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Andrea B. Pace

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## Utah Leads the Way in Regulating Land Use Exactions through Statute but Still Has Room to Improve

### I. INTRODUCTION

Land use exactions law is an important area of law because it affects a great deal of people. When a person or entity decides to develop a piece of land, the local jurisdiction in which the property is located may impose certain requirements on the developer. Often, the jurisdiction will require an exaction. This means a local body conditions that a developer give up land or pay some type of fee, such as an impact fee, water or sewage connection fee, or fee-in-lieu of dedication, to obtain a building permit.<sup>1</sup> Current property owners who later want to expand their premises may also find a building permit conditioned upon an exaction.<sup>2</sup> Local government must be careful, however, that imposition of an exaction does not amount to a taking. Black's Law Dictionary defines a constitutional taking as "[t]he government's actual or effective acquisition of private property either by ousting the owner and claiming title or by destroying the property or severely impairing its utility" and states that a taking occurs when a "government action indirectly interferes with or substantially disturbs the owner's use and enjoyment of the property."<sup>3</sup> Moreover, exactions law can indirectly affect people as well. Costs of lots or houses in a new development will likely reflect costs imposed on a developer through an exaction.<sup>4</sup>

The Supreme Court recently outlined tests for local jurisdictions imposing land use exactions in *Nollan v. California Coastal Commission*<sup>5</sup> and *Dolan v. City of Tigard*.<sup>6</sup> In *Nollan*, the California Coastal Commission tried to exact some of the Nollans private beachfront property for use as a public easement in exchange for granting the Nollans a building permit to rebuild a dwelling on their

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1. B.A.M. Dev., L.L.C. v. Salt Lake County, 128 P.3d 1161, 1169 (Utah 2006).

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

3. BLACK'S LAW DICTIONARY 1493 (8th ed. 2004).

4. 9 MICHAEL J. DAVIS ET AL., THOMPSON ON REAL PROPERTY § 85.12(e) (David A. Thomas ed., Lexis 1999) ("[Developers] would like a chance to pass the fee . . . forward to homebuyers through higher house prices.").

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

6. *Dolan*, 512 U.S. at 374.

property.<sup>7</sup> The Supreme Court held that a nexus must exist between a legitimate state interest and the exaction imposed on the development<sup>8</sup> and that this requirement was not met because the state had an interest in preserving public ability to see the beach behind the Nollan's proposed dwelling but the Coastal Commission had asked for lateral beachfront property which would not serve this purpose.<sup>9</sup>

*Dolan* was about a lady who wanted to expand the size of her store. The City of Tigard conditioned her expansion upon dedication of some of her surrounding land. The Court felt that the City wanted to exact an inappropriate amount of property to serve the state interests of flooding prevention and traffic congestion reduction<sup>10</sup> and that "the city ha[d] not attempted to make any individualized determination to support this part of its request."<sup>11</sup> Thus, *Dolan* held that an exaction must be roughly proportional to the impact a development creates<sup>12</sup> and that a "city must make some sort of individualized determination" when determining rough proportionality.<sup>13</sup>

Statutory exactions laws in Utah compare favorably to those of other states' and the overall state of Utah exactions law has improved significantly since the enactment of the first Utah statute regarding exactions. In other words, current Utah exactions statutes better specify the law, better reference language from the *Nollan* and *Dolan* decisions, and better promote resolution of major concerns in exactions law. This article specifically discusses three statutes that govern Utah exactions law, the most recent being the Utah State Legislature's addition of the exactions sections in 2005 to the Municipal and County Land Use Acts.<sup>14</sup> The other two statutes are the Utah Private Property Protection Act<sup>15</sup> and the Utah Impact Fees Act.<sup>16</sup>

Despite the improvements in Utah statutory exactions law, the statutory law should be amended. The Utah Legislature should enact statutory provisions requiring the local government to make an individualized determination that considers certain factors or provides appropriate evidence to justify the proportionality of any of its exactions. Enacting such provisions would satisfy the full requirements of both

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7. *Nollan*, 483 U.S. at 827.

8. *Nollan*, 483 U.S. at 837.

9. *See Nollan*, 483 U.S. at 836.

10. *See Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).

11. *Id.* at 393.

12. *Id.* at 386, 391.

13. *Id.* at 391.

14. UTAH CODE ANN. § 10-9a-508 (2006); § 17-27a-507.

15. §§ 63-90-1-4; §§ 63-90a-1-4; UTAH CODE ANN. § 78-34a-4(1) (1993).

16. UTAH CODE ANN. §§ 11-36-101-501 (2006).

*Nollan* and *Dolan* by incorporating their holdings into statutory law with guidelines on how local jurisdictions can comply with the rough proportionality aspect of *Dolan*.

Other sections of this article support the above paragraphs as follows: Section II discusses general advantages of having land use decisions made at the state rather than the local level, including specific advantages of statutory exactions law. Section III examines what Utah has done to regulate exactions through statutory means. It analyzes the strengths and weaknesses of each of the three Utah statutes mentioned above, including to what extent the statute references the *Nollan* and *Dolan* tests and how well the statute promotes resolution of the existing concerns in exactions law because of the particular statute's clarity. Section IV compares Utah's statutory exactions law to other states' statutory exactions law. Section V analyzes the effectiveness of exactions legislation in Utah. Section VI suggests how exactions law in Utah can be improved. Section VII concludes and summarizes the arguments discussed throughout the paper.

## II. IT IS ADVANTAGEOUS TO REGULATE LAND USE ISSUES AT THE STATE LEVEL AND ESPECIALLY ADVANTAGEOUS TO CONTROL EXACTIONS LAW THROUGH STATE STATUTE

Regulating land use issues at the state rather than the local level creates considerable advantages. The first advantage is that generally officials at the state level, compared to elected or appointed officials at lower levels of government, have more expertise and training in creating law. The second advantage is that state officials can create law that provides a uniform and consistent standard among lower level jurisdictions. This may benefit developers, or even single landowners who move over time, because these individuals can deal with an issue under one standard even if they confront different jurisdictions. The third advantage is that through elected representatives in the state legislature, "the people," rather than the judiciary, decide the law. If decisions in exactions law are left to the local government, litigation often ensues (according to current trends), which is why the judiciary would be deciding the law. The last advantage is that a proactive statutory approach helps make the law more predictable for anyone in the state involved in exactions. A statute is an attempt to clarify things beforehand while courts establish law by reacting to existing problems on a case-by-case basis.

Additionally, a state statutory standard is the best way to regulate exactions law because it helps resolve two major problems existing in

land use exactions law. First, it is questionable whether local governments comply with or even understand existing exactions law, resulting in arbitrary decisions.<sup>17</sup> A more specific statutory provision providing factors for determining whether the full *Dolan* test is met for land dedication exactions and ideally other exactions as well is needed to help local government understand the law and avoid arbitrary decisions. Because what is not spelled out in a statute leaves room for local discretion whereas a state impact fee statute (one type of exactions law) can “direct local governments toward the development of a constitutionally sound impact fee ordinance[.]”<sup>18</sup> a state statute can help local governments to comply with the current law of exactions by spelling out a standard that conforms to holdings of the Supreme Court and other authoritative courts.

The second problem in land use exactions law is that exactions are very litigious in nature.<sup>19</sup> “Exactions law is one of the most litigious areas of land use law today.”<sup>20</sup> Because “statutes often impose rigid procedural and substantive requirements that a local government must fulfill to make use of impact fees or . . . other exactions,”<sup>21</sup> legislative boundaries can prevent local challenges to exaction ordinances.<sup>22</sup>

More clarity at the local level is an alternative way to enhance compliance with and prevent challenges to exactions law, but it is not a good idea. As mentioned above, the current state of exactions regulation leaves what is not spelled out statutorily to local discretion, resulting in arbitrary decisions and litigation. If instead more is done at the state level, this higher authority can see that the local bodies know about and follow the *Nollan* and *Dolan* tests, which may reduce exactions litigation.

Overall, a state statute can resolve these existing problems in exactions law by outlining clear requirements. Such a statute can increase understanding of the law, can direct local government to comply with the law, thereby avoiding arbitrary decisions, and can help prevent future challenges or litigation concerning local exactions.

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17. See Schultz 884 P.2d 569, 572–73 (Or. Ct. App. 1994).

18. Michael G. Sterthous, *Accommodating Growth and Development after Guilderland: Is the New York Legislature about to (Re)Act on Impact Fees?*, 8 PACE ENVTL. L. REV. 175, 227 (1990).

19. 13 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79D.04[7], 79D-170 (Michael Allen Wolf ed., Matthew Bender 2000).

20. *Id.*

21. *Id.* at 79D-169.

22. See Sterthous, *supra* note 18 at 227 (“To eliminate *ultra vires* challenges to local impact fee ordinances, the enabling statute should include certain provisions describing the extent of authority delegated.”).

### III. THREE ACTS REGULATE EXACTIONS LAW IN UTAH

This section highlights the three Utah statutory provisions that deal with exactions law, in order of their enactment. Under each Act in this section, there are two parts. The first part provides a descriptive overview of the act's substance. The second part comprises an analysis of the act's strengths and weaknesses. This analysis includes how well the act incorporates principles from *Nollan* and *Dolan* and whether the act helps resolve the major concerns of exactions law.

#### A. *The Utah Private Property Protection Act*

1. *The Utah Private Property Protection Act protects property owners by requiring the state agency to conduct a detailed assessment.*

The Private Property Protection Act deals with takings issues that may arise under a state agency or local government<sup>23</sup> The definition of “taking” under the statute specifically includes “required dedications or exactions from owners of private property.”<sup>24</sup> The first part of the Act was adopted in 1993.<sup>25</sup> It requires a state agency to conduct an assessment to help determine whether a state action constitutes a taking.<sup>26</sup> Then, the agency must send the report to the governor as well as the Legislative Management Committee before any “government action” (proposed rules and emergency rules by a state agency that if adopted and enforced may limit the use of private property) can be taken.<sup>27</sup> The second part of the Act, which governs local government, was enacted in 1994.<sup>28</sup> It constitutes section 63-90a-1 through 4 and is also known as the Constitutional Takings Issue Legislation.<sup>29</sup> This part of the statute directs a political subdivision, defined as a “county, municipality, special district, school district, or other local government entity”<sup>30</sup> to evaluate an action under their local takings guidelines to determine whether a taking

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23. John Martinez, *A Framework for Addressing Takings Problems*, UTAH B. J. 13, 17 (June/July 1996).

24. UTAH CODE ANN. § 78-34a-2(2)(a)(iii) (1993). *See also* UTAH CODE ANN. § 63-90a-1(1) (2006) (defining taking issues as “actions involving the physical taking or exaction of private real property by a political subdivision”).

25. Martinez, *supra* note 23, at 17.

26. *Id.*; UTAH CODE ANN. § 63-90-4(1) (2006).

27. Martinez, *supra* note 23, at 17.

28. *Id.*

29. UTAH CODE ANN. §§ 63-90a-1–4 (2006); David A. Thomas, *The Illusory Restraints and Empty Promises of New Property Protection Laws*, 28 URB. LAW. 223, 230 (1996).

30. UTAH CODE ANN. § 63-90a-1(2) (2006).

occurs.<sup>31</sup>

2. *The strengths of the Utah Private Property Protection Act lie in its imposition of specific guidelines upon the state and its language reference to Nollan and Dolan but it is weak because it contains limited direction for local government.*

The strengths of the Private Property Protection Act are its specific guidelines imposed on the state government and its indirect references to language from *Nollan* and *Dolan* in regard to state action. The statute requires the state government agency to consider three things as part of its assessment: the likelihood of its action being a taking, alternative actions, and the estimated cost and source of money to compensate a property owner in the event its action is deemed a taking.<sup>32</sup> The statute references the important Supreme Court exaction language by providing that when a person is required to obtain a permit by a state agency, “any conditions imposed on issuing the permit *shall directly relate* to the purpose for which the permit is issued,”<sup>33</sup> (remember that *Nollan* requires a nexus between a state interest and the exaction) and “[a]ny restriction imposed on the use of private property *shall be proportionate* to the extent the use contributes to the overall problem that the restriction is to redress.”<sup>34</sup> (This is similar to *Dolan*’s rough proportionality requirement that compares the impact of a development to the exaction imposed on the developer). Both of these statements recall the familiar tests found in *Nollan* and *Dolan*, but contain even stricter language. Rather than merely a nexus, the statute requires a direct relationship, and rather than rough proportionality, a restriction must be proportionate.

The Act is weak, however, because its direction to the local political subdivisions is limited. The statute merely asks the local government to look at its locally established guidelines to help determine when an exaction becomes a taking.<sup>35</sup> It further states that the “guidelines adopted under the authority of [the statute] are advisory,” and “[a] court may not impose liability upon [the jurisdiction] for failure to comply with the guidelines.”<sup>36</sup> These guidelines, then, hold little or no weight because they are advisory and a court cannot enforce them. Finally, although an owner may appeal an exaction decision, if the local body fails to hear the

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31. Martinez, *supra* note 23, at 17.

32. UTAH CODE ANN. § 78-34a-4(1) (1993).

33. § 78-34a-4(2)(a) (emphasis added).

34. § 78-34a-4(2)(b)(emphasis added).

35. Martinez, *supra* note 23, at 17.

36. UTAH CODE ANN. §§ 63-90a-3(3)(a)–(b) (2006).

appeal, then the exaction or taking is automatically deemed valid!<sup>37</sup> In other words, the local body could choose not to consider the issue, which ultimately resolves the issue in their own favor. The lack of guidelines and the weak statutory requirements that are imposed on the local bodies diminish the statute's ability to prevent litigation and to help local bodies comply with the law.

Although the statute includes the *Nollan* and *Dolan* standards, its application of these standards is limited. The "nexus" idea is referenced only in relation to a permit granted by the state,<sup>38</sup> which excludes impact or other fee exactions. The proportionality standard is also limited, since it only pertains to state restrictions on the use of private property.<sup>39</sup> In addition, the statute provides no requirement that a local body make an individualized determination about rough proportionality or guidance on how a public entity could justify the proportionality of its exaction.

Other weaknesses of the statute are seen when comparing the requirements imposed on the state but not the local government. In contrast to the state's required assessment, the statute does not require that the local government's evaluation be subject to review by any other authority.<sup>40</sup> In addition, the specific considerations that must be included in the state assessment (cost, alternatives, etc) are not required of local governments.<sup>41</sup> In essence, the Act only provides suggestions, not concrete directives, to the lower levels of government.

Overall, the Private Property Protection Act does an excellent job of regulating the state government, but it is weak in imposing requirements upon the local level in exactions issues. The following sections of this article will discuss how some of the problems with the Private Property Protection Act have been resolved in the subsequent Utah statutes pertaining to exactions. For example, guidance on how a city can justify the proportionality of an exaction, specifically an impact fee exaction, is provided in the Utah Impact Fees Act.<sup>42</sup>

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37. §§ 63-90a-4(2)(a)(i)–(iii).

38. § 63-90-4(2)(a).

39. § 63-90-4 (2)(d)(3).

40. Martinez, *supra* note 23, at 17.

41. Compare UTAH CODE ANN. §§ 63-90-4(1)(b)(i)–(iii) (2006) with § 63-90a-3 (showing that the local government does not have a similar requirement).

42. UTAH CODE ANN. § 11-36-201(5)(b) (2006).

*B. The Utah Impact Fees Act*

*1. The Utah Impact Fees Act provides specific requirements upon entities in the imposition and handling of impact fee exactions*

In 1995, the state of Utah adopted statutory law specific to one area of exactions—impact fee exactions.<sup>43</sup> Known as the Utah Impact Fees Act, the new legislation added a substantial body of law to Utah land use exactions.<sup>44</sup> Previous exactions law only existed in a few provisions of the Utah Private Property Protection Act.<sup>45</sup> The Utah Impact Fees Act, Utah Code Annotated §§ 11-36-101 to -501, consists of five sections. It deals with impact fee imposition, calculation, challenges, and more, with specific requirements in each section.

*2. The strength of the Utah Impact Fees Act lies in its detail, its incorporation of the Dolan and Nollan standards, and its specific factors cities must consider when applying the Dolan proportionality standard; however, it deals exclusively with impact fee exactions*

The strong points of the Utah Impact Fees Act are its specificity and its recognition of the *Nollan* and *Dolan* requirements. For example, in imposing a fee, a municipality must first prepare a detailed analysis that:

- (i) identifies the impact on system improvements required by the development activity;
- (ii) demonstrates how those impacts on system improvements are reasonably related to the development activity;
- (iii) estimates the proportionate share of the costs of impacts on system improvements that are reasonably related to the new development activity; and
- (iv) based upon those factors and the requirements of this chapter, identifies how the impact fee was calculated.<sup>46</sup>

The Act also provides specific factors a local entity *must* consider in determining whether an impact fee is proportionate to the burdens imposed by a new development. These include:

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43. §§ 11-36-101–501.

44. §§ 11-36-101–501.

45. §§ 63-90-1–4; 63-90a-1–4 (2006).

46. UTAH CODE ANN. § 11-36-201(5)(a)(i)–(iv) (2006).

- (i) the cost of existing public facilities;
- (ii) the manner of financing existing public facilities, such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants;
- (iii) 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;
- (iv) 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;
- (v) 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 charges, in other parts of the municipality;
- (vi) extraordinary costs, if any, in servicing the newly developed properties; and
- (vii) the time-price differential inherent in fair comparisons of amounts paid at different times.<sup>47</sup>

As shown above, the statute recognizes *Nollan* and *Dolan*. It requires a detailed analysis by the city (remember that *Dolan* requires an individualized determination by the city), a demonstration that the impact on city systems are reasonably related to a development (similar to the nexus requirement of *Nollan*), and that the costs of an impact fee be proportionate to the impact a development creates (similar to *Dolan*, although even stricter since this statute mandates proportionality and not simply rough proportionate value).

Two other things make this Act effective. One, the Act includes guidance on how a local entity can justify the proportionality of an impact fee exaction.<sup>48</sup> The factors listed above show the specificity of the Act and reference important language from Supreme Court cases. The real strength of these factors, however, lies in helping a local body determine, when conducting its detailed analysis, whether an impact fee is proportionate to the burdens imposed by development. These factors help a city comply with *Dolan*'s individualized determination requirement. The other strength of the Utah Impact Fees Act follows the

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47. § 11-36-201(5)(b)(i)–(vii).

48. § 11-36-201(5)(b)(i)–(vii).

list of factors in the statute.<sup>49</sup> It states that “[e]ach local political subdivision that prepares a written analysis under this Subsection on or after July 1, 2000 shall also prepare a written summary of the written analysis, designed to be understood by a lay person.”<sup>50</sup> Now the statute helps ensure that people will know the meaning of the local entity’s analysis. Making it understandable can especially benefit single landowners, who unlike large developers, may be dealing with an exactions issue for the first time.

The weakness of the Utah Impact Fees Act is that it deals exclusively with impact fee exactions. The only other type of exaction ever mentioned in the Act is land dedication exactions, which appears only in a sentence stating that a municipality may grant “a credit against impact fees” to developers “for any dedication of land.”<sup>51</sup> Thus, this Act’s strengths, its specificity and recognition of the *Nollan* and *Dolan* requirements, are inapplicable to other types of exactions.

*C. The New Exactions Sections of the Utah Municipal and County Land Use, Development, and Management Acts*

*1. The most recent Utah exactions legislation requires local bodies to apply the nexus and rough proportionality tests from Nollan and Dolan*

In 2005, the Utah Legislature added exactions sections to the already existing Municipal and County Land Use Acts. Utah Code Annotated § 10-9a-508 and § 17-27a-507, both titled “Exactions,”<sup>52</sup> deal with all types of land use exactions.<sup>53</sup> The two statutory provisions are identical except that the first applies to municipalities and the second to counties. They state that a municipality or county may impose an exaction or exactions on development proposed in a land use application provided that “(1) an essential link exists between a legitimate governmental interest and each exaction; and (2) each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.”<sup>54</sup>

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49. § 11-36-201(5)(c).

50. § 11-36-201(5)(c).

51. UTAH CODE ANN. § 11-36-202(3)(c) (2006).

52. § 10-9a-508; § 17-27a-507.

53. B.A.M. Dev., L.L.C. v. Salt Lake County, 129 P.3d 1161, 1171 (Utah 2006).

54. UTAH CODE ANN. § 10-9a-508 (2006); 17-27a-507.

2. *The strength of the new exactions sections lies in their broad application to all types of exactions and their directives illustrative of Nollan and Dolan, but it is weak in that it fails to impose the Dolan “individualized determination” requirement or give local entities direction on how to interpret rough proportionality*

The new exactions sections have many advantages. One advantage is that these sections apply to all types of land use exactions in whatever circumstance they arise. The fact that the titles of the new sections are simply “Exactions,” and that they are part of a Land Use Act, shows that these sections apply to all land use exactions. The Utah Supreme Court, in a recent exactions case, affirmed the broad applicability of the sections.<sup>55</sup> These new sections are an improvement over the Utah Impact Fees Act because, unlike the Act, the new sections are universally applicable, instead of exclusive to one area of exactions law. Provided the two requirements in the statute are met, these sections allow a city or county to impose an exaction. This means the sections govern exactions that arise not only in administrative but legislative actions as well. The Utah Supreme Court in *B.A.M. Development, L.L.C. v. Salt Lake County* stated this fact when they wrote, “the legislature has intervened by codifying the policy decision to require rough proportionality treatment of all development exactions, both those emanating from the application of uniform land-use provisions . . . and from individual adjudicative decisions.”<sup>56</sup> Such sweeping clarity ends the debate in Utah that continues today in other states: whether *Nollan* and *Dolan* apply to all exactions or whether they only apply to non-legislative actions.<sup>57</sup>

Another advantage of these new sections is that they attempt to codify the *Nollan* and *Dolan* language. Comparing the language from these court decisions to that found in the statute is illustrative of their similarity. *Nollan* states that:

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end

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55. *B.A.M. Dev. L.L.C.*, 129 P.3d at 1171 (“Knowing as we do that the legislature intended to apply the rough proportionality test to all exactions.”).

56. *Id.* at 1167–68.

57. *Id.* at 1168 (“[D]ebate over [the rough proportionality test’s] application . . . continues in jurisdictions that, unlike Utah, have not achieved resolution through statutory enactments.”); James S. Burling, *A Short History of Regulatory Takings—Where We Have Been and What Are the Hot Issues of Today*, SL012 ALI-ABA 1, 33 (Sept. 29–Oct. 1, 2005) (“What remains subject to some debate is whether there is a distinction between exactions of land and money and whether there is a distinction between exactions imposed as part of an adjudicatory permit process and those enacted pursuant to a legislative process.”).

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advanced as the justification for the prohibition. When that essential nexus is eliminated . . . adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. . . . Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was.<sup>58</sup>

The new sections indicate that a municipality or county “may impose an exaction . . . if . . . an essential link exists between a legitimate governmental interest and each exaction.”<sup>59</sup> The new sections also use language similar to that found in *Dolan*. That case says, “[R]ough 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.”<sup>60</sup> The new sections state that a municipality or county “may impose an exaction . . . if each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.”<sup>61</sup> Using the language of the Supreme Court empowers these new statutory sections and helps avoid misinterpretation of *Nollan* and *Dolan* by the courts, municipalities, or other governmental entities. This kind of clarity will also likely help ensure that the law is correctly implemented and that future challenges or litigation are avoided.

The disadvantage to this new legislation, however, is that although the sections introduce the rough proportionality test from *Dolan*, they lack key language and give no further guidance to the local bodies about how to interpret rough proportionality. The new sections leave out the *Dolan* requirement that a city must make an individualized determination to support the proportionality of its exaction. This is an important part of the Supreme Court decision because it means the local body has to shoulder the burden of showing its exaction is proper.<sup>62</sup> The local bodies are also left to their own discretion as to the determination of rough proportionality. In contrast, the Utah Impact Fees Act gives specific factors that a local entity must consider. Thus, while Utah statutory law provides specific guidance in applying the rough proportionality test to

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58. *Nollan v. Cal. Coastal Comm’n.*, 483 U.S. 825, 837 (1987).

59. UTAH CODE ANN. § 10-9a-508 (2006); § 17-27a-507.

60. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

61. UTAH CODE ANN. § 10-9a-508 (2006); § 17-27a-507.

62. POWELL, *supra* note 19, at § 79D.04[3], 79D-156 (“Thus accompanying a new substantive test ‘rough proportionality’ was a shift in burden from the party challenging the regulation to the government defending the conditional permitting.”); DAVIS, *supra* note 4, at § 85.12(c)(2), 909 (citing *Miller & Starr, NEWSALERT*, 5–6 (Cal. Ed. Sept. 1994)).

impact fees, it fails to provide similar guidance in these new sections for any other kind of exaction.

As shown in Section III above, Utah statutory law governing exactions has improved over time. Each subsequent legislative enactment has improvements not found in the previous statutory law. Statutory exactions law in Utah began with a few provisions in the Utah Private Property Protection Act. Subsequently, the Utah Impact Fees Act added specific factors to suggest ways of satisfying the *Dolan* individualized determination requirement (at least for impact fee exactions). Finally, the “Exaction” sections in the Municipality and County Land Use Acts codified most of the *Nollan* and *Dolan* requirements and made the tests applicable to all types of exactions in whatever setting they arise.

IV. UTAH SHARES SIMILARITIES WITH OTHER STATES IN EXACTION  
LAW, BUT STANDS OUT BECAUSE IT IS THE ONLY STATE OTHER THAN  
ARIZONA TO CREATE A STATUTORY PROVISION THAT CODIFIES  
LANGUAGE FROM *NOLLAN* AND *DOLAN*

Some states have enacted statutes similar to the three Utah statutes mentioned above. Many states have enacted legislation that protects private property from government regulation,<sup>63</sup> just as Utah did with the Private Property Protection Act. These states include Florida, Texas, Kansas, Montana, Wyoming, Idaho, Tennessee, and West Virginia.<sup>64</sup> This section compares some of these states’ Private Property Rights Acts (PPRAs) and other statutes to Utah’s exactions law to show the strength of the Utah exactions legislation. In addition, this section highlights some of the states that have enacted impact fee provisions and the one state, Arizona, which has enacted exactions sections similar to the new Utah sections in the Municipal and County Land Use Acts.<sup>65</sup>

Although Wyoming has statutory provisions similar to the Utah Private Property Protection Act, it follows a very different approach when it comes to evaluating exactions.<sup>66</sup> Its statutory law states a purpose similar to that of the Utah Private Property Protection Act in that it seeks to “establish an orderly, consistent process that better enables governmental bodies to evaluate whether . . . actions may result in a taking of private property.”<sup>67</sup> The statute says that such actions include

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63. Ann L. Renhard Cole, Comment, *State Private Property Rights Acts: The Potential for Implicating Federal Environmental Programs*, 76 TEX. L. REV 685, 685 (1998).

64. *Id.* at 721 n.1.

65. ARIZ. REV. STAT. ANN. § 9-500.12 (2006); § 11-810.

66. WYO. STAT. ANN § 9-5-305 (2006).

67. § 9-5-305.

exactions.<sup>68</sup> Another provision that exhibits similarity is that which governs permits. According to the Wyoming statute, “[i]f an agency requires a person to obtain a permit for a specific use of private property, conditions imposed on issuing the permit shall directly relate to the purpose for which the permit is issued.”<sup>69</sup> This same direct relationship language is found in Utah’s law.<sup>70</sup> However, the Wyoming law fulfills the purpose of the statute through the attorney general<sup>71</sup> and not through state agencies or local government as in Utah. The statute indicates that the “attorney general shall develop guidelines and a checklist . . . to assist government agencies in the identification and evaluation of actions that have constitutional implications that may result in a taking.”<sup>72</sup> Perhaps the Wyoming Act is superior to the Utah Private Property Protection Act because, while essentially fulfilling the same function as the Utah Act, it also allows a legal expert (the attorney general) to determine what constitutes a taking rather than a government body which presumably lacks the same level of understanding of legal takings issues.

The Montana and Texas Private Property Rights Acts are discussed here in detail because they provide a good indication of “typical language variations found among PPRAs.”<sup>73</sup> Like Utah, the Acts in Montana and Texas require the government to conduct a takings impact assessment.<sup>74</sup> Unlike Utah but similar to Wyoming, these two states require the attorney general to establish the guidelines upon which to base such an assessment, rather than the state agency.<sup>75</sup> Also different from the Utah Act is the fact that neither the Montana nor Texas Acts explicitly mention exactions in their taking definition. Montana “defines an action with taking or damaging implications as a state agency ‘rule, policy, or permit condition or denial’ regarding environmental matters that could constitute an unconstitutional deprivation of private property.”<sup>76</sup> The Texas statute defines taking as:

[A]ny state or local government action that impacts ‘private real property, in whole or in part or temporarily or permanently’ in such a

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68. § 9-5-302(a)(iii)(A)(II).

69. § 9-5-304(b)(i).

70. UTAH CODE ANN. § 63-90-4(2)(a) (2006). Under the Utah Private Property Protection Act, when a person is required to obtain a permit by a state agency, “any conditions imposed on issuing the permit *shall directly relate* to the purpose for which the permit is issued.” (emphasis added)

71. WYO. STAT. ANN § 9-5-303(a) (2006).

72. § 9-5-303(a).

73. Cole, *supra* note 63, at 685.

74. *Id.* at 691.

75. *Id.* at 693, 697.

76. *Id.* at 693 (internal quotations omitted).

way that: (1) the United States or Texas Constitutions require that the property owner be compensated, or (2) it infringes on a property owner's right to the property, and (2b) it causes a twenty-five percent market value reduction of the property.<sup>77</sup>

The Montana and Texas Acts appear more favorable than Utah's because, like Wyoming, the attorney general provides taking guidelines to the state. However, the attorneys general in Montana and Texas only provide taking assessment guidelines and not a checklist as does the attorney general in Wyoming. Yet, the Utah Act better governs exactions, rather than just takings in general, because it specifically includes landowner exactions as part of its taking definition.

Statutes in California and Puerto Rico, though not PPRA's, also exhibit language similar to the Utah Private Property Protection Act by specifically referencing exactions and giving broad deference to the local government.<sup>78</sup> The California statute allows local government agency to establish the amount of an exaction.<sup>79</sup> The Utah Private Property Protection Act does primarily the same thing because it asks the local government to look at its locally established guidelines to determine when a taking, which includes exactions, occurs.<sup>80</sup> Statutory law in Puerto Rico is also similar in that it states, "[t]he municipal governments may adopt ordinances establishing the exactions they deem are necessary to finance the infrastructure projects that are partially or totally the responsibility of the municipalities."<sup>81</sup> Though these laws' specific references to exactions are positive, as discussed earlier in regards to the Utah's Private Property Protection, such deference to the local government is a grave weakness because they can rule in their own favor without automatic review by another authority.

A number of states have enacted either impact fee statutes, as Utah has done, or impact fee provisions. States that have enacted statutes include: Arizona, Georgia, Hawaii, Idaho, Maine, Nevada, New Hampshire, New Mexico, Oregon, Rhode Island, South Carolina, Texas, Washington, West Virginia, and Wisconsin.<sup>82</sup> The New Hampshire statute specifies certain factors the government should consider when assessing the amount of an exaction.<sup>83</sup> Specifically, the government must

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77. *Id.* at 696.

78. CAL. GOV'T CODE § 66411.5 (Deering 2006); P.R. LAWS ANN. tit. 21 § 1095j (2004).

79. CAL. GOV'T CODE § 66411.5 (Deering 2006).

80. Martinez, *supra* note 23, at 17.

81. P.R. LAWS ANN. tit. 21, § 1095j (2004).

82. POWELL, *supra* note 19, at § 79D.04[4][b], 79D-160 n.48.

83. N.H. REV. STAT. ANN. § 674:21 (2006).

determine the “proportional share of municipal improvement costs not previously assessed against other developments, which is necessitated by the development, and which is reasonably related to the benefits accruing to the development from the improvements financed by the exaction.”<sup>84</sup> In contrast, the Pennsylvania legislature enacted a provision specifying how to calculate impact fees for transportation capital improvement programs. Impact fees are found by dividing the “total costs of all road improvements [in the area] by the total costs of all road improvements [in a specific area].”<sup>85</sup> The Utah statute is like the New Hampshire statute because it uses a factor-based analysis rather than a specific calculation to determine the exaction amount due. Factors-based analysis may be better because it is more flexible; however, explicit equations provide a local entity with more clarity.

Arizona shows great strides in exactions legislation comparable to Utah. It is the only other state that has enacted statutory provisions similar to Utah’s newest exactions sections. The specific language of the Arizona statute (the city and county provisions are nearly identical) states:

In all proceedings under this section the county [agency or official of the city or town] has the burden to establish that there is an essential nexus between the dedication or exaction and a legitimate governmental interest and that the proposed dedication, exaction or zoning regulation is roughly proportional to the impact of the proposed use, improvement or development or, in the case of a zoning regulation, that the zoning regulation does not create a taking of property in violation of § 11-811[§ 500.12]. If more than a single parcel is involved this requirement applies to the entire property.<sup>86</sup>

Like the Utah provisions, the Arizona provisions codify the nexus and rough proportionality tests of *Nollan* and *Dolan*. In addition, they apply to cities and towns as well as counties just as Utah’s do. Since the two state statutory exactions provisions are so similar, the advantages and disadvantages discussed above in regard to the new Utah sections are equally applicable to Arizona.

Overall, although Utah’s statutory exactions law show similarities to other states’ laws, it also differs in important respects. The Utah law uses a flexible factor-based analysis rather than a rigid formula to calculate impact fees and it is the only state other than Arizona to codify the

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84. § 674:21 (V)(j).

85. 53 PA. CONS. STAT. ANN. § 10503-A (2006).

86. ARIZ. REV. STAT. ANN. § 9-500.12 (1995); § 11-810.

important requirements from *Nollan* and *Dolan*. However, the Utah law could be better if it required the attorney general to establish takings guidelines in a fashion similar to Wyoming, Montana, or Texas.

V. THE ACTUAL EFFECTIVENESS OF EXACTIONS LEGISLATION IN UTAH IS DIFFICULT TO ASCERTAIN, BUT CASE LOAD FOLLOWING ENACTMENT OF AN ACT AND STATE COURT REFERENCES TO AN ACT PROVIDE SOME ASSESSMENT

It is difficult to know whether or how well the Utah statutes governing land use exactions actually work to increase local compliance or understanding of the law and to reduce litigation or challenges to local exactions for a couple of reasons. One, cases in Utah can provide evidence as to whether exactions litigation has decreased over time but little Utah case law regarding exactions exists. Two, most exactions disagreements occur as local challenges and local records are either hard to find or exactions challenges may not even be reported. This section analyzes the effectiveness of the exactions statutory law in Utah based on two factors that should provide some external evidence: whether the existing case load that deals with land use exactions has decreased since the statute was enacted and how state courts reference the statutory law in land use exaction cases.

A. *The Effectiveness of the Utah Private Property Protection Act is Unclear*

It is difficult to ascertain whether the case load dealing with exactions law in Utah has decreased as a result of the Private Property Protection Act. The same is true when analyzing whether Utah state courts adhere to this statutory law in cases that follow its enactment. Only one Utah case dealing with land use exactions predates the enactment of the Private Property Protection Act<sup>87</sup> and there are essentially no subsequent cases that can be used to evaluate this Act's effectiveness. Subsequent cases are either specific to impact fees or follow the enactment of the other two Utah statutes dealing with exactions as will be discussed below.

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87. *Call v. City of W. Jordan*, 606 P.2d 217 (Utah 1979).

*B. The Effectiveness of the Utah Impact Fees Act is Uncertain*

The comparative numbers of cases before and after the enactment of the Utah Impact Fees Act do not show a decrease in the case load, but that does not necessarily indicate that the Act is ineffective. Before the Utah Impact Fees Act was enacted in 1995, there were four cases in Utah courts about impact fees.<sup>88</sup> Since its enactment there have also been four cases.<sup>89</sup> Thus, having the Act in place does not readily seem to reduce the litigation in the courts over impact fees. Yet, it is possible that more development occurred after the enactment of the Utah Impact Fees Act, which would ultimately include a corresponding increase in situations dealing with impact fees. Even stronger, challenges to impact fees at the local level may actually have decreased since the Act, but the comparative number of impact fee cases before and after the Act cannot indicate that fact because local challenges do not exist in the case law record.

The effectiveness of the Utah Impact Fees Act can be gauged by assessing whether state courts follow or reference this statutory law because courts that feel the statutory law is correct will cite to it. In two cases since the Act's enactment, the Utah Supreme Court refers to definitions in the Utah Impact Fees Act. Both cases dealt with whether a particular fee could be classified as an impact fee.<sup>90</sup> In *Board of Education of Jordan School District v. Sandy City Corporation*, the Court looked at whether a storm sewer fee that the city imposed on the Jordan School District fits the Act's definition of an impact fee.<sup>91</sup> The Act defines an impact fee as, "a payment of money imposed upon development activity as a condition of development approval."<sup>92</sup> The Court held that the sewer fee was not an impact fee because the fee was not imposed upon the school district when the schools were built.<sup>93</sup> In *Board of Trustees of Washington County Water Conservancy District v. Keystone Conversions, L.L.C.*, the Utah Supreme Court looked at whether a water availability fee was an impact fee under the Utah Impact

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88. *Am. Tierra Corp. v. City of W. Jordan*, 840 P.2d 757 (Utah 1992); *Salt Lake County v. Bd. of Educ. of Granite Sch. Dist.*, 808 P.2d 1056 (Utah 1991); *Lafferty v. Payson*, 642 P.2d 376 (Utah 1982); *Banberry Dev. Corp. v. S. Jordan City*, 631 P.2d 899 (Utah 1981).

89. *Bd. of Educ. of Jordan Sch. Dist. v. Sandy City Corp.*, 94 P.3d 234 (Utah 2004); *Bd. of Trs. of Washington County Water Conservancy Dist. v. Keystone Conversion, L.L.C.*, 103 P.3d 686 (Utah 2004); *Home Builders Ass'n v. City of N. Logan*, 983 P.2d 561 (Utah 1999); *Home Builders Ass'n of Utah v. City of Am. Fork*, 973 P.2d 425 (Utah 1999).

90. *Bd. of Educ. of Jordan Sch. Dist.*, 94 P.3d at 234; *Bd. of Trs. of Washington County Water Conservancy Dist.*, 103 P.3d at 686.

91. *Bd. of Educ. of Jordan Sch. Dist.*, 94 P.3d at 234.

92. UTAH CODE ANN. § 11-36-102(7)(a) (2006).

93. *Bd. of Educ. of Jordan Sch. Dist.*, 94 P.3d at 240-41.

Fees Act definition.<sup>94</sup> The Court expanded the definition to include authorization “when [development activities] create demand and need for public facilities.”<sup>95</sup> The Court then held that the water fee was not an impact fee since the developer’s construction did not create a greater need for such facilities.<sup>96</sup> Both of these cases demonstrate that the Utah Supreme Court is following the Utah Impact Fees Act because it is applying the definitions found therein, which implies that the Court feels the statutory law is good law. Lower state courts will likely follow the Utah Supreme Court’s interpretation.

In one case decided subsequent to the enactment of the Utah Impact Fees Act, the Act is not recognized.<sup>97</sup> *Home Builders Association of Utah v. City of American Fork* was a case involving a developer’s challenge to the City’s imposition of various impact fees.<sup>98</sup> The Utah Supreme Court decided the case in 1999, four years after the enactment of the Utah Impact Fees Act, without making reference to the Act.<sup>99</sup> It is possible that the case may have begun before the Act was enacted or that the plaintiffs failed to raise an argument dealing with the statute. The Court only mentions law from a 1981 case *Banberry Development Corporation v. South Jordan City*,<sup>100</sup> which established factors to help assess the reasonableness of an impact fee on a development, although the factors were actually incorporated as part of the Utah Impact Fees Act.<sup>101</sup> The Utah Supreme Court reversed the decision of district court and decided that summary judgment for the developers was unwarranted although the Mayor and City Council members in *Home Builders* did not consider the *Banberry* factors when it imposed the impact fees.<sup>102</sup> The Court held that the City officials did not need to personally investigate fee reasonableness because they were entitled to rely on members of the city staff.<sup>103</sup> Furthermore, the Court found that the trial court was wrong to presume that “the seven factors suggested in *Banberry* constitute a mandatory test of some sort for the creation of a valid fee,”<sup>104</sup> and instead wrote that the factors were merely “an illustrative list of factors that

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94. Bd. of Trs. of Washington County Water Conservancy Dist. v. Keystone Conversion, L.L.C., 103 P.3d 686, 686 (Utah 2004).

95. *Id.* at 693.

96. *Id.*

97. *Id.*

98. Home Builders Ass’n of Utah v. City of Am. Fork, 973 P.2d 425 (Utah 1999).

99. *Id.*

100. Banberry Dev. Corp. v. S. Jordan City, 631 P.2d 899 (Utah 1981).

101. David Nuffer, *Utah’s 1995 Impact Fee Legislation*, UTAH B. J. 12, 14 (Aug./Sept. 1995).

102. *Home Builders Ass’n of Utah*, 973 P.2d at 427, 430.

103. Home Builders Ass’n of Utah v. City of Am. Fork, 973 P.2d 425, 431 (Utah 1999).

104. *Id.* at 430.

municipalities should consider.”<sup>105</sup> It seems that the court wrongly decided this point of law if the case was decided under the Utah Impact Fees Act, because the statute states that when “analyzing whether or not . . . the costs of public facilities (and the impact fees included fees for such facilities) are reasonably related to the new development activity, the local body *shall* identify . . .” and then the statute lists the seven factors.<sup>106</sup> This illustrates that the Utah Impact Fees Act was not yet in place or else the Act is not very effective because the Utah Supreme Court failed to follow or reference the statutory law. Exactly why the Court failed to recognize the existing statutory law in this case is unknown.

*Home Builders Association v. City of North Logan*<sup>107</sup> is another case that the Utah Supreme Court decided subsequent to the enactment of the Utah Impact Fees Act. It deals with and has essentially the same issue and holding as *Home Builders Association of Utah v. City of American Fork*.<sup>108</sup> Again, the Utah Supreme Court refers to *Banberry* and how its factors are more like suggestions than requirements.<sup>109</sup> Yet, this case was filed in 1994<sup>110</sup>, which may explain why no reference is made to the Utah Impact Fees Act.

In summary, the amount of cases dealing with impact fees has not decreased since the statute was enacted and some Utah cases subsequent to the enactment of the Utah Impact Fees Act reference the Act while others do not. For the reasons mentioned in this subsection, both of these indicators may not provide a very reliable showing of this Act’s effectiveness. A longer period of time in which to assess the impact of the Utah Impact Fees Act is necessary to fully evaluate the Act’s effectiveness.

*C. The “Exactions” Sections of the Municipal and County Land Use Acts seem effective*

The actual effectiveness of the new provisions in the County and Municipal Land Use Acts are somewhat difficult to ascertain because they have been in effect for less than a year.<sup>111</sup> Thus, whether the case load has decreased since the statutes went into effect is not a question

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105. *Id.*

106. UTAH CODE ANN. § 11-36-201(5)(b) (2006).

107. *Home Builders Ass’n v. City of N. Logan*, 983 P.2d 561 (Utah 1999).

108. *Id.* at 562–564.

109. *Id.* at 564.

110. *Id.* at 562.

111. The new sections had only been in effect for a year at the time this article was being prepared for publication.

that can yet be answered. But since the new sections' enactment in May of 2005, the Utah Supreme Court has addressed the County exactions section in one case.<sup>112</sup> In *B.A.M. Development, L.L.C. v. Salt Lake County*<sup>113</sup>, the Court found that although the statute could not be applied retroactively in this case, the statute provided guidance on how the state would have likely held in regard to county exactions a few years ago.<sup>114</sup> The court stated that,

Knowing as we do that the legislature intended to apply the rough proportionality test to all exactions . . . we are hard pressed to find a reason to assume that the legislative view of the proper scope of the rough proportionality test would have been different before section 17-27a-507 went into effect.<sup>115</sup>

This case provides proof that the legislative enactment holds great weight. Moreover, because the Utah Supreme Court commented highly on the provision, other Utah courts should uphold this statutory law in subsequent exaction cases. Finally, *B.A.M.* also shows that the Court, and Utah, may even apply its principles retroactively.

VI. MEANS OF IMPROVING STATUTORY EXACTIONS LAW IN UTAH:  
REQUIRING THE LOCAL GOVERNMENT TO MAKE AN INDIVIDUALIZED  
DETERMINATION THAT JUSTIFIES THE PROPORTIONALITY OF  
EXACTIONS, MANDATING A CONSIDERATION OF CERTAIN FACTORS,  
AND PROVIDING APPROPRIATE EVIDENCE OR A SET FORMULA.

The new exactions sections in the Municipal and County Land Use Acts would better encompass the U.S. Supreme Court decisions on exactions law if they explicitly stated outright that a political subdivision must make an individualized determination to support the proportionality of its exaction. The Supreme Court rule from *Dolan* states that the local body must make an individualized determination regarding exaction proportionality.<sup>116</sup> It is then reasonable that the Utah statute should also include this important part of the Court's decision. According to legal scholars, "[a] critically important aspect of the *Dolan* decision is the . . . placement of the burden on the public entity to justify its exactions."<sup>117</sup>

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112. *B.A.M. Dev., L.L.C. v. Salt Lake County*, 129 P.3d 1161 (Utah 2006).

113. *Id.*

114. *Id.* at 1171.

115. *Id.*

116. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

117. DAVIS, *supra* note 4, at 909 (citing Miller & Starr, NEWSALERT, 5-6 (Cal. Ed. Sept.

The Utah legislature could also improve the new exactions sections if they required the local entity to consider certain factors or provide specific evidence in making its determination about exaction proportionality. Legal scholars have indicated that “[w]hile it is not entirely clear from the majority opinion, as a practical matter, the [*Dolan*] Court’s decision probably means that cities . . . will have to make findings . . . that show a reasonably close fit between the particular development’s projected impacts and any exactions or conditions required.”<sup>118</sup> If the new exaction provisions contained language imposing mandatory consideration of certain factors, they would provide clear guidelines on how to satisfy *Dolan*’s rough proportionality requirement as to any kind of land use exaction. The Utah legislature could do so by using some or all of the factors already found in the Utah Impact Fees Act. As described earlier in this article, this Act mandates that a political subdivision consider seven factors when determining whether an impact fee is proportionate to the burdens imposed by a new development.<sup>119</sup> In addition, or instead, the legislature could ask a local entity to support a finding of proportionality through providing appropriate evidence. One legal scholar suggested the use of traffic surveys, engineering studies, and expert testimony as evidence.<sup>120</sup>

If nothing else, the new statutory provisions should include some kind of considerations or factors to determine if the rough proportionality test is satisfied for *land dedication* exactions, since the *Dolan* standard originated in this context.<sup>121</sup> It is somewhat surprising that a Utah statute specified factors to consider in the application of the *Dolan* rough proportionality test as to impact fees before a Utah statute was even enacted that explicitly applied the rough proportionality test to land dedication exactions. It is surprising not only because the rough proportionality test originated from a decision involving land dedication and not impact fees, but also because land dedications are so commonplace.<sup>122</sup> The lack of factors applicable to exactions other than an impact fee may be the result of these new sections being enacted ten years later than the Utah Impact Fees Act. Perhaps the Utah Legislature has just not yet broadened the scope of the new statutory provisions. Or, perhaps land dedication exactions have been less litigious than impact

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1994)).

118. *Id.* at 910.

119. UTAH CODE ANN. §§ 11-36-201(5)(b)(i)–(vii) (2006).

120. DAVIS, *supra* note 4, at 910.

121. *Dolan*, 512 U.S. 374.

122. POWELL, *supra* note 19, at § 79D.04[2][b], 79D-152 (“[I]t is not unusual to require a developer to dedicate land or to construct such on-site improvements as streets, sidewalks, or utility easements.”).

fee exactions, or have seemed less important to those pushing for exactions legislation. Whatever the reason is, a more specific statutory provision providing factors for determining whether the full *Dolan* test is met for land dedication exactions is needed to avoid arbitrary decisions by local governments. Such a provision would require greater showing by the local entity to justify its land dedication exaction, thus providing more assurance to a landowner that a fair trade, the giving of land in exchange for new development, had occurred.

Critics of the individualized determination requirement of the *Dolan* decision argue that shifting “the burden of proof to the municipality . . . could make land-use decisions more expensive and more time-consuming.”<sup>123</sup> Even if this is true, their concern can be assuaged while still requiring that the local authority make a determination. Expense to the local entity could be reduced by passing the cost on to developers. The local entity could “commission ‘property right impact statements,’ much like developers now pay for environmental impact statements.”<sup>124</sup> The amount of research local bodies might engage in to justify an exaction could be decreased if specific factors were spelled out in the exactions sections of the Utah statute. This way, local bodies could focus their finding efforts on meeting just those factors.

One scholar suggests that a set formula is the best way to regulate exactions.<sup>125</sup> He states that “fees and other exactions based on a formula are the most likely to withstand the scrutiny of courts today.”<sup>126</sup> He also indicates that dedications without a formula may violate the rough proportionality test.<sup>127</sup> A different legal scholar indicates that land dedications could be exacted based on “a fixed percentage of the total amount of land in the subdivision—varying from [three percent] to [fifteen percent] or more.”<sup>128</sup> Or, a developer could be required to pay an in-lieu of land fee based on the “[1] fair market value of the land or a percentage . . . at a specific point in time; (2) a fixed dollar amount per lot or dwelling unit; or (3) a variable amount of the fair market value based on the density of the subdivision.”<sup>129</sup> Impact fees could be assessed by imposing a set fee for each unit of development or using a mathematical formula that accounts for things necessary to build a facility.<sup>130</sup> For example, a road impact fee calculation could consider the

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123. DAVIS, *supra* note 4, at 910.

124. *Id.*

125. POWELL, *supra* note 19, at § 79D.04[2][b], 79D-152.

126. *Id.*

127. *Id.* § 79D-151.

128. DAVID A. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 256 (4th ed. 2004).

129. *Id.* at 257.

130. *Id.* at 273.

number of new travel miles per day the development imposed, the new lane miles, construction cost, right of way cost, etc.<sup>131</sup> These are all potential ways the state could use a formula in imposing exactions. Although *Dolan* specifically stated that “no precise mathematical calculation is required” to determine the proportionality of an exaction,<sup>132</sup> maybe more clarity would better avoid litigation and prevent local governmental abuses.

A higher statutory standard that incorporates mandatory factors, evidentiary considerations, or a set formula along with an individualized determination requirement in the new exactions sections is necessary for many reasons. Such requirements could stop local areas from abusing their power and thereby reduce challenges or litigation to exactions.<sup>133</sup> It would also be easier for political subdivisions to apply correct law if ways to satisfy proportionality are laid out for them in the statute. For a single landowner who probably will not or cannot afford to bring suit against a local entity, unlike some developers, a clear provision that curbs municipal abuse is especially helpful. Clarity may also benefit taxpayers. Cities could also save community resources that would otherwise be used in exaction litigation. A decrease in litigation would also save valuable judicial resources. For many reasons, it is best to try to resolve exactions more proactively, rather than reactively.

## VII. CONCLUSION

Utah statutes governing exactions law started out very general and became more specific over time. Each subsequent legislative enactment has improvements not found in the previous statutory law. Statutory exactions law in Utah started in 1993 with the Utah Private Property Protection Act. The Act defines what constitutes a taking, including in its definition invalid exactions. It is very specific about how a state agency should address a potential takings issue, but fails to provide specific guidance to local bodies. Next, the Utah Impact Fees Act was enacted in 1995. It tells political subdivisions they must consider specific factors to satisfy the *Dolan* proportionality requirement in regard to impact fees. Finally, the addition of the “Exactions” sections to the Municipal and County Land Use Acts codified much of the *Nollan* and *Dolan*

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131. *Id.* at 273–74.

132. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

133. See CALLIES ET AL., *supra* note 128, at 254 (“Municipalities that rely on after-the-fact findings to support exactions . . . may face costly litigation. Moreover, because ad hoc exactions are immediately suspect under the remoteness standard, [the *Nollan* test] developers may be more willing to challenge them. The better plan is for a community to devise standards, supported by studies, to guide its imposition of exactions.”).

requirements and made them applicable to all kinds of exactions in whatever setting they arise. It is yet to be seen if the statutes are effective in Utah, but Utah's law compares favorably to other states' exactions law. Increased specificity of statutory law likely helps reduce litigation and helps local governments comply with the law. For these reasons, and to be sure that the full requirements of *Dolan* are met, the Utah legislature should add to the new exactions sections language requiring local entities to make individualized exaction determinations and include in those determinations justification of an exaction's rough proportionality to the impact created by a new development. The enhanced statutory law could mandate that a local entity use factors, perhaps analogous to those found in the Utah Impact Fees legislation, expert evidence, formulas, or all three, to support a finding of rough proportionality.

*Andrea B. Pace\**

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\* J.D. Candidate 2007, J. Reuben Clark Law School, Brigham Young University; B.A. 2003, Brigham Young University.