

Rough Proportionality: Who Pays for Infrastructure?

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**Terrence S. Welch
Brown & Hofmeister, L.L.P.
740 E. Campbell Road, Suite 800
Richardson, Texas 75081
214/747-6100
214/747-6111 (Fax)
www.bhlaw.net**

Terrence S. Welch

In 1981, Terry began his legal career in the Dallas City Attorney's Office and is one of the founding partners of Brown & Hofmeister, L.L.P. Since 1991, Terry has served as the Town Attorney for the Town of Flower Mound, Texas, one of the fastest growing communities in the State of Texas. He routinely represents and advises local governments on a variety of issues, including employment, land use, civil rights, police, election, condemnation and regulatory matters.

Terry received his Bachelor of Arts degree at the University of Illinois at Urbana-Champaign in 1976, his law degree in 1979 from the University of Houston College of Law and a Master of Public Affairs in 1981 at the Lyndon Baines Johnson School of Public Affairs at The University of Texas at Austin. Terry has authored and presented over 150 papers to various groups, including the American Bar Association, the Texas City Attorneys Association, the Texas Municipal League, the American Planning Association, the North Central Texas Council of Governments, CLE International and the National Business Institute. He has had three law review articles on civil rights and public employment law issues published in *The Review of Litigation*, *Southern Illinois University Law Journal* and *Baylor Law Review*. He was the 2004-05 Chair of the State and Local Government Law Section of the American Bar Association and Immediate Past Section Chair of the State and Local Government Relations Section of the Federal Bar Association.

For recreation, Terry enjoys long distance running, having completed his 24th marathon in December 2006. Unfortunately he runs them all very slowly!

I.

INTRODUCTION

In recent years, perhaps no area of municipal planning and practice has become the subject of more confusion and debate than zoning and land use practice. While federal and state courts attempt to unravel the often perplexing decisions of the United States Supreme Court in regulatory takings and land use cases, mayors, city council members, city managers, planners, city attorneys and building officials are left scrambling for footing on an ever shifting playing field that appears to become softer and more unsure with each Supreme Court opinion.

One need only read a local newspaper and, more than likely, you will probably see an article about a zoning or land use dispute. Disputes about zoning classifications, variances and permits are commonplace. More frequently, in addition to these traditional situations, we now see new controversies that stem from increased municipal efforts to protect the environment, preserve our historic landmarks and cultural heritage, and enrich the quality of life in our neighborhoods. Overlying all of these issues is a greater emphasis on identifying and controlling urban sprawl and its ill-effects.

While each of these issues are worthy of significant and in depth discussion, this paper makes no effort to do so, primarily because the task would be somewhat daunting and the results extremely voluminous. Rather, this paper seeks to provide an overview of the concept of rough proportionality in Texas, with emphasis on the Texas Supreme Court case of *Town of Flower Mound, Texas v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004), and further, to offer suggestions on how Texas cities may address the issue of exactions in the land development process.

II.

AN OVERVIEW OF TAKINGS CASES

Article I, Section 17 of the Texas Constitution provides that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person. . . .” Tex. Const. art. I, § 17. The federal Takings Clause is substantially similar. *See* U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation”). As a result, the Texas Supreme Court relies upon interpretations of the federal Takings Clause in construing the Texas takings provision and analyzes Texas takings claims under the more familiar federal standards. *See, e.g., City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234, 239 (Tex. 2002) (considering aircraft overflights takings claim, asserted under Texas Constitution, by reference to federal standard established in *United States v. Causby*, 328 U.S. 256 (1946)); *City of Corpus Christi v. Pub. Util. Comm’n of Texas*, 51 S.W.3d 231, 242 (Tex. 2001) (examining federal precedent to decide the framework for determining whether utility charges constitute a taking); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1996); (“[W]e assume, without deciding, that the state and federal guarantees in

respect to land-use constitutional claims are coextensive, and we will analyze the Mayhews' claims under the more familiar federal standards.”).

Both the Texas and Federal Constitutions recognize a claim for a taking of property. *Mayhew*, 964 S.W.2d at 933; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). There are three general categories of takings claims: (1) physical occupation, (2) exactions and (3) regulatory takings. *Stafford*, 135 S.W.3d at 630; *Mayhew*, 964 S.W.2d at 933; *Sheffield Development Company, Inc. v. City of Glenn Heights, Texas*, 140 S.W.3d 660, 671-72 (Tex. 2004). The United States Supreme Court has determined that the first category, a physical invasion or a regulatory activity that produces a physical invasion, will support a takings claim without regard to the public interest advanced by the regulation or the economic impact upon the landowner. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-440 (1982). *See also Mayhew*, 964 S.W.2d at 933 (recognizing physical takings as takings category).

The second category of takings claims is found where an exaction, such as the required dedication of land, is made a condition of development approval. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987).

The third category of takings claims—regulatory takings—encompass the majority of takings cases and involve the most complex analysis. *See Mayhew*, 964 S.W.2d at 933 (recognizing regulatory takings as category of takings claim). Within the context of regulatory takings, the United States Supreme Court has recognized a categorical rule where a regulation itself “denies all economically beneficial or productive use of land,” finding that such regulation requires compensation without “case-specific inquiry into the public interest advanced in support of the restraint.” *Lucas*, 505 U.S. at 1015-16. The Texas Supreme Court also recognized this rule in *Mayhew*, in which it held that a compensable taking occurs when a governmental restriction “denies the landowner all economically viable use of the property or totally destroys the value of the property. . . .” *Id.* at 935.

When a regulatory takings claim does not render property valueless, however, a taking may still result after evaluation of the three factors promulgated in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Those factors are (1) the character of the governmental action, (2) the economic impact of the regulation upon the claimant, and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016-20 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978). The United States Supreme Court has consistently reaffirmed the viability of the *Penn Central* standards. *See Tahoe-Sierra*, 535 U.S. at 321 (“[W]e conclude that the circumstances in this case [determining whether a 32 month moratorium is a taking] are best analyzed with the *Penn Central* framework.”); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (“Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation’s

economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.”).

III.

THE UNITED STATES SUPREME COURT ADDRESSES EXACTIONS

Two United States Supreme Court cases articulate the current federal tests for determining whether conditions that require the dedication of land, and possibly all exactions, constitute a taking under the Fifth Amendment.¹ The first, *Nollan*, requires a court to evaluate the nexus between (1) what the municipality seeks to exact from the developer by way of imposing a condition that takes land, and (2) the projected impact of the proposed development. In *Nollan*, the Supreme Court required that in cases involving permanent dedication of title, an “essential nexus” must exist between the title condition imposed and the stated police power objective of requiring development to meet the needs created by the development. *Id.*, 483 U.S. at 837. Under this test, the dedication must serve the same governmental purpose as the regulation. The Court employed a heightened level of scrutiny, differentiating the ad hoc, factual inquiry balancing test of an economic take as enunciated in *Penn Central*.

Following *Nollan*, there was uncertainty regarding the degree of nexus that a municipality was required to establish in order for a land dedication condition to pass constitutional muster. In *Dolan*, the Supreme Court clarified *Nollan* by adopting the “rough proportionality” test as the means for determining the degree of nexus required between a real property exaction imposed by a municipality and the projected impact of a proposed development. In *Dolan*, the Court addressed the question of a second nexus required between the city’s conditions of title transfer and the projected impact caused by the proposed development. *Id.*, 512 U.S. at 388.

To evaluate this question, the *Dolan* Court articulated a two-pronged test. First, as determined in *Nollan*, there must exist an essential nexus between legitimate state interests and the permit conditions. *Id.* at 386. Second, the exaction required by the permit condition must be roughly proportional to the projected impact of the proposed development. *Id.* at 391. Under this prong, the government bears the burden of proof and must show that the dedication or exaction is roughly proportional to the impact of the project. *Id.* The Supreme Court intended this two-prong test to function as a higher standard of review. The Supreme Court noted, however, that traditional land use planning tools such as dedications for streets, sidewalks and other public ways will generally be considered reasonable exactions. *Id.* at 395.

A. *Nollan* Facts

¹ An exaction is an example of the “unconstitutional conditions” doctrine which prohibits the government from “requir[ing] a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 547 (2005).

As a condition to granting the Nollans a permit for their house, the California Coastal Commission required the Nollans to give the public an easement across their beachfront property. The Commission recited the usual “health, safety and welfare” justifications which have traditionally supported land use regulation, and declared that the easement was necessary because the new building “would increase blockage of the view of the ocean” from the street; might reduce the public’s perception that a public beach existed in the other side of the house; and would “burden the public’s ability to traverse to and along the shorefront.” The Commission refused the permit to build unless the couple granted an easement across the shorefront part of their land for public use.

The United States Supreme Court recognized the general police power of the Commission, but found that there was no “essential nexus” between the exaction (a public easement across the beach front of the Nollans’ land) and the state impact created or exacerbated by the construction of a new house (ability to see the beach, assisting the public in overcoming the “psychological barrier” to using the beach created by a developed shorefront, and preventing congestion on the public beaches). *Nollan*, 483 U.S. at 835. The Court held that the absence of any “nexus” between the exaction and the state interest asserted by the Commission resulted in taking without just compensation in violation of the U.S. Constitution. *Id.*

B. *Dolan* Facts

This “essential nexus” requirement of *Nollan* was refined by the Court in *Dolan*. Mrs. Dolan operated a store which had a gravel parking lot. A creek traversed part of her property. Mrs. Dolan applied for a permit to increase the size of her store and pave the parking lot. The city conditioned the permit upon a dedication by Mrs. Dolan of a portion of her land for use as a flood control area and upon the dedication of an additional 15-foot strip of land adjacent to the creek as a bicycle path. *Dolan*, 512 U.S. at 385-86. The city claimed that the creek land was necessary to control flooding and the bicycle path might alleviate congestion on the streets and was necessary for the health, welfare and safety of the public. Mrs. Dolan complained on appeal that the city had not identified any “special quantifiable burdens” created by her new parking lot or building that would justify the particular exactions from her.

After concluding that there was a “nexus” between the exactions and the claimed state interest, the United States Supreme Court framed the following additional question: “What is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.” *Dolan*, 512 U.S. at 375. The Court answered as follows:

We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, *but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.*

Dolan, 512 U.S. at 391 (emphasis added).

The exactions were stricken because less invasive measures than taking Mrs. Dolan's land would have accomplished the same stated goals. Read together, *Nollan* and *Dolan* appear to inquire first whether the government imposition of the exaction would constitute a taking if done without the corresponding application for a permit by the landowner. If the question is answered affirmatively, the Court then applies the two part "rough proportionality" test which asks whether the exaction demanded is roughly proportional both in nature (nexus) and extent (proportionality) to the impact of the proposed development. *Dolan* appears to place the burden of proof squarely upon the governmental entity to show compliance with the rough proportionality test. *Dolan*, 512 U.S. at 391.

C. *Turtle Rock*

Before adopting the "rough proportionality" test, the *Dolan* Court considered the tests that existed among the states for determining the degree of nexus required for a condition to be constitutionally valid. The state tests considered by the Court have been organized into three categories: (1) the judicial deference test; (2) the "specifically and uniquely attributable" test, and "the reasonable relationship" test. *Id.* at 390-92. The principal difference among the three tests is the requisite degree of nexus between the exaction and the projected impact caused by the development. Under the judicial deference test, a court would find that the required degree of nexus between the exaction and the need created by the development exists by the mere existence of a statute calling for the exaction. A court utilizing the judicial deference test simply defers to the legislature, which in enacting the statute authorizing the exaction, has already decided that the projected impact is addressed by the exaction. The specifically and uniquely attributable test requires the municipality to show that the exaction is directly proportional to the specific need created by the proposed development. *Dolan*, 512 U.S. at 389-90.

The Court rejected the judicial deference tests used in states such as Montana and New York as "too lax." On the other hand, the Court found that the specifically and uniquely attributable test used in states such as Illinois to be more exacting than what was required by the Federal Constitution. The Court ultimately concluded that the reasonable relationship test, used in states such as Texas, was closest to the federal constitutional norm. *Id.* at 391. The test adopted by the *Dolan* Court was labeled the "rough proportionality" test because the majority wanted to differentiate the newly articulated federal constitutional standard from the less demanding rational basis test which the Court implied was analogous to the judicial deference test.

The rough proportionality standard adopted by the Court in *Dolan* requires a court to conduct a more exacting scrutiny of real property exactions than does the judicial deference test, and a less exacting scrutiny than does the specifically and uniquely attributable test. Stated differently, the specifically and uniquely attributable test guarantees an individual more protection than federally mandated, the judicial deference test does not provide enough protection, and the reasonable relationship test provides a constitutionally sufficient amount of protection.

In determining that the reasonable relationship test provides a constitutionally sufficient

amount of protection under the Fifth Amendment, the Court cited the Texas Supreme Court's decision in *City of College Station v. Turtle Rock*, 680 S.W.2d 802 (Tex. 1984), as a jurisdiction that used this test. *Dolan*, 512 U.S. at 390-91. Consequently, the United States Supreme Court has reviewed and addressed the Texas Supreme Court's analysis in *Turtle Rock* and has arguably held that the *Turtle Rock* test passes constitutional muster under the *Dolan* standard.

In *Turtle Rock*, the Texas Supreme Court set forth a test to determine the validity of ordinances requiring dedications, or fees in lieu of dedicating property, for park purposes. Drawing upon previous Texas Supreme Court cases, the Court held that a city may enact reasonable regulations to promote the health, safety and general welfare of its citizens provided that the ordinance meets two requirements: (1) the regulation must accomplish a legitimate goal; and (2) the regulation must be reasonable and not arbitrary. *Id.*, 680 S.W.2d at 805.

The first requirement depends upon whether or not reasonable minds could differ that the ordinance has a substantial relationship to the public health, safety, morals, or general welfare. The Court in *Turtle Rock* recognized that cities may impose reasonable regulations as a condition for the use of property or as a condition precedent to the subdivision of land and held that the College Station ordinance in question was a regulatory response to park needs created by the developer's use of land. As a result, the ordinance satisfied the first level of judicial scrutiny. *Id.* at 805-806.

The second test articulated in *Turtle Rock* identified the reasonableness requirement for a valid ordinance. The Court stated that the second requirement for park land dedication is whether a reasonable connection exists between the increased population arising from the subdivision development and the increased park and recreation needs in the neighborhood. Citing The American Law Institute, the Supreme Court stated that "[t]he Code adopts the position that developers may be required to provide streets and utilities but only of the quality and quantity reasonably necessary for the proposed development." *Id.* at 807. Among the important elements to be considered include the extent of the dedication and the size of and number of subdivision lots. The Court opined that the requested exaction would be deemed reasonable if imposed to offset the need created by the proposed development. *Id.*

The Court expressly noted, however, that the burden rests on the plaintiff challenging a city's regulation "to demonstrate that there is no such reasonable connection." *Id.* at 806-807. To that extent, *Turtle Rock* is at odds with the burden of proof allocation discussions in *Dolan*.

IV.

TOWN OF FLOWER MOUND V. STAFFORD: TEXAS GETS ITS FIRST DOLAN CASE

In 2004, the Texas Supreme Court released its opinion in *Stafford*, which concerned the constitutionality of a subdivision exaction and, for the first time, addressed the application of the United States Supreme Court's decisions in *Nollan* and *Dolan* to a fairly standard road improvement subdivision requirement used by many Texas cities. *Stafford*, and its take on the law of exactions, is

important to understand given that it has application to many work-a-day development requirements commonly imposed by municipalities as a condition of development approval.

While the United States Supreme Court issued its decision in *Dolan* in 1994, there had not been a reported decision in Texas addressing how *Dolan* would be applied in Texas until the decision in *Stafford*. *Stafford* is a regulatory takings case challenging the constitutionality of a plat approval condition under the two-prong test articulated in *Dolan*. In a bifurcated trial, the trial court held, based upon a stipulated record, that the Town's plat approval condition (that Stafford reconstruct and improve an abutting substandard street from which the subdivision development would take access) was a taking under the Texas and United States Constitutions. After a trial on damages, the court awarded Stafford \$425,426 in damages, as well as attorney's fees, expert fees and costs.

On appeal, the Fort Worth Court of Appeals affirmed that the plat approval condition was a taking under the Texas Constitution and upheld the damage award; but reversed and rendered the award of attorney's fees, expert fees and costs. *Stafford*, 71 S.W.3d 18 (Tex.App.—Fort Worth, 2002), *aff'd*, 135 S.W.3d 620 (Tex. 2004). The Texas Supreme Court upheld the appellate court in its application of the nexus test of *Nollan*, and the rough proportionality test of *Dolan*, to all types of development "exactions," which the appellate court defined broadly to include "any requirement that a developer provide or do something as a condition to receiving municipal approval. . . ." *Stafford*, 71 S.W.3d at 30 n. 7.

A. Factual Background

Between 1994 and 1997, Stafford developed a 247 single-family lot subdivision ("Subdivision"), in three phases, on 90 acres located at the intersection of McKamy Creek Road and Simmons Road ("Simmons") in the Town. Phases II and III of the planned Subdivision proposed two street intersections with Simmons, which at that time was a two-lane asphalt road abutting the Subdivision. Pursuant to the Town's subdivision regulations, which required that all proposed developments take access to and from concrete streets, the Town required Stafford, as a condition of plat approval, to improve Simmons, at Stafford's cost, to the Town's minimum standards as a concrete road. The required improvements to Simmons were located entirely within existing Town right-of-way, no part of which was required to be dedicated by Stafford.

Section 4.04 of the Town's Land Development Code ("LDC") addresses subdivision standards for streets located within the Town. Section 4.04(o) of the LDC provides as follows:

(o) Construction and dedication of boundary streets. Where a subdivision or industrial area abuts a street that does not meet the minimum design standards of this section, the following shall apply.

(1) Local and collector streets. Abutting substandard local and collector streets shall be constructed or reconstructed as necessary by the developer to bring them up to minimum standards, and all right-

of-way from the centerline of such roadway necessary to meet minimum right-of-way requirements dedicated to the Town, with no cost participation from the Town. The Federal Government, the State of Texas, and political subdivisions of the State of Texas may be exempt from the provisions of this requirement.

(2) Major and minor arterials. In the event that the subdivision or industrial area proposes access to a planned major or minor arterial shown on the Thoroughfare Plan, no development plan or record plat shall be approved and no development permits shall be issued until such arterial is constructed or until agreement is reached between the Town and the developer on the financing and construction of such arterial.

Section 4.04(b) of the LDC requires that “all builder/developers shall be required to construct concrete streets according to the Engineering Standards Manual.” Section 4.04(a) of the LDC allows property owners to apply for and the Town Council to grant an exception to the street design standards “provided that the Council finds and determines that such standards work a hardship on the basis of utility relocation costs, right-of-way acquisition costs, and other related factors.”

While Stafford objected to bearing the total road improvement costs in various letters to the Town, and unsuccessfully sought to obtain from the Town an exception to be relieved of 50% of the costs, Stafford did not file suit seeking to have the road improvement condition found unlawful until after Stafford had received the benefits of plat approval and Simmons had been rebuilt, thereby irreparably changing the status quo so that the Town’s only recourse, in the event of a *Dolan* violation, would be the payment of damages.

In October 1994, the Town adopted roadway impact fees pursuant to Chapter 395 of the Texas Local Government Code. The Town’s impact fee ordinance establishes a maximum road impact fee per service unit based on the total cost of capital improvements necessitated by and attributable to new development. For the service area in which the Subdivision is located (Service Area No. 2), the maximum impact fee is \$1,249 per service unit. The number of service units for a single-family dwelling is 2.85, making the maximum allowable impact fee approximately \$3,559 per single-family dwelling for Service Area No. 2.

At that time, roadway impact fees were assessed at the maximum impact fee per service unit for each service area at the time of plat approval for most developments. The Town’s impact fee ordinance heavily discounts impact fees for single-family dwellings. The ordinance thus establishes a fee to be collected of \$1,140 per single-family dwelling unit, roughly 32% of the maximum allowable fee. As a result, although Stafford was assessed impact fees in the amount of \$3,559 per single-family dwelling unit at the time of final approval for each phase of the Subdivision, Stafford was only required to pay impact fees in the amount of \$1,140 per single-family dwelling unit.

After the lawsuit was filed, the Town retained an expert to perform a rough proportionality

analysis. That expert concluded that the Town's requirement that Stafford improve Simmons was roughly proportional and, at trial, he testified that the Town's regulatory objective of providing an adequate roadway network concurrent with new development was implemented through road impact fees, paid for by builders, in conjunction with mandatory right-of-way dedication and road construction requirements for perimeter roads that provide access to new development. Road impact fees are used to finance major arterial roads within the Town and are established by the impact fee ordinance. In Service Area No. 2, which includes Stafford Estates, the fee is roughly 32% of the impact of the development's traffic. Pursuant to the Town's regulatory strategies for providing roads, developers must dedicate right-of-way and construct perimeter roads, including access points, as established by the Town's subdivision ordinance. Developers are required to construct two or four lanes for major collectors or arterials, and two lanes for rural collectors. No developer, however, is ever required to build more than two lanes

The Town's expert further testified that only the costs for major roads can be financed with impact fees. An impact fee shortfall (maximum fee allowed less actually fee charged) must be taken into account in evaluating the impact on roads created by new development. As applied to the Subdivision, the maximum impact fees are \$3,560 per dwelling unit. Stafford paid \$1,140 per unit, which created a shortfall of about \$600,000. This shortfall was roughly proportional to the total cost of the improving Simmons. Based upon this analysis, the Town contended that the Simmons improvements were roughly proportional and did not violate *Dolan*.

The Town also presented testimony that the Simmons improvements were roughly proportional given the safety considerations involved in the Simmons improvements. The Town's subdivision regulations prescribe minimum safety design features where perimeter roads must be upgraded. Those features include sight distance, safe access, interface of old and new road segments, increased road shoulders, and long-term durability by utilizing concrete over asphalt. Additionally, the size of the subdivision and the length of frontage along Simmons necessitated that a second point of access be taken from Simmons for the Subdivision. The Simmons improvements supplied safety features benefiting residents of the Town traveling on the adjacent segment of Simmons, in addition to the Subdivision's residents, by upgrading the road to community standards.

The Town presented evidence that the improved Simmons was a safer road that would benefit the Subdivision's residents because of better sight distances, which would allow both traffic turning into and exiting the Subdivision on Simmons to have more time to see approaching vehicles. Testimony established that the wider shoulders added to Simmons provided an additional degree of safety that would be of benefit to the Subdivision's residents, and that the Simmons improvements, being made of concrete rather than asphalt, would extend the life expectancy of Simmons and reduce the necessity for repairs on Simmons, which repairs would be an obvious detriment to traffic flowing in and out of the Subdivision from Simmons.

B. *Nollan/Dolan* on the Spectrum of Takings Claims

Traditionally, takings jurisprudence has distinguished between two kinds of encroachments on property interests, with significantly different analyses applicable to each. The first is an actual

physical invasion or occupation of property, whether in the form of a physical trespass or a forced dedication. The Takings Clause is particularly protective of property against that form of encroachment, and physical invasions or diminutions of rights of exclusive possession have been deemed to be *per se* takings that entitle a property owner to compensation. See *Tahoe-Sierra*, 535 U.S. at 321-22; *Lucas*, 505 U.S. at 1015; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-440 (1982). See also *Mayhew*, 964 S.W.2d at 933 (recognizing physical takings as takings category). This categorical rule recognizes that such an invasion is unconstitutional "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 434-35. See *Sheffield*, 140 S.W.3d at 669-70 ("Physical possession is, categorically, a taking for which compensation is constitutionally mandated, but a restriction in the permissible uses of property or a diminution in its value, resulting from regulatory action within the government's police power, may or may not be a compensable taking.").

A similar categorical rule applies where a regulation itself "denies all economically beneficial or productive use of land," with such regulation requiring compensation without "case-specific inquiry into the public interest advanced in support of the restraint." *Lucas*, 505 U.S. at 1015-16. See also *Mayhew*, 964 S.W.2d at 935 (recognizing that a compensable taking occurs when a governmental restriction "denies the landowner all economically viable use of the property or totally destroys the value of the property. . .").

These categorical approaches do not apply, however, to most traditionally recognized types of government encroachments on property interests, namely, regulatory restrictions on property uses, *e.g.*, zoning. In testing use restrictions, no "set formula" determines whether an unconstitutional taking has occurred. *Lucas*, 505 U.S. at 1015. Instead, a court must engage in an essentially *ad hoc*, factual inquiry that considers evaluation of the three factors promulgated in *Penn Central*, *supra*. Those factors are (1) the character of the governmental action, (2) the economic impact of the regulation upon the claimant and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Lucas*, 505 U.S. at 1016-20; *Penn Central*, 438 U.S. at 122. Thus, when the government regulates property without physically occupying it or totally destroying its value, the Takings Clause is much less protective of the interests of the property owner and much more deferential to the public interests served.

Dolan, and the case that foreshadowed it, *Nollan*, were decided against that landscape. Both cases involved development conditions that, in effect, required the landowner to forfeit part of his property in exchange for approval to develop. The Court therefore was confronted with a blend of the governmental encroachments described above. On the one hand, the challenged government action involved a regulatory use restriction in the form of a restriction on further development. Traditionally, such a restriction would have triggered a lenient takings standard. On the other hand, as a condition of relaxing the use restriction, the government required the property owner to suffer a physical occupation or invasion. Traditionally, such an invasion would have been considered a *per se* taking. The issue for the Court was how to test that amalgamation.

The facts of the cases provide context that is helpful to understanding the Court's resolution of that issue. In *Nollan*, the plaintiffs sought approval from a California agency to rebuild a

beachfront house. The agency granted the approval, subject to the condition that the plaintiffs dedicate a public easement behind their house, along the shore, so that the public could pass freely between the two public beaches bordering the plaintiffs' property. In invalidating the dedication, the Court accepted as legitimate the agency's concern that the house that the plaintiffs proposed to build would block visual access to the beach and create a "psychological barrier" to its use by the public. But the Court considered the requirement of a public easement behind the house to be unrelated to that interest, because it did nothing to enhance visual access of the beach from the street or to overcome any psychological barrier. Instead, the easement merely facilitated use of the public beaches by people already aware of and using them. The Court concluded that the dedication therefore lacked an "essential nexus" between the condition imposed and the government interest in imposing it, which rendered the dedication a taking. *Id.* at 841-42. In short, although the Court declined to deem the condition a *per se* taking as it had for other physical invasions or dedications of property interests, the Court required that there be a logical connection between the governmental interest to be served and the particular condition imposed on the landowner.

Because the Court determined that no connection existed between the dedication and the government's interest in imposing it, the Court did not, however, have to decide how close a nexus was required between the two to avoid an unconstitutional taking. *Id.* at 838. The Court granted *certiorari* in *Dolan* for the express purpose of settling that unresolved issue. *Id.*, 512 U.S. at 377.

In *Dolan*, the property owner sought to double the size of her retail store and to pave her parking lot. As a condition of allowing the development, the city required the owner to dedicate a 15-foot strip of land for use as a pedestrian path and bikeway and also to dedicate a portion of her property within the 100-year flood plain for a publicly accessible "greenway." The city defended the bikeway requirement with a calculation that the increased size of the retail store would add 937 car trips per week and that the bikeway "could" help to offset the increased traffic. The city defended the flood plain dedication on the basis that paving the gravel parking lot would increase the amount of impermeable ground, thus adding to flooding from the adjacent and already overburdened creek. *Id.* at 379-82.

The Court, in examining the dedications, established a two-step inquiry for analyzing regulatory takings claims in the context of conditional use or development permits. First, as it had in *Nollan*, the Court examined whether there was an "essential nexus" between the conditions and legitimate governmental interests, such that the purpose to be served by the condition was the same as the government's interest in the use restriction. The Court found that nexus requirement readily satisfied. More specifically, the Court determined that there was a logical relationship between relieving traffic congestion and requiring a bike path and between the increased risk of flooding due to the parking lot and requiring property within the local flood plain to remain undeveloped. *Id.* at 387-88.

Second, having determined that the "essential nexus" inquiry was satisfied, the Court turned to the degree of connection between the dedications and the projected impact of the proposed development. *Id.* at 388. The Court began by endorsing the predominant test developed by state courts--*i.e.*, the requirement of a "reasonable relationship" between the condition imposed and the

impacts of the development. That test, the Court reasoned, best “encapsulat[ed]” what the federal Takings Clause requires. *Id.* at 391. The Court, however, adopted the phraseology “rough proportionality” to avoid confusion with “rational basis” scrutiny, which the Court viewed as appropriate for equal protection rather than takings analysis. *Id.* Thus, the Court held that there must be “rough proportionality” between a development’s projected impacts and the condition required of the property owner to permit development. *Id.* The Court emphasized that it was requiring proportionality of only an approximate kind: “No precise mathematical calculation is required, but the city must make some effort to quantify its finding in support of the dedication . . . beyond the conclusory statement that it could offset some of the [impacts of the development].” *Id.* at 395-96. The government “must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” *Id.* at 391. Moreover, the Court made clear that it was departing from the general rule applicable to zoning and other use restrictions that the “burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights.” *Id.* at 391 n. 8. Instead, the burden was on the government “to justify the required dedication.” *Id.*

Applying the “rough proportionality” prong of the test to the case before it, the Court concluded that the record in *Dolan* was insufficient to satisfy the government’s burden. With respect to the dedication of the greenway, the Court observed that the city’s interest in not overburdening the adjacent creek was served by keeping the flood plain free of development. But rather than just regulate petitioner’s private use of that portion of the property, the city required her to dedicate it to public use as a greenway. The Court concluded that nothing in the record demonstrated any “individualized determination” of the development impacts that would support divesting the owner of her property, rather than regulating her use of it. *Id.* at 393-94. As for the bike and pedestrian pathway, the Court deemed the city’s finding that the pathway *could* offset some of the traffic demand insufficiently precise to justify a dedication of some the landowner’s property for public use. *Id.* at 395-96.

In departing from the less exacting requirements applicable to zoning and other traditional use regulations, the Court in *Dolan* explained:

Th[ose sort of land use regulations], however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Id. at 385.

Both *Nolan* and *Dolan* arose in the context of discretionary adjudicative determinations specific to one development proposal on a particular parcel of land. Both, moreover, involved conditions that took the form of a dedication of property for public use. As the decision in each case

reveals, those facts played an explicit part in the Court’s rationale for adopting a heightened level of scrutiny for the development conditions at issue. The issue that lower courts throughout the nation have struggled with is whether those facts are therefore an indispensable predicate for applying this heightened scrutiny. As a result, the two questions that consistently arise, and which were before the trial court, court of appeals and Texas Supreme Court in *Stafford*, are (1) does *Dolan* apply to nonpossessory exactions, such as the street improvement requirement imposed in this case, and (2) does *Dolan* apply to development conditions imposed through generally applicable legislation, rather than individual adjudicative decisions?

In Texas, as demonstrated by the *Stafford* decision, the “land only” defense is no defense at all, and the *Dolan* standard will be found to apply to all exactions, regardless of their characterization as legislative or adjudicative.

C. The Texas Supreme Court Speaks in *Stafford*

The Court in *Stafford* applied *Dolan* broadly, rejecting the distinctions that some courts had made in limiting *Dolan*’s reach. Additionally, the Court rejected the Town’s efforts to force developers to bring suit to challenge alleged *Dolan* violations before accepting the benefits of permit approval.

1. A Threshold Defense

As a threshold matter, the Court declined to accept the Town’s argument that the developer had waived, or was estopped from asserting, a takings claim because the developer took the benefits of plat approval without first seeking to challenge any conditions attached to the approval that the developer contended were unlawful. Cases from other jurisdictions that have addressed this issue have required permits holders to file suit seeking to invalidate conditions before accepting the benefits of permit approval. *See, e.g., Weatherly v. Town Plan and Zoning Commission of Town of Fairfield*, 579 A.2d 94, 97 (Conn.App.1990) (“One who seeks to avail himself of the benefits of a zoning regulation is precluded from raising the question of that regulation’s constitutionality; or of that regulation’s validity; in the same proceeding.”) (citations omitted); *Crystal Green v. City of Crystal*, 421 N.W.2d 393, 394-95 (Minn. Ct. App. 1988) (“Developers must challenge dedications prior to final plat approval and registration in order to assure finality of dedication, give municipalities an opportunity to change their requirements if their requirements are unreasonable, and prevent municipalities from being sued by developers when the only remedy available to a losing municipality is payment.”); *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.*, 172 Cal. App. 3d 914, 941 (Cal. App. 1985) (“[M]eaningful governmental fiscal planning would be impossible and legislative control over appropriations emasculated if persons were permitted to simply stand by in the face of administrative action claimed to be unlawful and injurious and years later assert substantial monetary damages.”); *County of Imperial v. McDougal*, 564 P.2d 14, 17 (Cal. 1977) (landowner who accepts and complies with the conditions of a building permit cannot later sue the issuing public entity for inverse condemnation for the costs of compliance); *Pfeiffer v. City of La Mesa*, 69 Cal. App. 3d 74, 78 (Cal. Ct. App. 1977) (“It is fundamental that a landowner who accepts a building permit and complies with its conditions waives the right to assert the invalidity of

the conditions and sue the issuing public entity for the costs of complying with them.”)

The *Stafford* Court, however, was not persuaded. In fact, while recognizing the Town’s argument that “[i]t is in the public interest ... for the government to have the opportunity to withdraw a condition of approval that is found to constitute a taking and thereby avoid the expense to taxpayers of money damages” (*Stafford* at 628), the Court found that the countervailing public policy of protecting developer interests more convincing. *Id.* (“The Town does not address the obvious concern that such a standard would pressure landowners to accept the government’s conditions rather than suffer the delay in a development plan that litigation would necessitate.”).

2. *The Dedications Only Limitation is Rejected*

The Town had urged the Court to find that the Fort Worth Court of Appeals had erred by extending the land dedication tests from *Nollan* and *Dolan* to the Town’s concrete road requirement. *Nollan* and *Dolan* involved, and as a result were particularly concerned with, forced dedications of land. *See Nollan*, 483 U.S. at 841 (“We are inclined to be particularly careful. . . where the actual conveyance of property is made a condition to the lifting of a land-use restriction.”); *Dolan*, 512 U.S. at 385 (distinguishing permit conditions from “a requirement that [Mrs. Dolan] deed portions of the property to the city.”).

Thus, the Town urged the Court to recognize the limitation found by other courts in limiting *Dolan* to land dedication cases. *See, e.g., Texas Manufactured Hous. Ass’n v. Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996) (holding that *Nollan* and *Dolan* do not apply because “the Nederland Ordinance does not ‘extract benefits’ from [the plaintiff] in the *Nollan* sense of requiring some dedication of property ...”); *Harris v. City of Wichita*, 862 F. Supp. 287, 294 (D. Kan. 1994), *aff’d*, 74 F.3d 1249 (10th Cir. 1996) (“The Supreme Court’s decision in *Dolan* was based on the facts of that case, namely that the City had required a dedication of property as a condition for granting a redevelopment permit.”); *Clajon Prods. Corp. v. Petera*, 70 F.3d 1566, 1578-79 & n.21 (10th Cir.1995) (“[W]e believe that the ‘essential nexus’ and ‘rough proportionality’ tests are properly limited to the contexts of development exactions where there is a physical taking or its equivalent.”); *Southeast Cass Water Resource Dist. v. City of Burlington*, 527 N.W.2d 884, 896 (N.D. 1995) (holding that *Dolan* is not applicable to a duty to pay for culvert improvements); *GST Tucson Lightwave, Inc., v. City of Tucson*, 949 P.2d 971, 978-79 (Ariz. Ct. App. 1997) (holding that *Nollan* and *Dolan* do not apply because “this case does not involve the City forcing Lightwave ‘to dedicate a portion of its public property to public use’”); *Sprenger, Grubb & Assocs. v. City of Hailey*, 903 P.2d 741, 747 (Idaho 1995) (*Dolan* is limited to real property exactions); *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712, 724 (Md. Ct. App. 1994) (impact tax “does not require landowners to deed portions of their property to the County”).

The Court rejected this distinction, however, noting that “[f]or purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved. The *Dolan* standard should apply to both.” *Stafford* at 639-40.

3. *The Legislative/Adjudicative Distinction is Rejected*

In *Dolan*, the Supreme Court expressly distinguished its holding from traditional zoning, exaction and development regulations that did not require the dedication of land from a property owner in an adjudicative manner.

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Dolan, 512 U.S. at 385.

As a result, many courts have limited the reach of *Dolan* to adjudicative decisions and found *Dolan* inapplicable to the application of legislatively created standards. See *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000, *cert. denied*, 521 U.S. 1120 (1997); *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (1996), *cert. denied* 519 U.S. 929 (1996); *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 105 (2002); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695 (Colo.2001) (“Application of the *Nollan/Dolan* test has been limited to the narrow set of cases where a permitting authority, through a specific, discretionary adjudicative determination, conditions continued development on the exaction of private property for public use.”); *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 n. 3 (1994) (*Dolan* test did not apply to city's legislative determination), *cert. denied*, 515 U.S. 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from the denial of certiorari, noting conflict in lower courts on whether test from *Dolan* or *Agins* applied when a taking is alleged based on a legislative act); *Southeast Cass Water Res. Dist. v. Burlington Northern R. Co.*, 527 N.W.2d 884, 896 (N.D.1995) (stating that *Nollan* and *Dolan* do not “change the constitutional analysis for legislated police-power regulation”).

The Texas Supreme Court, however, was not persuaded.

While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could “gang up” on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others. Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative . . . We think that the Town's argument, and the few courts that have accepted it, make too much of the Supreme Court's distinction in *Dolan*.

Stafford at 641.

4. ***The Taking is Upheld, but the Attorneys' Fees are Not***

Having determined that *Dolan* applied fully to the street improvement requirement at issue, the Court held that Stafford's development, which would only account for 18% of the increased traffic on the road in question, could not be charged for 100% of the costs to improve the road. *Stafford* at 645 (“[C]onditioning development on rebuilding Simmons Road with concrete and making other changes was simply a way for the Town to extract from Stafford a benefit to which the Town was not entitled.”).

The Court did provide some good news for Texas cities in its decision. Importantly, the Court held, in contrast to the holdings of most other courts on this issue, that the government did not have to make an advance determination of rough proportionality, but could perform its studies “after the fact” to be used to justify the condition at trial. *Stafford* at 644 (“Stafford argues that the Town was required to make [the rough proportionality] determination before imposing the condition on development, but we agree with the court of appeals that while the determination usually *should* be made before a condition is imposed, *Dolan* does not preclude the government from making the determination after the fact.”) (emphasis in original). Additionally, the Court upheld the court of appeals determination that Stafford could not recover attorneys' fees and expert witness fees because its federal takings claim, which was the only claim for which such fees could be awarded, as a matter of law could not become ripe once Stafford had obtained compensation under the Texas Constitution. *Stafford* at 645-46.

D. **A Legislative Response: H.B. 1835**

The Texas Legislature expanded the reach of *Stafford* in its enactment of H.B. 1835, which became effective September 1, 2005, and which created Section 212.904 of the Local Government Code. Section 212.904 provides as follows:

Sec. 212.904. APPORTIONMENT OF MUNICIPAL INFRASTRUCTURE COSTS.

(a) If a municipality requires as a condition of approval for a property development project that the developer bear a portion of the costs of municipal infrastructure improvements by the making of dedications, the payment of fees, or the payment of construction costs, the developer's portion of the costs may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development as approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality.

(b) A developer who disputes the determination made under Subsection (a) may appeal to the governing body of the municipality. At the appeal, the developer may present evidence and testimony under procedures adopted by the governing body.

After hearing any testimony and reviewing the evidence, the governing body shall make the applicable determination within 30 days following the final submission of any testimony or evidence by the developer.

(c) A developer may appeal the determination of the governing body to a county or district court of the county in which the development project is located within 30 days of the final determination by the governing body.

(d) A municipality may not require a developer to waive the right of appeal authorized by this section as a condition of approval for a development project.

(e) A developer who prevails in an appeal under this section is entitled to applicable costs and to reasonable attorney's fees, including expert witness fees.

(f) This section does not diminish the authority or modify the procedures specified by Chapter 395.

Tex. Loc. Gov't Code Ann. § 212.904.

This new law provides developers with the attorneys' fees and expert fees denied the developer in *Stafford* should they prevail in an appeal under the statute. Among the many unanswered questions presented by Section 212.904 are the following:

1. Does the "roughly proportionate" study requirement apply if the city requires the developer to bear the entire cost of the exaction versus only a portion of the cost?
2. What are the standards for a "roughly proportionate" exaction?
3. Is the legislatively-imposed "roughly proportionate" standard the same as the constitutionally-imposed "rough proportionality" standard discussed in *Dolan* and *Stafford*?
4. What criteria does the professional engineer that the city is required to retain to do the "roughly proportionate" utilize?
5. While Section 212.904 requires that the city retain the engineer for the study, can the city shift the costs of the study in whole or in part to the developer?
6. While a city cannot require a developer to waive its rights to appeal under Section 212.904, can a city and a developer enter into a development agreement wherein both parties agree that the exaction is "roughly proportionate" without the preparation of the required study?

V.

WHAT'S A CITY TO DO?

In considering who pays for right-of-way or infrastructure, there are several options available to a municipality, most of which are not feasible due to the timing of the construction of the improvements or the piecemeal acquisition of land for right-of-way.

A. On-Site Improvements/Dedications

With standard subdivision development, it has never been challenged that cities do not have the right to require a developer to provide, free of charge, such things as street right-of-way, paved streets (constructed in accordance with applicable subdivision ordinance standards), easements for utilities, on-site infrastructure such as sewer lines and water lines, sidewalks and curbs. While technically non-residents will utilize those streets and sidewalks along with subdivision residents, no Texas court has ever held that a developer would be entitled to some financial contribution from a municipality in such a case. Thus, rough proportionality studies are not mandated for on-site improvements and land dedications—if such were required, every developer could certainly receive some minimal municipal contribution for infrastructure and land dedications since such will not be 100% attributable to the new development. Nevertheless, Section 212.904 recognizes the authority and primacy of Chapter 395 of the Texas Local Government Code relative to impact fees and recognizes that Section 212.904 “does not diminish the authority or modify the procedures specified by Chapter 395.” Tex. Local Gov’t Code § 212.904(f). The impact fee statute specifically provides that an “impact fee” does not include “dedication of rights-of-way or easements or construction or dedication of on-site or off-site water distribution, wastewater collection or drainage facilities, or streets, sidewalks, or curbs if the dedication or construction is required by a valid ordinance and is necessitated by and attributable to the new development.” *Id.*, § 395.001(4)(B).

B. Off-Site Improvements/Dedications

The question of who pays off-site improvements and dedications really is the key issue facing many, particularly smaller, cities around the State. The options available to a city are listed below with comments about the feasibility of each option.

Option 1: The Rough Proportionality Study. The obvious answer, in light of the recent adoption of Section 212.904 of the Local Government Code, is that the developer and the municipality make that determination through a rough proportionality study, but is this really a practical answer? For example, if a city’s share of roadway construction is \$1 million and the city does not have funds available for such construction, does the subdivision project come grinding to a halt until the city has the funds available for the construction project? In all likelihood, no developer is going to sit back and wait several years for the city to budget the construction project. Further, the city runs a massive legal risk if it denies the subdivision project due to the city’s lack of funds for its share of the roadway construction costs. Nevertheless, if a city has funds available for the roadway construction project, it certainly may pay its proportionate share of the roadway construction costs.

Option 2: Buy the Right-of-Way/Pay for the Public Improvements. This is just another variation of the first option. In most cases cities do not have available the funds to buy all or a portion of the

right-of-way needed or to construct the necessary public improvements with the developer paying a proportionate share of the costs.

Option 3: Condemn the Right-of-Way or Easements. While the necessary rights-of-way and easements clearly would be obtained for a public purpose, eminent domain is generally not feasible for the reasons specified in Options 1 and 2—the city in all likelihood has not budgeted the funds for such eminent domain proceedings. Further, even if funds are available, most cities do not use eminent domain for piecemeal portions of roadways or public improvement projects. Obviously there are political considerations to be taken into account when a city utilizes eminent domain, especially after the recent United States Supreme Court case of *Kelo v. City of New London*, 545 U.S. 469 (2005), and the furor raised over local governments’ use of eminent domain for economic development purposes.

Option 4: Assessments. The assessment of abutting property owners for roadway improvements pursuant to Chapter 313 of the Texas Transportation Code or water and sewer assessments pursuant to Chapter 402 of the Texas Local Government Code is a feasible option. Cities around the State have used the assessment process for the construction of capital improvements such as roadways, water and sewer lines, and related infrastructure, including the costs of property acquisition and related acquisition costs such as legal fees. Assessments, however, are generally not done piecemeal and are used, for example, to construct a new roadway, not just a portion of an existing roadway. Nevertheless, assessments, while not particularly popular with adjoining landowners, are an available option to pay for capital improvements in certain cases.

Option 5: Impact Fees. The adoption of an impact fee ordinance may be one of the best responses for dealing with new development, and in light of current case law and statutory requirements, impact fee ordinances will be the best defense available to a city that is challenged for the amount of money it charges for capital improvements attributable to new development.

“Impact fees, like other forms of development exactions, are imposed as a condition of development approval to mitigate impacts on public facilities and services generated by the development project. The principal use of impact fees, which distinguishes them from traditional subdivision exactions, is the financing of off-site capital facilities to support new growth.”² Further, “[i]mpact fees . . . serve as a substitute for denial of development projects that otherwise would not be served by adequate facilities. In essence, development exactions mitigate adverse impacts of new development on the municipality’s ability to provide essential facilities and services.”³

² T. Morgan, “*The Effect of State Legislation on the Law of Impact Fees, With Special Emphasis on Texas Legislation*,” 18th Annual Institute on Planning, Zoning & Eminent Domain § 7.01 at 7-2 (1988).

³ *Id.*, § 7.02[1] at 7-4.

An impact fee is broadly defined as a contribution of land, improvements or money imposed as a condition of development approval to mitigate the impacts of the development project. Such development exactions include mandatory dedications of property for rights-of-way, requirements to construct capital improvements, fees in lieu of dedication or construction, impact fees for public facilities, and fees or charges that are assessed against development projects to mitigate environmental or social impacts.⁴

If *Stafford* and *Dolan* have taught us anything, the safest course to follow is to adopt an impact fee ordinance and to require new development to pay for off-site capital facilities to support the new growth and development. While impact fees are often cumbersome to adopt and utilize, and the statute authorizing impact fees (Chapter 395 of the Local Government Code) is not a model of clarity, impact fees nevertheless address the issue of off-site exactions and the extent a local government may go in assessing costs for capital improvements necessitated by new development. Thus, in light of *Stafford* and *Dolan*, it has been our advice to clients that adoption of an impact fee ordinance may be the most prudent course of action in light of the guidance from Texas courts.

Option 6: Pro Rata Agreements. In Texas, pro rata agreements may only be utilized for water and wastewater projects and costs, but may not be used for roadways. Section 395.001(4)(C) of the Texas Local Government Code provides that “lot or acreage fees to be placed in trust funds for the purpose of reimbursing developers for oversizing or constructing water or sewer mains or lines” and pro rata agreements are not included in the definition of “impact fees.” While a pro rata agreement for water and wastewater projects and costs may be feasible, roadway acquisition and construction costs are not permissible in Texas, thus depriving local governments of another basis on which to pay those costs.⁵

Option 7: Development Agreement. While impact fees surely address the underlying cost issues, we have found that the best way for a city to deal with the exactions issue is to provide that the developer pay all such costs and the city protect itself through a development agreement with appropriate waivers of causes of action and related litigation potential. Certainly every developer will not agree to this option since the result is that the developer still “picks up the tab” for all off-site costs; however, our experience has been that most will do so and will sign a development agreement with waivers of liability. A sample waiver paragraph follows:

The Developer hereby agrees that any land or property it donates to City X, as reflected on the Final Plat or as may be donated at a later date by Developer, is roughly proportional to the need for such land and Developer hereby waives any claim therefor that it may have. Developer further acknowledges and agrees that all

⁴ Texas Municipal League Public Policies Briefing Series, “Impact Fees in Texas,” § 1.2 at 1-2 (Nov. 1989)(hereinafter “Impact Fees”).

⁵ In the 2005 legislative session, the Town of Flower Mound requested that Representative Mary Denny support a bill that amended Chapter 395 to include roadway projects as being an eligible subject of a pro rata agreement. House Bill No. 2628 was introduced and would have added “roadway facilities” to Section 395.001(4)(D); however, that bill died in committee.

prerequisites to such a determination of rough proportionality have been met, and that any costs incurred relative to said donation are related both in nature and extent to the impact of Development Y upon the Town and its needs related thereto. Both Developer and the City further agree to waive and release all claims one may have against the other related to any and all rough proportionality and individual determination requirements mandated by the United States Supreme Court in *Dolan v. Town of Tigard*, 512 U.S. 374 (1994), and its progeny, as well as any other requirements of a nexus between development conditions and the projected impact of the foregoing, including all dedications of land, parkland and any infrastructure referenced herein. Developer specifically reserves its right to appeal the apportionment of municipal infrastructure costs in accordance with Section 212.904 of the Texas local Government Code, as amended; however, notwithstanding the foregoing, Developer hereby releases the City from any and all liability under Section 212.904 of the Texas Local Government Code, as amended, regarding or related to the cost of those municipal infrastructure improvements required for the development of Development Y.

VI.

CONCLUSION

While the old days of requiring a developer to pay for off-site improvements has changed as a result of *Dolan* and *Stafford*, there are still options available to municipalities in addressing these costs. Care must be given, however, to the new jurisprudence on this topic and any response by a local government to the topic of off-site exactions must be carefully tailored so as not to run afoul of case law and Section 212,904 of the Local Government Code.