

## Taking Water and Other Exactions

Many cities and towns require land developers to give to the city or town trails, set backs, parks or water rights as a condition of getting development approvals. In land use jargon a requirement that a person give some property to the city as a condition of getting a permit or approval is an exaction. A common example of an exaction is the requirement that a land owner dedicate a strip of his or her frontage to widen a city road as a condition of receiving a building permit.

While many developers see exactions as just a fancy word for extortion, the real issues are when is an exaction permissible and when is the exaction an unconstitutional taking of property without compensation?

The United States Supreme Court has answered these questions in the cases of *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 687 (1994). In *Nollan* the United States Supreme Court held that there must be a nexus between a legitimate state interest and the permit condition exacted by the government. (“Nexus” is just a fancy word for “connection”). In *Nollan*, the California Coastal Commission demanded a lateral public easement across Nollan’s beachfront property to connect two public beaches that were separated by the Nollan property. Nollan was seeking a building permit to enlarge the house on the beachfront property. The commission argued that the larger house would interfere with the public’s right to view the ocean and therefore, it could require the easement. The Supreme Court found that there was no connection (nexus) between the permit requested and the easement demanded by the commission. The court even gave the example that if the commission had been concerned about the larger house blocking the public’s view of the ocean, a viewing spot would be permissible on the Nollan property for a passerby with whose sighting of the ocean the new house would interfere. The court found no connection between the stated governmental purpose of preserving the view of the ocean and the condition that the public have an unlimited right to traverse along the shore front on the Nollan property. The court commented that this absence of a nexus left the commission in the position of simply trying to obtain an easement through gimmickry by converting a valid land use regulation into a plan of extortion.

In *Dolan*, the Supreme Court answered the questions on exactions left unanswered in the *Nollan* decision. If there is a nexus between the exaction, what is the degree of connection between the exactions imposed by the city or town and the projected impact of the proposed development. In other words--are there any limitations on what the government can require from the developer?

In *Dolan*, a business owner sought a building permit to enlarge an existing business. The city conditioned the permit on the owner dedicating property to the city for flood control and a bike path along a creek that bordered her property. The court found that there was a nexus between the governmental interests of flood prevention and reduction of traffic congestion and the required dedication of property. The court then examined whether the

required degree of the exactions had any relationship to the projected impact of the developer's proposed development.

The court set forth some rules to follow in making this determination. The court found that the exaction must be roughly proportional to the needs created by the new development. The court's ruling does not require a precise mathematical calculation, but it does require that the city or town make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

This was not really new law in Utah. The Utah Supreme Court had previously considered similar exactions. In *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979), the Utah Supreme Court upheld a city's required dedication of park and storm drain land as a condition of subdivision approval. But, the Utah Supreme Court required that there be a reasonable relationship between the dedication and the needs created by the development. In *Child v. Spanish Fork City*, 538 P.2d 184 (Utah, 1975), the Utah Supreme Court upheld a city requirement that persons, annexing into a city, transfer irrigation water to the city as a condition of annexation. The court said that as long as the requirement was not wholly unreasonable or unjust it would not interfere with the required dedication.

The Land Use Development and Management Act has now put in statute the standards enunciated by the courts. It states that a city or town may impose an exaction on a development proposal only if there is a link between a legitimate governmental interest and the exaction and that the exaction is roughly proportionate to the impact of the proposed development.<sup>1</sup>

It is clear that a city or town can, if the standards of this statute and the court decisions are met, require a developer to dedicate any property including water rights or irrigation shares as a condition of development. There are some obvious preconditions. The following example using water rights apply to any property exaction.

First, the city or town must have an ordinance that requires the dedication of the water right (or other property). The ordinance would be very similar in form and adoption to an impact fee ordinance. There must be a study or other fact finding process done to justify the need for and the amount of the required water and the proper procedures--public hearings etc.--must be completed.

In addition to having a good study and ordinance, a city or town must then properly apply its ordinance. The city or town must be prepared to show that there is a nexus between the required dedication and the permit requested. This should be easy when it is new development that will add either additional population or additional territory to the city. It will be impossible if the proposed new development does not place any additional burden on the city's water requirements.

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<sup>1</sup> Utah Code 10-9a-508.

If this nexus exists the city or town must still be prepared to show that the amount of the required water right has some relationship to the needs created by the new development. While this does not have to be an exact calculation it must be roughly accurate. More importantly a city or town must be prepared to examine the requirement for each individual development. It is not enough to say that since there is an ordinance everyone has to comply. Each developer has the right to argue that his development creates a lesser or differing water need.

The city or town cannot require water at all if the city or town has enough water already to meet its reasonable future needs. The reasonable future water requirement of the public is the amount of water needed in the next 40 years by the persons within the city's or town's projected service area based on projected population growth or other water use demand.