

*A BRIEF HISTORY OF
UTAH IMPACT FEE AND EXACTION LAW*

by

Smith | Hartvigsen, PLLC



J. Craig Smith
SMITH HARTVIGSEN, PLLC
175 S. Main, Suite 300
Salt Lake City, Utah 84111
www.smithhartvigsen.com

801-413-1600
jcsmith@smithlawonline.com

VI. A BRIEF HISTORY OF UTAH IMPACT FEE AND EXACTION LAW

by

J. Craig Smith and Scott M. Ellsworth

INTRODUCTION

Utah law on Impact Fees and Exactions grew out of a common constitutional and judicial heritage. Although Impact fee law became statutory in 1995, the principles and tests for determining the validity of impact fees and exactions remain similar to this day. Impact Fees are defined as the payment of money that is imposed on new development (see UCA §11-36a-102(8)) an exaction is understood to be the request of a nonmonetary dedication, such as land or water, as a request for developed approval.

A. Pre-statutory Case Law Development 1979 - 1994

The first significant decision in Utah addressing the legality of impact fees and exactions was *Call v. City of West Jordan*.¹ 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." 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

¹ 606 P.2d 217 (Utah 1979). There are actually three Utah Supreme Court opinions. 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 land/fee exaction is based and that, in response, the land/fee exaction must be used to benefit the subdivision (*Id.* At 1259).

impose imposition of a development fee to promote the health, safety and welfare of city residents, *Id.*,² and that the exaction or impact fee need not inure to the exclusive benefit of the subdivision; so long as the dedication has "some reasonable relationship to the needs created by the subdivision" it would not be an unconstitutional taking. *Id.* at 220.³

The amount of a permissible exaction or impact fee was addressed only briefly in *Call*.⁴ In the seminal impact fee and exaction case, *Banberry Development Corp. v. South Jordan City*,⁵ the Utah Supreme Court held that the "constitutional standards of reasonableness" govern the validity **and amount** of subdivision exactions and impact

² 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." *Id.* at 219. The authority of a county or municipality to enact such ordinances has been preserved and expanded in the County Act and the Municipal Act. See *Utah Code Ann.*, §§ 17-27-102, 109-102 (legislative body may enact ordinances providing for "health, safety, and welfare, and [to] promote the prosperity, improve morals, peace and good order, comfort, convenience and aesthetics . . . to protect the tax base, secure economy in governmental expenditures, foster . . . industries, protect urban and non urban development, protect property values"); *Id.* §§ 17-27-201, 10-9-201 (comprehensive general plan may address "present and future needs of [community] ... growth and development..., provide for . . . health, general welfare, safety, energy conservation, transportation, prosperity, civil activities, and recreational., educational and cultural opportunities [and] . . . ; protection of the urban environment."). Moreover, the zoning enabling statutes now make explicit reference to dedications and impact fees. See, e.g., *Id.* §§ 17-27-105(2)(e), 10-9-105(2)(e) (prohibition of impact fee [against school districts] for improvements not reasonably related to the impact of the [school] project on the need which the improvement is to address").

³ 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." *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899, 905 (Utah 1981).

⁴ 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." *Id.* at 221. On rehearing, the court held that the reasonableness of the dedication or cash requirement is a question of fact. *Call v. City of West Jordan*, 614 P.2d 1257 (Utah 1980).

⁵ 631 P.2d 899 (Utah 1981).

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.*

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);

- (4) the relative extent to which the newly developed properties in the municipality will contribute to the cost of existing capital facilities in the future;
- (5) 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;
- (6) extraordinary costs, if any, in servicing the newly developed properties; and
- (7) the time-price differential inherent in fair comparisons of amounts paid at different times. *Id.* at 904 (citations omitted).

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*.⁶ In *Lafferty*, a developer challenged the validity of an "impact fee" imposed as a condition to the

⁶ 642 P.2d 376 (Utah 1982).

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.⁷ *Id.* at 378. 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 equitable share of the capital costs . . . in relation to benefits conferred." *Id.* at 379. Therefore, "[i]f properly applied, {the *Banberry* factors} should put the new homeowner on essentially the same basis as the average existing homeowner with respect to costs borne in the past and to be borne in the future, in comparison with benefits already received and yet to be received." *Id.* See also *Patterson v. Alpine City*,⁸ (requiring that sewer connection fees treat all users equally and be reasonable in accordance with *Banberry*.)⁹

B. Nollan/Dolan Nexus and Rough Proportionality Test For Exactions

Two decisions by the United States Supreme Court in *Nollan v. California*

⁷ The court noted that the validity of a fee "to augment general revenues" (as opposed to connection fees for a specific purpose) is determined by its legality at the time it is enacted without consideration of how the funds are later allocated or spent. *Lafferty*, 642 P.2d at 378 n.l.

⁸ 663 P.2d 95 (Utah 1983).

⁹ The remedy for an unlawful impact fee or exaction was addressed by the Utah Supreme Court in *American Tierra Corp. v. City of West Jordan*, 840 P.2d 757 (Utah 1992). In *American Tierra*, the developers brought an action against the city for a refund of impact fees held by the court in *Call* to be unconstitutional. The *American Tierra* court held that the claim for refund is an equitable claim that is not subject to government immunity and that such claims are subject to a four year statute of limitations from the date the fees are paid. If a class action is involved, the commencement of the class action tolls the statute of limitations as to all putative class members who would have been parties had the class certification been approved. *Id.* at 761-762.

*Coastal Commission*¹⁰ and *Dolan v. City of Tigard*,¹¹ define the law on exactions. In *Nollan*, the United States Supreme Court ruled that there was no “essential nexus” of legitimate governmental interest between the exaction of a public easement to access the beach and the impact created by the rebuilding of a beach house. In *Dolan*, the court extended the test to include a second prong of “rough proportionality” between the exaction and the impact. If essential nexus and rough proportionality are not present the exaction is a taking.¹² In reviewing various state approaches including Utah's as enunciated in *Call v. West Jordan*,¹³ the Court chose a reasonable relationship requirement between the exaction and the need created by the development. However, *Nollan/Dolan* also requires individualized determination of nexus between exaction and impact. In *Dolan*, the City had required a greenway easement in flood plan and a bike path easement as conditions to the expansion of a plumbing supply store. Although both easements qualified as legitimate public purposes, the Court found that there was not an individualized determination that the required dedications were related both in nature and extent to the impact of the proposed development.¹⁴ The test under

¹⁰ 483 U.S. 825 (1987).

¹¹ 512 U.S. 364 (1994).

¹² The Takings Clause of the Fifth Amendment of the United States Constitution provides: “[N]or shall private property be taken for public use, without just compensation.” A taking also can be established under the Utah Constitution. Article I, Section 22 of the Utah Constitution provides, “Private property shall not be taken or damaged for public use without just compensation.”

¹³ 606 P.2d 220 (Utah 1979).

¹⁴ In *Erlich v. City of Culver City*, 114 S. Ct. 2731 (1994) the Supreme Court extended the *Dolan* analysis from property dedications to development fee exactions. Erlich was the owner of a defunct private health and tennis club, and sought a building permit to construct condominium townhouses on the project site. The city approved the permit but conditioned it on payment of numerous fees, including \$280,000 to enable the city to build tennis courts that would replace the facilities lost with the demolition of the tennis club. Erlich refused, and sued claiming that the fee exactions bore no relationship to the impact caused by the project. The supreme court granted certiorari, vacated the judgment of the lower court dismissing the case for failing to state a takings claim under the Fifth

Nollan/Dolan is: The U. S. Supreme Court first analyzed whether there was an essential nexus between legitimate state interests and the regulatory conditions being imposed upon the land owner. The court determined that there was a legitimate state interest in preventing flooding along the creek and reducing traffic congestion. However, the court was less persuaded that there was a degree of relationship existing between the permit requirement and the impact created by the development. The court held that there must be a "rough proportionality" between the permit requirement and the impact.

Presumably, the court used the term "rough proportionality" to heighten the standard from a rational basis standard. The court concluded that the City of Tigard had failed to show the required relationship. 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.

C. The Impact Fees Act

In 1995 the Utah Legislature first enacted a statutory framework for impact fees. This is now codified as Utah Code Ann. Title 11, Chapter 36a. The Act largely follows the common law discussed above. It also helps define important terms.

A development impact fee is defined in the Impact Fees Act as “as a payment of money imposed upon new development activity as a condition of development approval to mitigate the impact of the new development on public infrastructure (UCS §11-36a-

Amendment, and remanded the case "for further consideration in light of *Dolan*."

102(16)). Impact fees are imposed as a condition of receiving development approval. Under the legislation, such facilities must have a life expectancy of ten (10) or more years (UCS §11-36a-102(16)). They must also be owned or operated by or on behalf of a local government. An impact fee, is expressly distinguished from a tax, a special assessment under the special improvement or a special district acts, a building permit fee, a hook-up fee, a fee for project improvements, or other reasonable permit or application fees (UCA §11-36a-8(b)).

Impact fees are also distinguished from development exactions. An exaction is generally an on-site requirement of a dedication of property and accompanying improvements that are required to principally service the new development, giving only a secondary benefit to existing residents.¹⁵

1. Definitions in Utah's Impact Fees Act (UCA §11-36-102 Utah Code Ann.)

a. **"Development activity."** Development activity covers any type of original construction or additional construction that creates an additional demand or need for public facilities.

b. **"Development approval."** Development approval means the written approval necessary, from a local political subdivision, authorizing the commencement of development activity.

c. **"Enactment."** "Enactment," for municipal and county governments, is

¹⁵ Much has been written on the applicability of supreme court decisions, such as *Dolan v. Tigard*, 114 S.Ct. 2309 (1994), *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), and *Nolan v. California Coastal Commission*, 483 U.S. 825 (1987), on whether or not standards for a "constitutional taking" of a property interest as a condition of development approval, should be extended to a fee in lieu of dedication by the developer. This issue still remains to be addressed by the High Court. Notwithstanding, it appears wise to apply a similar standard in the establishment of an impact fee as the court used in determining the validity of an exaction.

synonymous with ordinance. For districts and private entities it means a vote by the governing body. The word "enactment" was used to accommodate the resolution process used by special districts that are subject to the Act. School districts were specifically exempted.

d. "**Hook-up fees.**" These fees were also meant to distinguish an impact fee from fees charged by local governments for hooking up utility services. Hook-up fees may not cover things such as, expanded capacity, oversized lines, or a fair share of the expansion costs of that utility throughout the city. Many impact fees were hidden in other fees. A hook-up may only be charged for the approximate average cost of services provided for and directly attributable to utility services.

e. "**Project Improvements and System Improvements.**" The Act specifically distinguishes "project improvements," which are generally limited to on-site improvements and facilities, from "system improvements" which are more broadly defined as "service area" wide improvements where the "service area" can include up to the entire geographic area of the local political subdivision.

f. "**Proportionate share.**" A definition for the proportionate share of a development's impact on public facilities came principally from wording in the *Banberry* case (*Banberry Development Corporation v. South Jordan City*, 631 P.2d 899 (Utah 1981), case and the U.S. Supreme Court's roughly proportionate language in *Dolan v. Tigard.*, 512 U.S. 374 (1994). In determining the proportionate share, it must be found to be roughly proportionate and reasonably related to the impact caused by the development activity.

g. "**Public facilities.**" It defines, and by definition limits, the types of activities

local government may charge impact fees for. They include:

1. Water rights and water supply, treatment, and distribution facilities;
2. Waste water collection and treatment facilities;
3. Storm water, drainage, and flood control facilities;
4. Municipal power facilities;
5. Roadway facilities;
6. Parks, recreation facilities, open space, and trails; and
7. Public safety facilities.

Later on in the Act, a provision is made for an "environmental mitigation impact fee," when certain criteria are met. (UCA §11-36-202(5))

i. **"Public safety facility."** Public safety facilities are restricted to buildings constructed or leased for the housing of police, fire, or other public safety entities. The definition specifically excludes jails, prisons, or other places of involuntary incarceration.

j. **"Roadway facilities."** Roadway facilities are restricted to those streets and roads that have been designated on an officially adopted subdivision plat, roadway plan, or general plan. However, they also include improvements such as signals and other appurtenances to federal or state roadways when such associated improvements are:

1. Required or necessitated by new development and are not funded by the state or federal government.
2. Under no circumstances, however, can impact fees be used for the construction of the federal or state roadway itself.

k. **"Service area."** Service area is the area within which the impact fee is charged. A service area must be selected by the local government on the basis of "sound planning or engineering principles" for a defined set of public facilities provided within that area. Service area may be defined as up to and including the entire political subdivision.

2. Requirements for Adopting an Impact Fee

a. Preparation of an Impact Fee Plan

1. Notice. The Act requires the preparation of an Impact Fee Facilities Plan if the entity services a population of five thousand (5,000) or more as of the last federal census or charges impact fees of \$250,000 or more per year. Those with under five thousand (5,000) in population and annually charge impact fees of less than \$250,000 need not comply with the Impact Facilities Plan requirements of the Act, but must insure that the impact fees imposed are based upon "reasonable plan" and gives all notices required by the Impact Fees Act (see UCA §11-36-) A reasonable plan is yet undefined.

An Impact Fee Facilities plan may be an element of the general plan of a municipality. If it is prepared as an element of the general plan, all the notice requirements generally required for amending the general plan must be met. If it is prepared separately from the general plan, public notice must still be given. The notice requirements for a separate plan are the same as required under the general plan provisions. If a local government complies with the notice requirements, and such notice is not challenged within thirty (30) days from which the notice was given, the notice is presumptively adequate and proper.

2. Contents. The Impact Fee Facilities Plan must identify the following:

- a. Identify the existing level of service.
- b. Establish a proposed level of service.
- c. Identify an excess capacity to accommodate future growth at the proposed level of service.
- d. Identify demands placed upon existing Public Facilities by new

development activity at the proposed level of service.

e. Identify the means by which the Political subdivision or private entity will meet those growth demands.

3. Written Analysis of Each Impact Fee

a. General Analysis. (Section 11-36-201(5)(a))

As a local government determines to impose an impact fee for a particular type of facility, parks, storm water, water, sewer, etc., an analysis must be performed that does the following:

1. Identifies the impact on system improvements required by the development activity;
2. Demonstrates how those impacts on system improvements are reasonably related to the development activity;
3. Estimates the proportionate share of the costs of impacts on system improvements that are reasonably related to the new development activity; and
4. Based upon those factors and requirements, identifies how the impact fee was calculated.

b. Proportionate Share Analysis. (Section 11-36-201(5)(b))

The "proportionate share" analysis is drawn directly from the criteria set forth in *Banberry*. When determining the proportionate share of this developer's impact on the public facilities, the following must, **if applicable**, consider:

1. The cost of existing public facilities;
2. The manner of financing existing public 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 public facilities, by such means as user charges, special assessments, or payment from the proceeds of general taxes;

4. The relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing public facilities in the future;

5. The extent to which the newly developed properties are entitled to a credit because the municipality is requiring the developer or owner, 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 charges, in other parts of the municipality;

6. Extraordinary costs, if any, in servicing the newly developed properties; and

7. The time-price differential inherent in fair comparisons of amounts paid at different times.

E. Post 1995 Case Law

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*,¹⁶ 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 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*¹⁷ 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*.¹⁸ The trial court granted summary judgment to the homebuilders. The supreme court reversed and remanded, observing that factgathering and analysis in creating impact fees could be delegated to staff.

In *Home Builders Assoc. v. City of North Logan*,¹⁹ a water connection fee and other fees of North Logan were challenged by the Home Builders Association.

¹⁶ 943 P.2d 226 (Utah 1997).

¹⁷ 973 P.2d 425 (Utah 1999).

¹⁸ 631 P.2d 899 Utah 1981).

¹⁹ (1999).

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.

F. The B.A.M. 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 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.

CONCLUSION

Utah law will undoubtedly continue to develop and evolve in this area. In creating impact fees and exaction requirements, the *Barberry* factors now codified and the *Nollan/Dolan* nexus, rough proportionality tests provide the best guidance.

4847-0012-7491, v. 1