution: Article I, § 22
- d. Exactions are unique type of takings
  - i. “Normal” taking: In order for government to get property, it has to pay for it. It is an “either/or” situation.
  - ii. An exaction, however, is permitted without compensation, as long as the exaction fairly represents the impact caused by development.

## II. Who May Impose an Exaction?

- a. Local Governments are authorized to impose exactions
- b. Cities, Counties, and Local Districts
- c. Exactions may be imposed on NEW development
  - i. “Replacement” development does not create a new impact, so an exaction cannot be required.
  - ii. Exactions must be required at the time of development approval.

## III. The “*Nollan/Dolan*” Analysis

- a. Developed by the U.S. Supreme Court in two landmark cases.
- b. Each exaction must satisfy the *Nollan/Dolan* rough proportionality test.
  - i. The test compares the exaction to the impact caused by new development.
  - ii. Each exaction stands separately—Each must satisfy the test.
- c. The “Impact” of a Development is the increased need for public services caused by new development.

#### **IV. Rough Proportionality Requirements**

- a. There must be an “Essential Link” between the Exaction and a Legitimate Public Interest
- b. The Exaction must be “Roughly Proportionate,” both in nature and extent, to the impact caused by the development
- c. This language was taken from *Dolan v. Tigard*, and included in the Utah Code:
  - i. § 10-9a-508 (Cities)
  - ii. § 17-27a-507 (Counties)
  - iii. § 17B-1-120 (Local Districts)

#### **V. An “Essential Link”**

- a. This Requirement derives from *Nollan v. California Coastal Commission*.
- b. The Nollans owned a beachfront lot in Ventura, California.
  - i. The lot extended to the high-water mark of the beach.
  - ii. They wanted to build a home on the lot
  - iii. The Commission would only grant approval if the Nollan’s dedicated a 25-foot wide public easement across the beach portion of their property.
- c. The Commission’s reason was that the new home blocked the view of the ocean from the road in front of the property, creating a “psychological barrier” to beach access.
  - i. The Nollans refused, and took the matter to the U.S. Supreme Court
  - ii. The Court ruled in favor of the Nollans
    1. The required exaction has to be related to a legitimate public interest, and
    2. There has to be an essential link between the exaction and the interest.

#### **VI. “Roughly Proportionate” in Nature and Extent**

- a. The part of the analysis comes from *Dolan v. Tigard*
- b. Mrs. Dolan owned a chain of hardware stores, and wanted to open a new store in Tigard, Oregon.
  - i. The store property ran along a creek, and the City required an easement along the creek, for flood control.
  - ii. The City also wanted to promote bicycling, and so it required a portion of the front property to be used as a public bike path.

- c. The U.S. Supreme Court agreed that flood control and traffic safety were legitimate public interests, and so the easement and bike path met the *Nollan* test.
- d. However, the Court went a step further, and ruled that the exactions also had to be “roughly proportional” to the impact on those interests.

## **VII. Proportionate in “Nature” and “Extent”**

- a. The Utah Supreme Court explained the meaning of “roughly proportionate in nature and extent” in *B.A.M. Development v. Salt Lake County*.
- b. The Court was asked to interpret what the *Nollan/Dolan* terms meant.
  - i. The Court held that “proportionate in nature” means that the exaction meets a need caused by the development.
    - 1. The need (or the impact) is seen as the “problem”
    - 2. The exaction is the “solution.”
  - ii. “Proportionate in extent” means that the cost of the exaction must be roughly equal to the public expense needed to address the impact.
    - 1. The cost to the developer is the cost of the land, construction, etc.
    - 2. The public expense is what is needed (from all public sources) to address the impact created.

## **VIII. Other Issues**

- a. If development approval requires an exaction for an agency other than the jurisdiction giving the approval, the same exaction rules apply
- b. If water rights are required, the exaction may only be for the amount of water needed for the development. If the local government has enough water to serve the development, no water rights may be required.

## **IX. Remedies**

- a. If the property obtained through an exaction is determined to be surplus within 15 years, it must be offered to the original owner before it may be sold.
- b. If the proposed exaction does not meet the rough proportionality test, one of the following should occur:
  - i. The Exaction may be returned (or not required). In other words, there is no exaction.
  - ii. The Exaction may be modified, so that it meets rough proportionality.
  - iii. The local government may pay for the excess.

1. The developer pays the fair share.
2. The local government makes up the difference.

## **CONCLUSION**

- Local governments may impose exactions on new development.
- An exaction must be proportionate to the impact caused by the development
- A developer may only be required to pay the fair share of the public demand of the development.

**10-9a-508. Exactions -- Exaction for water interest -- Requirement to offer to original 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) A municipality shall base any exaction for a water interest on the culinary water authority's established calculations of projected water interest requirements.

(ii) 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)(i) 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 development and renewal agency.

**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) A county or, if applicable, the county's culinary water authority shall base any exaction for a water interest on the culinary water authority's established calculations of projected water interest requirements.

(ii) 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)(i) 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).

(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

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

(1) A local 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 local district establishes that a legitimate local 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 local district.

(2) (a) (i) A local district shall base an exaction for a water interest on the culinary water authority's established calculations of projected water interest requirements.

(ii) If requested by a service applicant, the culinary authority shall provide the basis for the culinary water authority's calculations described in Subsection (2)(a)(i).

(b) A local district 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 in accordance with Section 73-1-4.

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

(b) The person described in Subsection (3)(a) shall, within 90 days after the day on which a local district makes an offer under Subsection (3)(a), accept or reject the offer.

(c) If a person rejects an offer under Subsection (3)(b), the local district may sell the real property.

## **Impact Fees Act**

Sections 11-36a-101 to -705 of the Utah Code.

A link to the Utah Code is available through the Ombudsman's Website, [www.propertyrights.utah.gov](http://www.propertyrights.utah.gov). Click the "Find The Law" button at the top of the page, and look under "Codes and Constitutions."

## Important Cases:

These cases are all available through the Ombudsman's Website, [www.propertyrights.utah.gov](http://www.propertyrights.utah.gov) Click the "Find The Law" button at the top of the page, and look under "Appellate Cases."

### U.S. Supreme Court

*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

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

*Koontz v. St. Johns River Water Conservancy District*, 131 S.Ct. 2586 (2013)

### Utah Supreme Court

*B.A.M. Development, LLC v. Salt Lake County*, 2006 UT 2 ("BAM I")

*B.A.M. Development, LLC v. Salt Lake County*, 2008 UT 74 ("BAM II")

*B.A.M. Development, LLC v. Salt Lake County*, 2012 UT 26 ("BAM III")