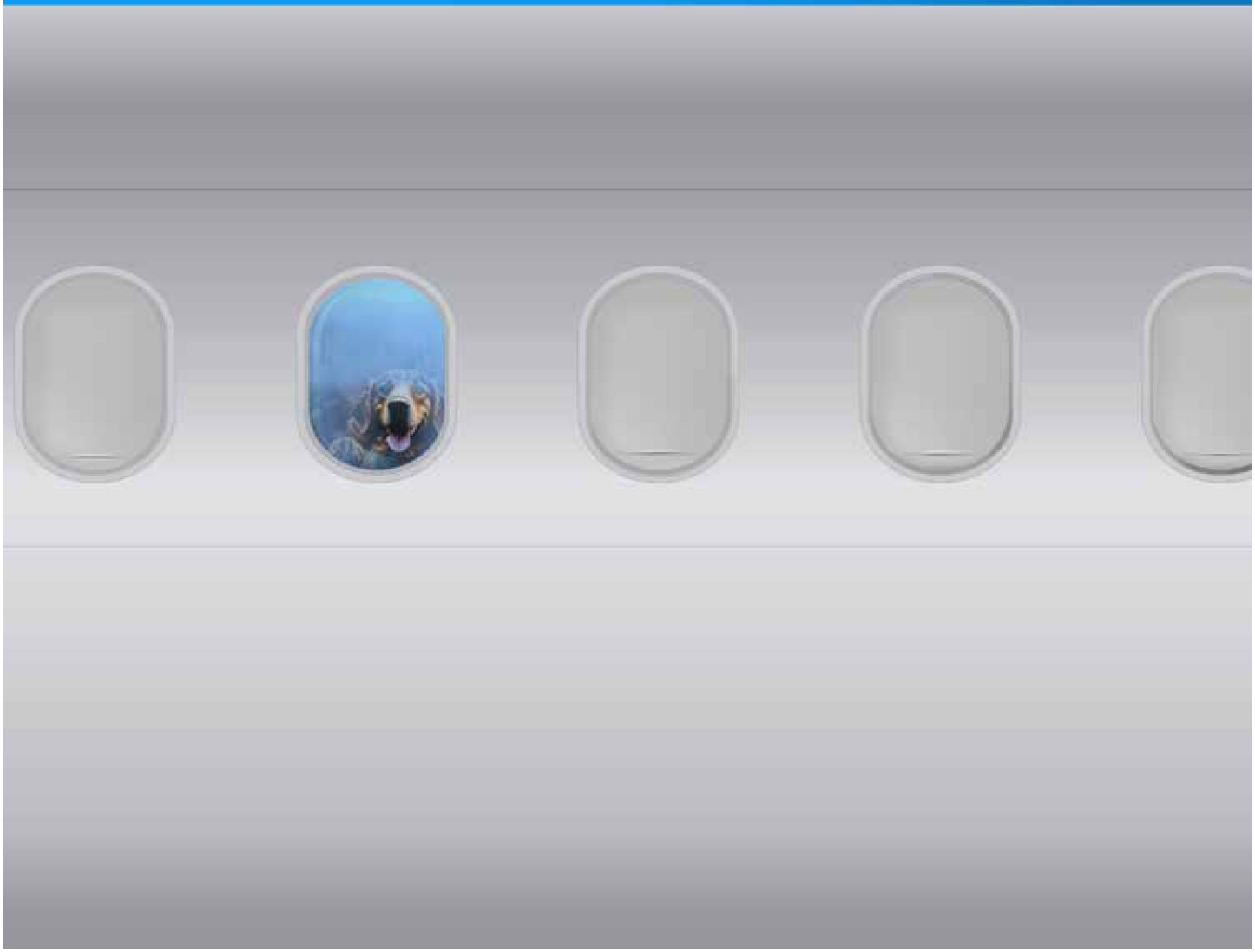
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Flying With Fido: A Brief Survey of Federal Service Animal Law



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CONTENTS

SEPTEMBER / OCTOBER 2023

FLYING WITH FIDO: A BRIEF SURVEY OF FEDERAL SERVICE ANIMAL LAW

By: Michelle Villareal, Deputy City Attorney, League City, Texas

Every year it seems that more of us are relying on the benefits of "emotional support" creatures, bringing them into previously animal-free environments. While these companions, four-legged or otherwise, undoubtedly provide great benefits, many are not "service animals" for purposes of federal law. Our author explains the regulations governing animals on airlines and related statutory nuances.

PAGE 6

THE PREROGATIVE TO UNSEAT: REMOVING COUNCILMEMBERS FROM COUNCIL COMMITTEES

By: Stephen K. Postema, City Attorney Ret., Ann Arbor, Michigan and Jennifer A. Richards, Assistant City Attorney, Ann Arbor, Michigan

Most city councilmembers comport themselves in a productive and cooperative manner. Occasionally, however, the city or county attorney will be called upon to evaluate the prospects for redressing unprofessional or unethical behavior by a councilmember. One such action may be to remove the member from a committee post. A thorough understanding of the rules and ramifications is required.

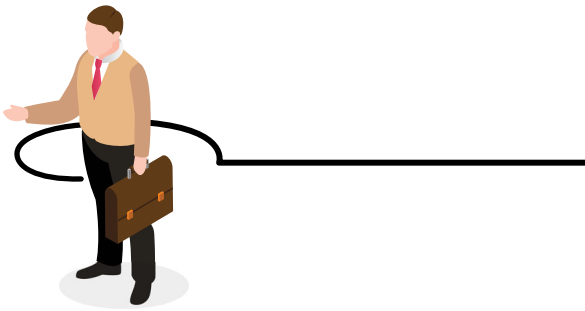
PAGE 10

"WE'RE HIRING, WE JUST NEED YOUR SOCIAL MEDIA LOGINS AND PASSWORDS"

By: Laura S. Burton, Police Attorney, Gastonia, North Carolina

Checking a job applicant's social media activity can provide a wealth of information, potentially revealing troublesome behavior and helping to avoid future problems. But such an inquiry triggers statutory and even constitutional issues, and many jurisdictions prohibit searching through a job seeker's non-public online activity.

PAGE 14



COVER AND FEATURE ILLUSTRATIONS BY TRUJILLODESIGN.NET

DEPARTMENTS

18 EMPLOYMENT
Marital Secrets: Spousal Privilege in Administrative Employment Proceedings
By: Nancy C. Rodgers, City and County Attorney, Broomfield, Colorado
When and where spousal secrecy can be maintained.

22 PRACTICE TIPS
City Attorneys: Things They Wish They Knew Before Running for Office
By: Karen L. Horner, City Attorney, Friendswood, Texas
Getting elected is just the beginning.

27 CITY PLANNING
Stub Streets: At the Corner of Essential Nexus and Rough Proportionality
By: Chase B. Ames, Assistant City Attorney, West Jordan, Utah
A dead-end street can have big legal consequences.

30 SUPREME COURT
Public Accommodations Law, Freedom of Speech, and Freedom of Religion
By: Megan Luptowski, Assistant City Attorney, Grand Rapids, Michigan
Expanding First Amendment protection of creative output.

34 INSIDE CANADA
Expanding Borders, Solicitor-Client Privilege, Roadway Spills, and More
By: Monica Ciriello, Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario
Recent cases of interest.

38 LISTSERV
The Parallel Universe
By: Brad Cunningham, Municipal Attorney, Lexington, South Carolina
Sovereign citizens on Main Street

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CITY PLANNING

By: CHASE B. AMES,
Assistant City Attorney,
West Jordan, Utah

Stub Streets: At the Corner of Essential Nexus and Rough Proportionality

INTRODUCTION

Municipalities commonly require developers to include stub streets (or stub-outs), a dead-ended street extension to an abutting undeveloped property, to provide for the efficient flow between future neighborhoods. While stub streets constitute only a small portion of a proposed development, and provide obvious community planning benefits, they are not free from constitutional inquiry. While developers have rarely challenged stub streets that are a condition precedent to approval of a development, courts have routinely struck such requirements down under the takings clause of the Fifth Amendment (as applied to municipalities pursuant to the Fourteenth Amendment). To avoid such rulings, municipalities must carefully examine each proposed development and relate the stub street to the burdens the proposed development will concurrently impose on the community at large.

1. Exaction Overview.
A. Stub Streets as Exactions.
A stub street constitutes an exaction when it is a condition of approval of a proposed development. Development exactions are "contributions to a government entity imposed as a condition precedent to approving the developer's project." This explicitly includes circumstances where there is a "mandatory dedication of land for roads, schools or parks, as a condition to plat approval[.]"[1] Thus, in any case where a city refuses to approve a proposed development without the dedication of a stub street, there is a developmental exaction.

B. When Exactions are Constitutional.
Exactions are constitutional if: (a) there is an essential link to a legitimate government interest; and (b) the exaction is roughly proportionate to the impact of the proposed development. While development exactions are framed "in the parlance of takings clause jurisprudence," development exactions are not unconstitutional per se.[2] The United States Supreme Court adopted "essential nexus" and "rough proportionality" tests in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) as the method for determining whether a development exaction passes constitutional muster.

The scope of *Nollan* and *Dolan*'s application has resulted in a split among courts. State courts in Alabama, Arizona, California, Connecticut, Oregon, and Washington have held that the *Nollan/Dolan* test does not apply to exactions imposed by municipalities pursuant to generally applicable regulations.[3] These courts have relied on language from the *Dolan* decision in which the court reaffirmed that, "in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights" and the court's application of the rough proportionality test was limited to "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."[4]

The Sixth Circuit and other state courts including North Carolina, Texas, Ohio, Maine, and Illinois have held that the *Nollan/Dolan* test "applies just as much to legislatively compelled permit conditions as it does to administratively imposed ones."[5] The Sixth Circuit interpreted the *Dolan* court's response to Justice Stevens quoted above to mean that the arbitrariness standard applies when governmental entities place conditions on the *use* of private property but rough proportionality is the proper test when a condition requires the *dedication* a property interest.[6] The United States Supreme Court is yet to conclusively address this split in interpretation.

Some states have avoided the split altogether by adopting statutes which apply the *Nollan/Dolan* test across the board. For example, the Utah legislature codified its own version of these tests in Utah Code § 10-9a-508:

> (1) A municipality may impose an exaction or exactions on development proposed in a land use application, including, subject to Subsection (3), an exaction for a water interest, if:
> (a)An essential link exists between a legitimate governmental interest and each exaction; and
> (b)Each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.[7]

By its plain language, in adopting the above statute, "the legislature intended to apply the rough proportionality test to all exactions, irrespective of source[.]"[8]

II. Applying the Tests.
A. Essential Link.
A stub street shares an essential link to a legitimate government interest when there is a direct correlation to the impact of the development on the community.

Under the first prong of the *Nollan/Dolan* test, a government entity must establish that "[a]n essential link exists between a legitimate governmental interest and each exaction." Utah Code § 10-9a-508(1)(a). Generally, a governmental interest is legitimate when it is "cognizable," within the government's

Cont'd on page 28

Stub Streets *cont'd from page 27*

"authority to implement," and rises above "a bare desire to harm a politically unpopular group."[9] While the United States Supreme court has "not elaborated on the standards for determining what constitutes a 'legitimate state interest[,]'" it has "made clear, however, that a broad range of governmental purposes and regulations" satisfy that definition.[10] "Under federal constitutional caselaw, a governmental entity may establish an essential nexus if there is a connection between a legitimate state interest and a permit condition. This is not an onerous requirement, and it may be satisfied if there is merely a logical connection between the legitimate state interest and the exaction of a dedication or fee."[11]

In *Nollan*, a property owner applied for a permit to demolish a bungalow and replace it with a three-bedroom home.[12] The California Coastal Commission (CCC) approved the application under the condition that the owner grant the public a lateral easement connecting two beaches across a portion of the property.[13] The United States Supreme Court agreed that the CCC had a legitimate interest in providing the public visible access to the beach.[14] However, the Court ruled there was no essential link between this interest and the easement because travelers did not need to traverse the owner's property.[15] The Court opined that an exaction would be constitutional if the CCC had simply required that the property owner "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere."[16]

With stub streets, the most obvious governmental interest is in allowing for the efficient flow of traffic between abutting developments. Courts have regularly conceded that "the flow of traffic is a legitimate concern of a municipal legislative body[.]"[17] However, as in *Nollan*, courts routinely reject stub streets which only provide a future benefit because such a condition precedent only acts as "a shorter cut than the constitutional way of paying for the change."[18]

In *Burton v. Clark Cty.*, 958 P.2d 343 (Wash. App. 1998), a county made a stub street a condition of approving a proposed development.[19] The county argued that the proposed development would exacerbate three issues: (1) "pocket neighborhoods" lacking access to adjoining neighborhoods; (2) traffic congestion; and (3) restricting emergency vehicle access into the development.[20] The court agreed that the development added to these public issues, "to at least a slight degree[,]" and that connection between the stub road and other travel ways would "tend to alleviate the identified public problems."[21] However, the court found that there was no evidence that the stub street would ever actually connect to a future road on the abutting property and was, at present, a "road to nowhere[.]"[22] The court ruled there was no essential link between the county's proffered interests and the stub street and ruled that the condition resulted in an unconstitutional taking.[23]

Stub streets are naturally focused on potential future development but municipalities must show that the stub street has a present-day use relating to a legitimate governmental interest to successfully defend against a takings claim. Examples of viable present-day use of stub streets could include controlling the flow of storm and irrigation water or providing additional street parking so fire apparatus have minimum proximity to buildings within the development. However, municipalities will need to closely evaluate proposed developments on a case-by-case basis to determine which use best connects the stub street to a legitimate governmental interest.

B. Rough Proportionality.

The cost to the municipality in the absence of a stub street must be roughly proportionate to the value of the dedicated property. Under the second prong of the *Nollan/Dolan* test, municipalities must establish that the "exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development."[24] "No precise mathematical calculation is required, but the city must make some sort of individualized determination" with respect to the exaction.[25] "[T]he nature component has been satisfied" when an exaction addresses a problem caused by the development."[26] The "extent" component is satisfied when the "exaction and the impact [are] measured in the same manner, or using the same standard. The most appropriate measure is cost— specifically, the cost of the exaction and the impact to the developer and the municipality, respectively."[27] In short, "[t]he *Dolan* analysis, properly applied, asks whether the imposition on the community of a proposed development is roughly equal to the cost being extracted to offset it."[28] The proper measurement is the impact to the community as a whole, not just the impact on the entity requesting the stub road.[29] ("In embracing costs to 'the community' we were squarely resolving to encompass costs beyond those borne directly" by the government entity requesting the dedication).

The rough proportionality test was applied to a stub street in *Luxembourg Grp. v. Snohomish Cty.*, 887 P.2d 446 (Wash. App. 1995). There, a developer applied to develop land abutting a buildable but undeveloped property.[30] The owner originally proposed providing access to the undeveloped land via a stub street but removed the stub street after its attempt to purchase the abutting property failed.[31] The city denied the application, asserting that the development would landlock the buildable portion of the abutting property.[32] On appeal, the county asserted that the stub street advanced its interest in "convenient travel by the public on streets and highways;" "proper ingress and egress;" and meeting "the housing and commercial needs of the citizens[.]"[33] The Washington Court of Appeals found that because the buildable portion of the abutting property "has always been isolated from the county roads, their need for access is not a result of the proposed subdivision."[34] Consequently, the court ruled that the county's denial of the application was



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an unconstitutional taking.[35]

The "nature" component of the rough proportionality test is similar to the "essential nexus" analysis in that a stub street cannot be tied solely to a potential future development. However, this step in the analysis goes a step further in requiring municipalities to establish that the proposed development negatively impacts the proffered government interest and that the stub street alleviates that impact. For example, if a municipality claimed that the stub street was linked to the legitimate governmental interest in controlling the flow of storm or irrigation water, the municipality would be required to show that the development increased or diverted water in a way that negatively impacted the community and that the stub street allowed the city to mitigate that impact by providing additional storm drains.

The example of minimum proximity of fire apparatus may be easier to argue for a municipality. A development increases the risk of fire both in the development and surrounding areas which increases demands on the local fire authority. Under National Fire Protection Association 1, *Fire Code*, fire apparatus must be able to get within at least 50 ft. of structures without a fire suppression system or 150 ft. of structures with a fire suppression system. Developments, particularly in high density areas, will have increased demand for street parking which will limit room for fire apparatus to maneuver and park. A stub street could alleviate the demand for parking increasing fire apparatus' ability to reach minimum proximity to structures within the development.

Municipalities can satisfy the "extent" component of the rough proportionality analysis if it quantifies the development's impact on the community in same manner it quantifies the value of the dedicated property, and the values are roughly proportional. For example, in *B.A.M. III*, the plaintiff sought a development permit for property abutting a state highway.[36] The developer proposed a 40 ft. wide right of way in favor of the Utah Department of Transportation pursuant to the county's road-width ordinance.[37] "The county's engineering and development staff approved this application."[38] The developer challenged the requirement, and after multiple trials and appeals, the trial court ruled that the county met its burden of proof under *Nollan/Dolan*.[39] On appeal, the Utah Supreme Court found that the cost of the road expansion attributable to proposed development was $337,500 and the value of the additional 13 ft. of easement was only $83,997.29.[40] The court found that where easement cost the owner "roughly 25% of the impact . . . imposed on the community[,]" the expanded easement "withstands rough proportionality review regardless of the degree of specificity or equivalency that the rough-proportionality test requires."[41]

While quantifying the monetary value of real property can be relatively easy, it can be extremely challenging to quantify the impact of the development on the community. Municipalities must determine difference in the accumulated costs the development would impart on the community, including and all impacted individuals and entities, with and without a stump street. If the difference is roughly proportional to the value of the dedicated land, the municipality should be able to safely satisfy the "extent" component of the rough proportionality test.

Notes

1. *Id*., at ¶ 34.
2. *Id*., at ¶ 4.
3. *See* St. Clair Cnty. Home Builders Ass'n v. City of Pell City, 61 So. 3d 992, 1007-08 (Ala. 2010) (per curiam); Am. Furniture Warehouse Co. v. Town of Gilbert, 425 P.3d 1099, 1103-06 (Ariz. Ct. App. 2018); San Remo Hotel L.P. v. City & Cnty. of San Francisco, 41 P.3d 87, 101-06 (Cal. 2002); Dunham v. Planning Comm'n, No. CV010085538, 2002 Conn. Super. LEXIS 2761, at *22-23 (Super. Ct. Aug. 20, 2002); Dudek v. Umatilla Cty., 69 P.3d 751, 755 (Or. App. 2003); City of Olympia v. Drebick, 126 P.3d 802, 807-09 (Wash. 2006).
4. 512 U.S. at 391 n.8.
5. Knight v. Metro. Gov't of Nashville & Davidson Cty., 2023 U.S. App. LEXIS 11453, *27, 67 F.4th 816 (6th Cir. 2023) (citing Anderson Creek Partners, L.P. v. County of Harnett, 876 S.E.2d 476, 496-503 (N.C. 2022); Town of Flower Mound v. Stafford Ests. Ltd. P'ship, 135 S.W.3d 620, 640-42 (Tex. 2004); Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000); Curtis v. Town of S. Thomaston, 708 A.2d 657, 658-60 (Me. 1998); N. Ill. Home Builders Ass'n, Inc. v. County of Du Page, 649 N.E.2d 384, 388-90 (Ill. 1995)).
6. 2023 U.S. App. LEXIS 11453, *39-40.
7. *Id*. (Formerly codified as Utah Code § 17-27a-507).
8. B.A.M. I, ¶ 46 (*emphasis added*).
9. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441, 446-48 (1985) (*internal quotation omitted*).
10. *Nollan*, 483 U.S. at 834.
11. Puce v. City of Burnsville, 971 N.W.2d 285, 295-96 (Minn. Ct. App. 2022) (*internal citations omitted*).
12. *Id*. at 828.
13. *Id*.
14. *Id*. at 835.
15. *Id*. at 836-37.
16. *Id*. at 836.
17. Smith Inv. Co. v. Sandy City, 958 P.2d 245, 255 (Utah Ct. App. 1998).
18. *Dolan*, 512 U.S. at 396 (*internal quotation omitted*).
19. *Id.at* 348-49.
20. *Id*. at 356.
21. *Id*. at 357.
22. *Id*.
23. *Id*.
24. Utah Code § 10-9a-508(1)(a).
25. *Dolan*, 512 U.S. at 391.
26. B.A.M. Dev. L.L.C. v. Salt Lake Cty. (B.A.M. II), 2008 UT 74, ¶ 10.
27. *Id*. ¶ 11.
28. *Id*. ¶ 14.
29. *See* B.A.M. Dev., L.L.C. v. Salt Lake Cty. (B.A.M. III), 2012 UT 26, ¶ 24.
30. *Id*. at 447.
31. *Id*.
32. *Id*. at 448.
33, *Id*.
34. *Id*.
35. *Id*. 448-49.
36. *Id*. ¶ 3.
37. *Id*.
38. *Id*. at ¶ 4.
39. *Id*. at ¶ 6.
40. *Id*. at ¶ 35.
41. *Id*.