

# Legal Exactions or “Platmail”?: The Developer Debate Over Proportionality

BY BRANDI SMITH

The project seemed like it had “green light” written all over it: a three-phase, 247-lot residential subdivision planned in a small community that struggled to keep up with a recent population boom.

On the surface, it appeared to be a win-win for the developer and the town. However, before the town would approve the plat, it required the developer to rebuild an existing two-lane asphalt road with concrete, the modern standard. The cost of such an exaction was steep: roughly \$500,000. Though the developer fought the requirement, the improvement was made, but under protest.

The developer filed suit once the project was complete, alleging the town took property without just compensation. The case made its way to the Texas Supreme Court, which upheld lower court rulings that the town had not adequately covered its share of the road costs.

This story, which may feel all too familiar for our developer readers, played out in 2004 in *Town of Flower Mound vs. Stafford Estates Limited Partnership*. The case put renewed emphasis on the idea of rough proportionality, an approach by which all future exactions were required to be measured.

## What is an exaction?

Exactions are fairly common in the development community, requiring a developer to mitigate anticipated negative effects of a new project on public infrastructure.

“Think of it as a payment by a developer to the government in order to be able to develop

a project,” said Reid Wilson, managing shareholder at Wilson Cribbs & Goren in Houston, who often represents developers. “The most common exactions come in the form of right-of-way and related public improvements, public easements of various types, including for public services, such as a police or fire station.”

The two-lane concrete road referenced in the *Stafford Estates* case is a perfect example. Before the project could get started, the town required the developer to agree to an exaction, which the town stated was mandatory to mitigate the traffic impact the residential development would have.

“The idea is that an exaction is ‘fair’ if it is to address the impact of the new project on the public, generally and specifically public infrastructure,” Wilson said.

The developer took issue with the amount of money spent to replace the existing road compared to his project’s impact on the road from increased density.

“Constitutionally, when the government takes your property, you are to be compensated for the taking of the property,” said Terry Welch, partner at Richardson-based Brown & Hofmeister, who represents municipalities and was involved in the *Stafford Estates* case.

## What is rough proportionality?

Rough proportionality is the tool by which entities are legally required to judge an exaction.

“Proportionality is the idea that there has to be a reasonable relationship between the exaction and the impact of the new

project,” said Wilson, who jumped into real estate law back in 1979. “The concept is that the developer should account for any burden that is related to their project. In a residential subdivision, the developer is creating a need for roads and utilities, so the developer is obligated to dedicate streets and utility easements.”

Referencing again the two-lane concrete road at issue in the *Stafford Estates* suit, the full construction cost absorbed by the developer was not proportional to its future use by drivers who didn’t live in the subdivision.

“The cost you charge that developer for whatever that infrastructure may be - roads, sewer, water - it has to be roughly proportional to their impact,” Welch said.

In the case of *Stafford Estates*, that would mean determining the percentage of its residents who would use the road, compared to all future driver. If the cost to build the road were \$500,000 and *Stafford Estates* residents only accounted for 20 percent of the traffic on it, rough proportionality decrees the developer should only be required to pay \$100,000 and the city should offset the remaining expenses.

“You get into those types of questions about ‘How do we apportion those costs?’ because it’s not really fair to say the first guy who does anything has to pay for everything, and then from that point forward everybody else kind of hooks on free of charge,” said Welch.

## Why the conflict?

Conflict can sometimes arise when the two sides cannot come to agreement on the terms of an exaction.



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“Both sides are looking at money and they are going to disagree on that,” Welch said.

“I’d like to think that most local entities are trying to be fair, but it’s fair in their minds,” Wilson said. “I can tell you that sometimes there is a mindset that the developer is an ATM that has unlimited resources available to provide benefits to a community.”

In the interest of forward progress, developers often give in to the demands of the entity to which it’s applying simply to keep the project alive.

**“Both sides are looking at money and they are going to disagree on that,” says Welch.**

“In the land use business, we sometimes will talk about those required dedications as ‘platmail,’ because they come at the platting stage” said Wilson. “We say that in fun, but sometimes the development community feels just

like that because the local government says, unless you give us those dedications on the face on the plat, you’re not going to get approved.”

However, since the 2004 Stafford Estates ruling, developers are becoming more aware of their rights as property owners.

“Those cities are being challenged more and more because they are not complying with the legal requirement for an individualized analysis and determination of rough proportionality, as required by Stafford Estates,” Wilson said.

## What about the government entity?

In some cases, though, the city or county to which a developer applies simply doesn’t have the money or resources to cover the public share of an exaction.

Imagine a small town of 1,300 on the fringes of a booming metro area. A developer eyeing the area applies for a permit to build a subdivision and the city agrees to the plan, but only if the developer also builds a \$1 million stretch of road. After gauging proportionality, it’s determined the developer should only be responsible for 25 percent of the burden, leaving the city with a \$750,000 tab.

“The problem arises: what if the city doesn’t have \$750,000 to pay for it? I’ve had that happen in smaller communities,” Welch said. “I’ve seen projects die because developers say, ‘Well, my share is \$250,000.’ The city says, ‘Great, but we’ll let you know when we get \$750,000 for our share of the road.’”

Welch, who represents several government entities in the Dallas area, points to a particular project in Kaufman County to illustrate the point.

“They have some of the most beautiful lots on a lake that I have ever seen,” he said.

The issue isn’t the lots, but the only road by which a driver can access the development. Built in the 1930s, Welch describes it as old, pocked and so awful “you’re afraid you’re going to break an axle.”

He says the developer asked the city to contribute to the road’s improvements, but budget limitations restricted what the city



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was able to provide. In the end, the project moved forward, but without a modern road for potential residents to travel.

"They had a hard time selling houses, or selling lots for houses, because the road to get you out there is awful," Welch said.

### Exactions vs. eminent domain

Though similar to an exaction, eminent domain is an entirely different issue faced by developers, but typically after a project has been completed. Eminent domain allows a variety of agencies to take property for public use, but only if they pay fair market value.

"There are a surprising number of governmental entities and private corporations that have the power of eminent domain," said David Showalter of Richmond's Showalter Law Firm.

Showalter got started in real estate law in 1977, just after graduating from Baylor Law School. His firm has handled hundreds of eminent domain cases, which, he says, often involve many twists and turns.

"The first thing developers need to do is hire a lawyer who's familiar with the eminent domain process because then we help strategize an approach to the condemnation," Showalter said. "The sooner we get involved in the process, the sooner we can be protecting the developer."

### What can developers do?

"Developers have to understand their rights, then they have to assert their rights," said Wilson. "They have to make the hard choice of whether they should accept an exaction as-is or whether they should acquiesce under protest, which they may do under the law."

Were a developer to "acquiesce under protest," the project moves forward with the exaction, as laid out by the permitting entity. It also leaves the door open for a legal fight if the developer chooses to pursue it.

"We're starting to see some litigation on these matters. I will say that much of the time, the developer will negotiate and make a decision to move forward and just absorb the cost," Wilson said. "But the development community is becoming aware of its rights and being more aggressive in asserting them."

In the end, the decision remains in the hands of the developer: to give in, to acquiesce under protest or to abandon the project altogether. Above all else, it's imperative Texas developers be familiar with the options available to them. After all, the most important tool in a developer's toolbox is knowledge. ●



Reid Wilson



Terry Welch

