Rough Proportionality:
Protection from Government Exactions

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I. Introduction

Municipalities routinely require developers to bear a portion of the costs related to infrastructure improvements as a condition of project approval. Such "exactions" may be imposed through impact fees, the payment of construction costs, or easement dedications. This practice is widely accepted based upon the reasoning that developers (not the general public) should be required to bear the burden of the impact that new projects have on municipal infrastructure. However, the level of exactions that a municipality imposes often resulted in disputes and litigation. State and federal courts have addressed this issue and determined the reasonable level of exactions. In 2005, the Texas Legislature adopted a statutory procedure for apportionment of municipal infrastructure to developers as part of the Texas Subdivision Act, Tex. Loc. Gov't Code Chapter 212, in Sec. 212.904.

This article explores the allowable amount of municipal infrastructure exactions under Texas law; specifically, the concept of "rough proportionality" as codified in Sec. 212.904, which dictates that the exactions imposed upon a developer must be roughly proportionate to the projected impact of the proposed project.

Two earlier articles on rough proportionality are recommended:

Impact Fees and Exactions: How Much is Too Much?, Arthur J. Anderson, Advanced Real Estate Law Course of the State Bar of Texas (2003), *available at* www.texasbarcle.com.

Rough Proportionality: Who Pays for Infrastructure?, Terrence S. Welch, Texas City Attorneys Association Summer Conference (2007).

II. How Did We Get Here?

A. *Town of Flower Mound v. Stafford Estates*

i. Adoption of *Nollan* and *Dolan*

In *Town of Flower Mound v. Stafford Estates*, 135 S.W.3d 620 (Tex. 2004) the Texas Supreme Court restated and adopted federal rules regarding limitations on development exactions, as established by the United States Supreme Court in *Nollan v. Cal. Costal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Understanding *Nollan* and *Dolan* is critical, in that they set the standards Texas is applying. The Texas Supreme Court's own discussion of these two cases in *Stafford Estates* is instructive on the issue of rough proportionality, and is reproduced below.

> "The Nollans owned a beachfront lot bordering on the Pacific Ocean. … The Nollans applied to the California Coastal Commission for a permit that would

allow them to demolish a small bungalow on their lot and replace it with a three-bedroom home characteristic of the neighborhood. The Commission granted the permit subject to the Nollans' creation of an easement allowing public access to the area between the ocean and the seawall.

The Supreme Court held that the requirement imposed by the Commission constituted a taking, reasoning as follows. "[L]and-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'". … "[A] permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." But in either instance, "substantial advancement" requires an "essential nexus" between the restriction and the interests to be served. "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"

Having found that the exaction imposed by the Commission was simply unrelated to the public interests it claimed to be advancing, the Supreme Court in *Nollan* did not consider the degree of connection required between an exaction that *did* advance public interests and the projected impact of the development for there not to be a taking. This half of the analysis the Supreme Court supplied in *Dolan v. City of Tigard.*

Dolan applied to the City of Tigard for a permit allowing her to expand her plumbing and electric supply store and pave the parking lot. In accordance with its Community Development Code, adopted as required by state statute, the City conditioned its approval of the improvements on Dolan's dedication of a portion of her property in the flood plain for use as a public greenway, and another portion for use as a bicycle and pedestrian path. The City explained that the greenway was necessary to help control the anticipated additional storm water runoff due to the impervious surface of the new parking lot, and the bike path was necessary to help alleviate traffic congestion. Dolan requested a variance from the Code requirements, which the City refused.

Dolan did not "quarrel with the city's authority to exact some forms of dedication as a condition for the grant of a building permit, but challenge[d] the showing made by the city to justify [the] exactions" it imposed. To determine whether the exactions constituted a taking, the Supreme Court first looked to see "whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city" as required by *Nollan.* The Court explained that in *Nollan,* [t]he absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of land use into "an out-and-out plan of extortion."

No such gimmicks are associated with the permit conditions imposed by the city in this case. The connections between a greenway dedication and flood

control, and between a bicycle path and traffic control, were "obvious".

The harder part of the takings analysis in *Dolan* was "whether the degree of the exactions demanded by the city's permit conditions [bore] the required relationship to the projected impact of petitioner's proposed development." To determine what relationship the Fifth Amendment requires, the Court looked to "representative" state court takings decisions, "[s]ince state courts have been dealing with this question a good deal longer than we have".

In some States, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. We think this standard is too lax to adequately protect petitioner's right to just compensation if her property is taken for a public purpose.

Other state courts require a very exacting correspondence, described as the "specifi[c] and uniquely attributable" test.... We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved. A number of state courts have taken an intermediate position, requiring the municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development.

We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

The Supreme Court counted Texas among the majority of states in the intermediate position, citing our 1984 decision in *City of College Station v. Turtle Rock Corp.*

The conditions imposed on Dolan's development of her property did not meet this "rough proportionality" test. The City had required Dolan to dedicate a *public* greenway, thereby requiring her to surrender the right to exclude others from part of her property, "one of the most essential sticks in the bundle of rights that are commonly characterized as property", but had "never said why a public greenway, as opposed to a private one, was required in the interest of flood control." The Supreme Court concluded: It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems ... and the city has not

attempted to make any individualized determination to support this part of its request.

With respect to the bike path, the Supreme Court concluded that the City's justifications for the requirement were "conclusory": on the record before us, the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand ... and lessen the increase in traffic congestion."

Each of the City's exactions was too severe, given the projected impact of Dolan's development on the City's legitimate interests. In sum: The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

We restate the rule of *Nollan* and *Dolan* generally as follows: conditioning government approval of a development of property on some exaction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate government interest and (2) is roughly proportional to the projected impact of the proposed development."

Stafford Estates, 135 S.W.3d at 631-34 (emphasis added).

As interpreted by the Texas Supreme Count, and adopted as the Texas standard, *Nollan* and *Dolan* have these essential elements:

- Presumption of taking- Any exaction is deemed a taking *unless it satisfies 2 tests:*
  - Essential nexus- The exaction must meaningfully support a legitimate pubic purpose.
  - Rough Proportionality- The exaction must have a reasonable relationship, both in nature and extent, to the development impact
- Burden of Proof- The municipality must make an individualized analysis and demonstrate the necessary connections.

ii. Application of *Nollan* and *Dolan*

Stafford Estates involved the development of a three-phase, 247-lot residential subdivision. The second and third phases abutted Simmons Road, a two lane asphalt road designated by the town as a rural collector street. As a condition for plat approval, the Town required the developer to rebuild the entire road with concrete instead of asphalt, per the terms of the Town's regulations, applicable to all developments in the Town. This was a standard of general application, not a specific requirement for this project

only. No additional lanes or right of way were required. Stafford Estates objected to paying the total cost of such construction at every administrative level, but was unsuccessful and ultimately rebuilt the road at a cost of approximately $500,000. The Town also assessed impact fees to pay for capital improvements to its roadway system, pursuant to Chapter 395 of the Local Government Code. Stafford Estates was assessed a discounted fee of roughly 32% of the maximum fee permitted, per the terms of a Town ordinance, which stated that the Town had chosen to assess uniformly a lesser fee than the maximum permitted under Chapter 395.

After making the required improvements, Stafford Estates filed suit, alleging that by conditioning the development upon improving the road, the Town had taken Stafford's property without just compensation, in violation of *Dolan*. The trial court ruled in favor of Stafford, holding that the exaction failed *Dolan's* rough proportionality test. The appeals court affirmed.

The Town asserted several arguments regarding rough proportionality to the Texas Supreme Court. Most significantly, it argued that the discounted rate of the imposed impact fees resulted in a shortfall of approximately $600,000 from what could have been charged under the Town's impact fee analysis under Chapter 395. This shortfall, the Town asserted, was roughly proportional to the cost of improving the road. The Town believed that its Chapter 395 impact fee analysis could be used to protect it from any exaction which was approximately the same or less than the differential between the impact fee actually assessed and paid by the developer and the maximum possible assessment derived from the Chapter 395 analysis. However, the Court noted that the Town failed to relate the discounted fees to the impact of the development on traffic, and the "discount" could really be the Town's determination that the Chapter 395 analysis was flawed.

The Town also asserted that requiring each developer in the Town to improve abutting roadways is roughly proportional to the impact of all developments on all roadways, and such reciprocal exactions meet the rough proportionality test. The Court concluded that this argument was too abstract. It could not be determined from the Town's assertion whether the exaction was more, less or roughly equal to the impact of the development.

The Court ultimately held that that the exactions did not meet the rough proportionality test and made the following notable findings:

- Rough proportionality may be challenged <u>after</u> obtaining final plat approval and providing the exactions.

- There is no distinction between onsite and offsite exactions.

- *Dolan* applies to a Texas takings claim to "prevent opportunistic takings by the government simply because a land owner is seeking some type of

land-related governmental approval", sometimes described as "regulatory leveraging."

- Burden of proof is on the government to "make some sort of individualized determination" that the dedication is related in nature and extent to the impact of the project, but the landowner has the burden to prove its damages.

- Municipalities are not required to make their determination regarding rough proportionality before imposing the exactions.

- Municipalities are required to "measure the impact in a meaningful, though not precisely mathematical way."

- When making a determination as to rough proportionality, the impact of the development on all roadways in its general vicinity may be taken into account, not just those immediately adjacent to the project.

- Damages are the portion of the exaction other than that appropriately assessed to the landowner (applying the rough proportionality test).

- Attorney's fees/expenses were not recoverable under USC § 1988, since Stafford Estates received a full recovery under its state law takings claim, thus eliminating any §1983 claim.

The first Texas case on rough proportionality after *Stafford Estates* was *Sefzik v. City of McKinney*, 198 S.W.3d 884 (Tex. App.–Dallas 2006, no pet.). In *Sefzik*, the court simply reversed summary judgment for the City which was improperly based on a waiver claim and remanded to the trial court to make a rough proportionality determination under *Stafford Estates*. The case did not come back up on appeal thereafter. The court held that sovereign immunity did not protect the City from an exactions claim, and that the developer's agreement to a Development Agreement required by the City did not constitute waiver of an exactions claim. The court emphasized the need for a developer to continuously object to an improper exaction in order to protect their claim.

B. The effect of *Stafford Estates* on existing Texas case law

Stafford Estates, through its adoption of US Supreme Court precedent in *Dolan*, established rough proportionality as the standard to for measuring an appropriate level of government exactions. In *Dolan*, the US Supreme Court identified Texas in the "reasonable relationship" class of states, which it followed to establish the federal rule on exactions, citing *City of College Station v. Turtle Rock Corp.* 680 S.W.2d 802 (Tex. 1984). In *Turtle Rock*, the Texas Supreme Court upheld a park fee assessed against new residential developers to provide funding for the City to purchase land for parks to support residential population growth in the area of the new development. The court established a two-part test for determining the validity of an ordinance requiring

dedication of land for park purposes or a contribution to a parks fund. In order for the ordinance to be valid, the following two requirements must be met:

(1) the regulation must accomplish a legitimate goal, and
(2) the regulation must be reasonable, and not arbitrary.

In remanding the case to the district court, the Court held that the fee was substantially related to the impact of the new development and would be valid if there was a reasonable connection between the increased population arising from the development and the increased park needs in the neighborhood. In effect, the Court remanded for a rough proportionality determination. Following the standard of The American Law Institute, the Texas Supreme Court in *Turtle Rock* states that any exaction is reasonable if its quality and quantity is reasonably necessary to offset the need created by the new development. The *Turtle Rock* court placed the burden of proof on the developer, which was changed in *Stafford Estates.* The case did not come back up on appeal. Since the US Supreme Court in *Dolan* cited with approval *Turtle Rock* as one of the cases in the "reasonable relationship" line of exaction cases, which test is used as the basis for the rough proportionality test, *Turtle Rock's* analysis has continued application on the issue of the adequacy of relationship of an exaction and the public purpose being advanced.

City of Corpus Christi v. Unitarian Church, 436 S.W.2d 923 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.) is often cited for the proposition that a City may require street dedication as part of the platting process. That case involved a church that sought to obtain a building permit. The issuance of the permit was contingent upon platting the property, and approval of the plat was subject to the church's dedication of property for extending an existing public street through the church's property which would take a substantial amount of land. The subdivision ordinance required dedication through the platting approval process only when property owners were subdividing their lots. However, in this case the church did not propose to subdivide its property; instead, it proposed to build utilizing the entire property. The court stated, without analysis or limitation, a general rule that, "[i]n subdivision development, a city, by statute and charter and/or ordinance is authorized to require the dedication of streets, alleys and utility easements as a part of the orderly development of a city proper." *Id.* at 930. This case ultimately decided the dedication was not permitted, since the subdivision ordinance only required dedication for true subdivisions. Clearly, the unqualified rule in *Unitarian Church* is modified by the subsequent Texas Supreme Court decisions in *Turtle Rock* and *Stafford Estates.* The general rule is no longer the broad statement from *Unitarian Church*, but the more nuanced rules in *Turtle Rock* and *Stafford Estates* requiring a "reasonable relationship" and "rough proportionality." If the case were decided today, and the ordinance clearly required the dedication, the dedication would be subject to a rough proportionality limitation which must be made by the City based upon the projected impact of the Church's new buildings on the City road system, presumably minor.

City of Houston v. Kolb, 982 S.W.2d 949 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) is frequently cited as an example where a City illegally exacted a road right of way dedication. The landowners filed an inverse condemnation action against the City of Houston after their subdivision plat was rejected. The plat was rejected, in part, because the property was located in the vicinity of the proposed state highway to be known as the Grand Parkway and the plat did not dedicate right of way for it. The City lacked authority to impact the path of the proposed Grand Parkway. The court of appeals upheld the trial court's judgment that a city requiring dedication of a right-of-way for a state highway constitutes a taking that requires just compensation. The landowners were awarded damages for the diminishment of the land's value caused by the City's restrictions on its use and development. *Kolb* is consistent with *Turtle Rock* and *Stafford Estates* since the Grand Parkway was not a City controlled local roadway, but a limited access freeway and the City failed to put on any evidence of the impact of the proposed development. The additional traffic the new development would add to the Grand Parkway, if any, was not addressed by the City. Instead, the City relied upon its informal agreement with the Grand Parkway Association, a special interest group advocating for the construction of the Grand Parkway, and the agreement of the City to require dedication of Grand Parkway right of way as part of the City's support for the Grand Parkway as the basis for the exaction, rather than an individualized determination of the development impact.

> The following exactions are typical:
> (1) drainage easements and facilities,
> (2) street rights of way,
> (3) water and wastewater easements and facilities,
> (4) street lighting,
> (5) fire hydrants,
> (6) sidewalks,
> (7) parking,
> (8) trees,
> (9) street signage, and
> (10) traffic control devices.

Exactions are permissible to the extent they require a developer to construct the amount of infrastructure required to support their proposed development. How far beyond the minimum may a municipality go? If the construction of a two-lane street is sufficient to absorb the additional traffic created by a proposed development, may a municipality require the dedication of right of way and construction of a four-lane street? Under rough proportionality, the answer is no. Yet, municipalities still require excessive dedication and infrastructure. Despite the protections of *Dolan* and *Stafford Estates*, developers demand more limitations on exactions.

C. Statutory Rough Proportionality- Tex. Loc. Gov't Code Sec. 212.904

The year after the Supreme Court decided *Stafford Estates*, the Texas Legislature codified and strengthened the rough proportionality standard through the addition of Local Government Code, Sec. 212.904. This section states the following:

> Sec. 212.904. APPORTIONMENT OF MUNICIPAL INFRASTRUCTURE COSTS.
>
> (a) If a municipality requires as a condition of approval for a property development project that the developer bear a portion of the costs of municipal infrastructure improvements by the making of dedications, the payment of fees, or the payment of construction costs, the developer's portion of the costs may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development as approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality.
>
> (b) A developer who disputes the determination made under Subsection (a) may appeal to the governing body of the municipality. At the appeal, the developer may present evidence and testimony under procedures adopted by the governing body. After hearing any testimony and reviewing the evidence, the governing body shall make the applicable determination within 30 days following the final submission of any testimony or evidence by the developer.
>
> (c) A developer may appeal the determination of the governing body to a county or district court of the county in which the development project is located within 30 days of the final determination by the governing body.
>
> (d) A municipality may not require a developer to waive the right of appeal authorized by this section as a condition of approval for a development project.
>
> (e) A developer who prevails in an appeal under this section is entitled to applicable costs and to reasonable attorney's fees, including expert witness fees.
>
> (f) This section does not diminish the authority or modify the procedures specified by Chapter 395.

TEX. LOC. GOV'T CODE § 212.904 (emphasis added). The legislative history for this law is contained in www.capitol.state.tx.us/ under House Bill 1835 (79th Leg.-2005). The bill analysis is reproduced below.

> "In 2004, the Texas Supreme Court, in *Town of Flower Mound v. Stafford Estates, Ltd. Partnerships,* 135 S.W.3d 620 (Tex. 2004) issued a significant decision regarding Texas law relating to exactions/dedications imposed by governmental entities as conditions to issuing permits for the development of property. The court restated and followed the rules established in two landmark United States Supreme Court cases, *Nollan v. California Coastal Com'n,* 483 United States 825 (1987), and *Dolan v. City of Tigard*, 512 United States 374 (1994), in ruling that exactions/dedications that are made as a condition of development permit approvals which do not (1) bear an essential nexus to the substantial advancement of some legitimate governmental interest, and (2) are not roughly proportional to the projected impact of the proposed development, violate federal and state constitutional provisions prohibiting the taking of private property for public use without just compensation. The Texas Supreme Court also ruled that state law does not entitle a developer to recover attorney's fees or expert witness fees.
>
> C.S.H.B. 1835 codifies the decision made in the *Stafford Estates* case, that a developer may dispute a condition of approval for a property development project that requires a developer to bear a portion of the costs of municipal infrastructure improvements, and establishes that the prevailing party in an appeal is entitled to applicable costs, and to reasonable attorney's fees, including expert witnesses fees."

Sec. 212.904 differs from *Stafford Estates* in a few important respects:

- Rough proportionality determinations are required prior to imposing exactions.
- Attorney's and expert witness fees are recoverable in a successful appeal.
- A process and procedure to appeal an improper determination is established.

The only Texas case to cite to section 212.904 is *Mira Mar Dev. Corp. v. City of Coppell*, 421 S.W.3d 74 (Tex. App. – Dallas 2013, no pet.). Coppell required from the developer straight curbs, extra drainage outlets, offsite sidewalks, over-fill for pad sites, tree retribution fees, park fees, sewer impact fees, and construction inspection fees for the approval of a 29-lot residential subdivision. *Id.* at 85-98. The court, however, held that the requirements that the developer to use straight curbs, add two extra drainage outlets, raise the elevation of the pad side, add a sewer manhole, use concrete water caps, pay a $2,000 review fee for a floodplain study, and pay sewer impact fees did not constitute a compensable exaction for property development. *Id.* The court only found that requiring the developer to extend a drainage pipe, change the slopes, and pay a $35,500 tree retribution fee constituted a compensable exaction. *Id.*

Since the legislative history for Sec. 212.904 specifies that it is codifying the holdings in *Dolan*/*Stafford Estates*, and uses very similar wording ("roughly proportionate") in establishing the standard for exactions, it is clear that in the application of Sec. 212.904 and appeals from exactions determinations, it is intended that the

Dolan/*Stafford Estates* standards, as interpreted by applicable case law should be considered.

III. Understanding Sec. 212.904

A. Practical Summary

1. Exactions covered: The definition of exactions is very broad: "condition[s] of approval for a property development project that [require] the developer bear a portion of the costs of municipal infrastructure improvements", such as i) "dedications", ii) "fees", and iii) "construction costs…." Only municipal exactions are affected.
2. Limit on developer's portion: The limitation is a restatement of the *Dolan* standard: "the amount…roughly proportionate to the proposed development."
3. Initial determination required: The rough proportionality determination is a condition precedent to the imposition of an exaction. The municipality's exaction is limited to the roughly proportionate amount, so it must have made such a determination in order to be authorized to impose the exaction. Further, since exactions may not exceed the rough proportionality standard "as approved by a professional engineer…", then unless a determination has been made, how can an engineer approve it?
4. Required approval: The municipality must retain a licensed engineer to approve the exaction. The rough proportionality determination must be "approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality."
5. Appeal Process:
    a. Governing Body- First, the developer is accorded an administrative appeal to the municipality's governing body (City Council or Board of Aldermen). This is an evidentiary hearing: "developer may present evidence and testimony under procedures adopted by the governing body." A decision is required in 30 days: "governing body shall make the applicable determination within 30 days following the final submission of…evidence…."
    b. Lawsuit- The developer may appeal within 30 days thereafter to either county or district court of the county where the development project is located. The 30 days commences upon "final determination by the governing body."
    c. No Waiver- Municipalities may not require a developer to waive its right to appeal.
    d. Attorney's/Expert fees- Reasonable fees (and costs) are recoverable by a developer if they prevail in litigation.
6. No Affect on Impact Fees- Tex. Loc. Gov't Code Chap. 395 is not "diminished" or "modified."

B. Questions & Proposed Answers

Many unanswered questions remain relating to the application of this important statute. Below are some significant questions and answers:

- **Must a municipality make a rough proportionality determination before mandating an exaction?**

  Yes. Sec. 212.904(a) clearly requires a rough proportionality determination so that a comparison of that determination to the exaction can occur. No determination means no possible exaction.
- **Who makes the initial determination?**

  The municipality may use staff or an outside consultant. The determination must be individualized to the facts and circumstances relating to the proposed project.
- **Can the municipality apply uniform standards?**

  No, the application of uniform standards such as a major thoroughfare map or similar general plan for extension of the municipal road system as applied in *Unitarian Church*, or boundary road reconstruction requirements such as applied in *Stafford Estates* will not pass muster.
- **Must the municipality issue a rough proportionality report?**

  It would be best practice to issue a formalized report setting forth a proper analysis of the project impact and the state of municipal infrastructure impacted, then a description of how rough proportionality is determined.
- **What standards apply to the determination?**

  The statutes only standard is "roughly proportionate". "Proportionate" requires a reasonable analysis of the project impact on municipal infrastructure and a rational relationship between the exaction and the impact. "Roughly" means that the rational relationship may be approximate, not exact. Roughly is commonly considered a synonym for "approximately." Since the statute adopts the *Dolan/Stafford Estates* standards, the discussion in those cases and their progeny will be relevant. Therefore, rough proportionality does not require "precise mathematical calculation", but does require an "individualized determination that the required [exaction] is related both in nature and extent to the impact of the proposed development", per *Dolan.* There must be a "reasonable relationship" between the exaction and the development impact, per *Turtle Rock.*
- **May the Professional Engineer be a city employee**?

  Not clear. There is no prohibition, but the requirement that the Professional Engineer "is retained" indicates a third party professional not associated with the municipality. In common usage, professionals such as lawyers, architects and engineers are "retained", whereas, employees are "employed" instead of retained. An argument can be made the so long as

they are licensed, the engineer is qualified to approve a rough proportionality determination under the statute.

- **What type of Professional Engineer is permitted?**

  Clearly, the engineer must have current licensing in the State of Texas. The area of specialization is not specified, although it would seem obvious that the engineer must be competent in the area of the determination. Best practice is to have an engineer with competence and experience in the engineering area relevant to the rough proportionality determination to provide the approval. Failure to do so will make the determination harder to uphold on appeal.

- **May the municipality require the developer to pay the cost of a 3rd party Professional Engineer for the municipality?**

  There is no prohibition. The requirement is that the Professional Engineer "is retained" by the municipality. If the engineer is selected and contracts with the municipality, but all or part of the cost is passed through to the developer, are they retained by the municipality? Can this be analogized to the developer having to pay their lender's attorney and appraiser fees? What if the cost is disproportionate to the exaction, thus having a practical chilling impact on a developer challenging an exaction? This would result in a type of waiver of the right to appeal the determination. What if the charge is passed to the developer only if they challenge the initial determination prior to approval by the Professional Engineer, or only in the event of an appeal? These types of non-uniform charges could be challenged as a back door attempt to quash appeals, and thus be a violation of the non-waiver provision. What if a municipality charged a reasonable, uniformly determined fee to all developers for all developments to offset the cost of making rough proportionality decisions? This type of fee would be more difficult to challenge as a type of waiver violation. What if a municipality offered the option of a 3rd party Professional Engineer, but only if the developer paid the entire fee? As an option to a municipal employee review, this charge would not seem to violate the spirit of Sec. 212.904. In this instance, the developer is gaining the expertise and professionalism of a non-employee engineer and thus has an arguable benefit.

- **What is the role of the Planning Commission?**

  The statute is part of the State Subdivision Act. Dedications of rights of way and easements are commonly by plat. In some municipalities, including Houston, the Planning Commission is the final authority over plats. The obligation to make commitments to construct infrastructure is a condition to plat approval. Clearly, Planning Commissions will be considering the question of whether exactions required in the platting process satisfy rough proportionality. Where the governing body retains final plat approval, the issue is not material, as the governing body will be hearing all issues. But where the Planning Commission is the decider on plats, how should it deal with rough proportionality? The issue is further complicated by the statutory structure

for plat approval. The practical answer is that the Planning Commission is not likely to be entangled in the rough proportionality issue since the statute clearly designates the appeal to the governing body, which is not the Planning Commission, even if it is the final authority on plats in a particular municipality.

- **Is the rough proportionality decision and appeal integrated in the platting process or separate?**

  The State Subdivision Statute, Tex. Loc. Gov't Code Chap. 212 requires a detailed and time sensitive process for plat submission, review and approval. If the rough proportionality determination and appeal is incorporated in the platting process, then the 30 day deadlines (Tex. Loc. Gov't Code Sec. 212.009(a)) for plat determinations are problematic. A developer does have the right under *Stafford Estates*, to continuously object to an exaction, yet plat their property with the required dedications/fees/constructed infrastructure, and appeal the rough proportionality determination. The municipality may not refuse to approve a plat submitted under protest by a developer reserving their appeal rights, as it would be a violation of the waiver prohibition in the statute. The rough proportionality determination will be made early in the platting process, so the developer can make the decision to plat under protest and appeal, or to abate the platting process until resolution of the rough proportionality determination. Municipalities should agree to administratively abate a plat application while a developer is appealing to the governing authority. The developer should be willing to acknowledge that the "30 day rule" for deemed plat approval does not apply to a plat subject to a rough proportionality appeal. Once the governing body decides the appeal, the developer may make their election to i) accept the exactions as determined by the governing body, ii) complete the platting process under protest and litigate the appeal, or iii) abate platting pending completion of the litigation of the appeal.

- **What are appropriate appeal procedures for the governing body?**

  The appeal procedures must satisfy constitutional due process, both procedurally and substantively. Since evidence and testimony is a statutory right, any attempt to unreasonably abbreviate the appeal process would expose the municipality to criticism. An adequate time must be provided to permit the developer to fully present their case and arguments. All governing body members who vote should attend all the evidentiary hearings. Listening to a recorded hearing should be acceptable. If the municipality presents evidence and testimony, the developer should be given a right of cross examination. The municipality should start by proving it has satisfied the requirements for a proper rough proportionality determination. If not, then the governing body could direct a verdict for the developer without further testimony. The developer would then present their arguments. If desired, the parties could each be given rebuttal time, but the developer should have the last presentation since it is the appellant, even though the municipality has the burden of proof. After

the close of the evidentiary hearing, the governing body must not take any "informal" evidence or testimony or it will taint the determination. The determination should be in writing, signed by the mayor and delivered within 30 days of the close of the evidentiary hearing. The evidence and testimony (recorded) should be maintained intact as a public record. A court reporter should be permitted if requested by the developer. The determination can have findings of fact.

- **Is the governing body acting like a Board of Adjustment in hearing this appeal?**

  Yes. Since the governing body will be acting as a fact finder, it could adopt rules similar to the municipality's Board of Adjustment.

- **Can the governing body grant a re-hearing?**

  Since the determination is required within 30 days, if the governing body completes its determination process in that period, there is no prohibition of a governing body requiring additional evidence or briefs from the developer and City Staff. If a decision is rendered and a re-hearing can be accommodated within the 30 days, it would not be prohibited.

- **What if no determination is made within the 30 days**?

  The developer could appeal the "non-decision" or seek to mandamus a decision. A non-decision would certainly be deemed a denial by a court hearing an appeal. If the developer does not appeal the decision, or non-decision, within 30 days, the right to appeal lapses.

- **What if the municipality does not retain a professional engineer?**

  Then the governing body would be required to determine that no exaction is permitted since any legal exaction must be compared to a rough proportionality determination that has been approved by a licensed professional engineer.

- **What if the professional engineer does not make an individualized determination (such as simply applies a rule or ordinance of general application)?**

  Then the governing body would be required to determine that no exaction is permitted since *Dolan/Stafford Estates* both clearly required an individualized rough proportionality determination.

- **What if the professional engineer gives an oral opinion to the rough proportionality without detailed substantiation?**

  This would not be best practice, but is not specifically prohibited. As long as the professional engineer is appropriately licensed and retained by the municipality, they may approve the initial rough proportionality determination. The appeal from the governing body determination is provided to protect the developer from an improper initial determination.

- **May the professional engineer actually make the rough proportionality determination rather than approving it?**

  Yes, it seems logical if the professional engineer has the right to approve it, they would have the right to prepare it.

- **May the professional engineer approve the rough proportionality determination with modifications?**

  Yes, it seems logical that if the professional engineer has the right to approve, they also have the right to disapprove or approve with modifications.

- **Who has the burden of proof in an appeal?**

  The municipality.

  Any exaction is deemed a taking *unless the municipality satisfies 2 tests:*

  - Essential nexus- The exaction must meaningfully support a legitimate pubic purpose.
  - Rough Proportionality- The exaction must have a reasonable relationship, both in nature and extent, to the development impact, based on an individualized analysis demonstrating the necessary connections.

  The governing body must carry the burden to prove up these points.

- **Should a developer rely on the fact that the burden of proof is on the municipality?**

  No. There is a practical necessity for the developer to present its own evidence arguing against the rough proportionality determination. The developer must not fail to make a case that the exaction is not roughly proportionate.

- **When does the 30 day appeal period start to run?**

  The statute is not clear, but since the words "final determination" are used, it could be argued that a written order would be required. However, any developer should be safe and work from any oral pronouncement of a decision, even if a written order is intended to follow.

- **What is covered by the "applicable costs", "reasonable attorney's fees", and "expert witness fees"?**

  Clearly, all court costs, all fees of valuation experts and "reasonable" attorneys fees. It is up to the court to determine if contingency-based fees are reasonable in a particular case.

- **Are Impact Fees affected?**

  No. Tex. Loc. Gov't Code Sec. 395 is specifically not diminished or modified.

- **How will courts handle these cases?**

  These cases may be handled like eminent domain cases and a challenge under *Dolan/Stafford Estates*, which would be likely alternative causes of action in an appeal, along with possible substantive due process, equal protection and Civil Rights claims.

- **Is there a benefit to County or District Courts for the appeal?**

  This is an opportunity for the developer to forum shop. The developer should consider that the issues to be reviewed are constitutional in nature, so the typical County Court will not have any experience in them, except to the extent the County Courts handle condemnation matters. In Harris County, all condemnation and inverse condemnation matters are within the sole jurisdiction of the County Courts. Therefore,

rough proportionality appeals could be brought in County Courts in Harris County. In other counties, there may be a strong presumption to file in District Courts, where the judges have a broader range of cases and experience.

IV. Suggested Procedures for Handling Sec. 212.904 Administrative Appeals

The appeal to a governing body of the City's Professional Engineer's rough proportionality determination should be handled similar to an appeal to a Board of Adjustment. The following outlines a suggested process to handle a rough proportionality determination for a disputed (or likely to be disputed) project, assuming no rough proportionality ordinance:

A. Developer Preparation
   a. Determine if the new development will materially impact public infrastructure
      i. Quantify impact of existing development, if any
      ii. Estimate impact of proposed development using industry standards
      iii. Identify potential mitigation options
      iv. Estimate available capacity in public infrastructure
      v. Identify any impact fees and the analysis supporting those impact fees
      vi. Identify any infrastructure reservations
      vii. Quantify the additional impact, taking into consideration the foregoing
   b. Retain Experts
      i. Traffic Consultant
      ii. Land Planner

B. Pre-determination Meeting with City Staff
   a. Determine Staff attitude
   b. Confirm applicable standards, if any
   c. Determine prior practice in similar or analogous situations
   d. Attempt to uncover any political, personal or other impacts or "baggage"
   e. Confirm who will make the initial rough proportionality determination
   f. Determine fees

C. Presentation to City Retained Professional Engineer
   a. Seek meeting before they make rough proportionality determination or review City's determination
   b. Insure correct facts relayed
   c. Confirm standards
   d. Confirm timing
   e. Confirm written report with supporting calculations
   f. Seek opportunity to discuss proposed determination before final

D. Review of City Rough Proportionality Determination
   a. Correct wrong facts, standards or analysis
   b. Consider accepting is "close enough"
E. Informal re-hearing
   a. City Staff
   b. Professional Engineer
F. Filing of Administrative Appeal
   a. Timing- any limit set by City?
   b. Fees
   c. Form
   d. Confirm ability to supplement appeal materials
G. Preparation for Appeal
   a. Assembly of Evidence
   b. Testimony
   c. Use of Court Reporter
   d. Use of Briefs/Binders
   e. Use of Power Point Presentation
   f. Discovery
   g. Offer to swap hearing materials with City Attorney at least 3 days in advance of hearing
   h. Time limits
   i. Use of Closing
H. Appeal Hearing
   a. Be clear, concise and direct
   b. Repeat the critical points such as the City's burden of proof
   c. Be professional, not casual, and always courteous
   d. Don't over lawyer- be practical- this is not a court room!
   e. Focus on fairness
   f. Analogize to other decisions made by the governing body (e.g. Plats, zoning, other admn. appeals, budget, etc.)
I. Public Relations/Public Opinion
   a. Hire PR firm?
   b. Seek Public support for project?
J. Negotiating/Lobbying
   a. No contact with governing body without permission of City Attorney
   b. Meeting with Planning Director and City Attorney- quasi-mediation
   c. Meeting with Mayor and City Attorney- problematic if the Mayor votes, but less so in General Law cities when Mayor does not vote.
K. Period after Close of Evidence
   a. Should be no more evidence
   b. Both parties may be requested to brief an issue
   c. Decision- should be written
   d. Re-hearing- if w/in original 30 day period
L. Judicial Appeal
   a. 30 days from "final determination"- assume oral decision applies
   b. Forum choice of County or District Court

V. How are Municipalities Responding?

A. City of San Antonio

The City of San Antonio amended its Unified Development Code ("**UDC"**) in late 2009 to address rough proportionality. The San Antonio ordinance stands in stark contrast to the Corpus Christi ordinance by using a very detailed, almost mechanical method to determine rough proportionality like an impact fee analysis. Determinations require the participation of a licensed professional engineer are made based on a supply and demand analysis, which utilizes a City-promulgated formula to compare the demand created by the development to the supply required under the City's UDC. If supply exceeds demand, the required improvements are not roughly proportionate and the amount of required mitigation is limited to the amount identified as demand. The process for determining rough proportionality under the San Antonio ordinance is outlined in the flowchart chart attached as "**Exhibit B**". A City-promulgated Rough Proportionality Worksheet and User Guide are also included in this exhibit. The following is a "step-by-step" breakdown of the process.

Step 1: Determine level of analysis required – determined by Peak Hour Trips ("**PHT**").

- PHT Form/Turn Lane Assessment: <76 PHT
  - Complete City-promulgated Rough Proportionality Worksheet and proceed to Step 5.
- "Study Level" Analysis: MDP's and PUD's >500 acres
  - Complete City-promulgated Rough Proportionality Worksheet and proceed to Step 5.
- Traffic Impact Analysis ("**TIA**") and Proportional Mitigation Report: 76 + PHT, other scenarios involving previously completed TIAs
  - Proceed to Step 2.
- Note: Certain exemptions exist, such as developments in infill development zones.

Step 2: If TIA required, complete in accordance with City's requirements ("**Supply**").

- Purpose of TIA: Identify mitigation improvements necessitated by the proposed development.
- Attend scoping meeting with City to determine TIA assumptions.
- Standards:
  - Level of Service ("LOS"):
    - Maintain Minimum LOS C.
    - If already below LOS C:
      - 10% degradation for unsignalized intersections
      - 20% degradation for signalized intersections
    - Exemption if no further mitigation possible.

        - "Non-compliant" intersections may be identified when no reasonable mitigation exists.

    - Turn Lanes:
        - Must show that "all reasonable efforts" have been made to implement required turn lanes.
        - Right turn lane required:
            - Traffic volume of 500 vehicles/day or 50 PHT
            - TXDOT locations, at their option
            - Where unsafe conditions exist
        - Left turn lane required:
            - All of the above situations
            - At all median openings
- Summarize the mitigation improvements identified in the TIA and the approximate cost.

Step 3: Determine maximum mitigation amount ("**Demand**").

- Utilizes City approved methodology to determine a dollar value by multiplying the following:
    - Intensity of development (e.g. – number of units)
    - Number of vehicles (PHT generation rate for applicable peak hour)
    - Trip length (anticipated trip length to/from the development)
    - Cost per vehicle mile (avg. cost per vehicle mi. for City to deliver typical roadway capacity improvement project)

Step 4: Compare Supply (from Step 2) to Demand (from Step 3) using City-promulgated Rough Proportionality Worksheet.

- If Supply is less than or equal to Demand → rough proportionality.
- If Supply is greater than Demand → no rough proportionality and mitigation limited to an amount roughly equal to Demand.

Step 5: Submit to City for final review and approval.

- Submit results to City Engineer at time of development plan / plat / permit submission.
- City Planning and Development Director to make final determination and provide written statement of required exactions.
    - May require additional improvements
    - May require submission of additional information

Step 6: Applicant may appeal final determination.

- Must give notice within 30 days of Director's written statement.
- File appeal and reasoning within 20 working days after notice.
- City to issue response within 30 days after receiving the appeal.
- Hearing between 30 & 60 days from receiving City's response.

- Applicant and Director each allotted one hour to present at the hearing.
- Final determination made by City Council within 30 days of the hearing.

B. City of Houston

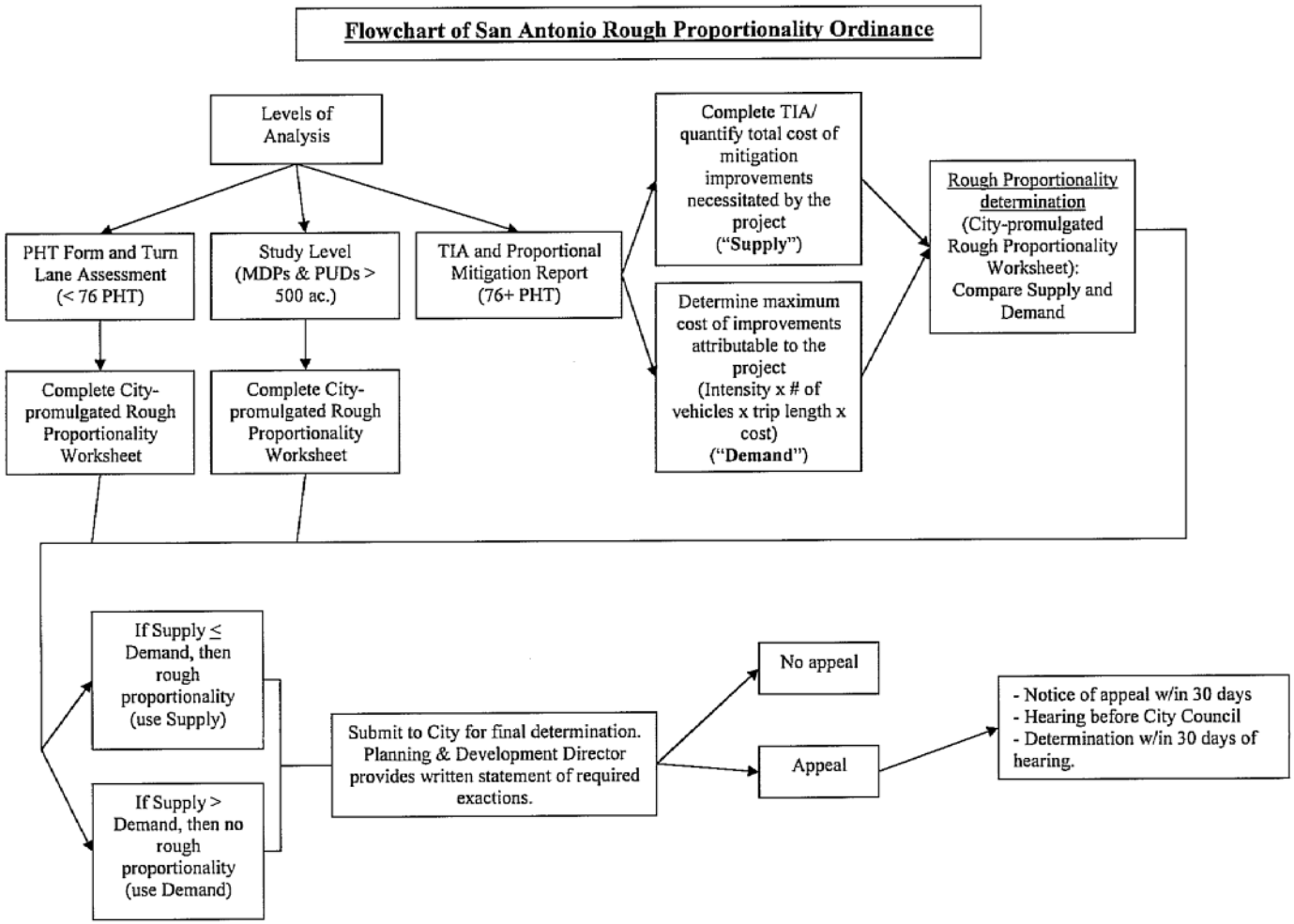
The City of Houston has not adopted an ordinance addressing the rough proportionality standard. However, it has regulations which require a TIA for any new development expected to generate 100 or more new peak hour trips. *See* City of Houston Infrastructure Design Manual, Chapter 15, published July 1, 2009 and available online at http://documents.publicworks.houstontx.gov/document-center/design-manuals/index.htm. Chapter 15 sets forth detailed requirements for a TIA and implements portions of § 40-86 of the City of Houston Code of Ordinances, which is discussed below. Similar to the TIA required by the San Antonio ordinance, the goal of the TIA is to identify potential adverse traffic impacts and propose mitigation options.

Chapter 15 states that the City and the applicant "share" in the responsibility to consider all possible mitigation measures to solve current and future traffic problems. However, applicants must pay for the TIA, proposed mitigation and project re-design, if required, without a rough proportionality determination. Mitigation measures may include, but are not limited to, median openings, turn lanes, traffic calming and traffic signals. Pursuant to Chapter 15, if "existing physical conditions limit available mitigation measures, the [applicant] shall meet with the City Engineer to review probable community impacts and possible mitigation measures." Permitting is not allowed until the City approves the TIA. Appeal is to the Director of Public Works.

Although Chapter 15 does not specifically address the consequence if mitigation is not viewed as adequate by the City, the City recently utilized a 40 year-old driveway ordinance (attached as **"Exhibit C"**) to limit the density of a proposed high rise mixed use project to a specified maximum peak hour trips after the review of a developer submitted TIA and supplemental materials. That ordinance, §40-86 of the City of Houston Code of Ordinances (known as the Driveway Ordinance, and last substantively changed in 1968), permits the City Engineer to determine the number and width of driveways connecting new development and public streets. Any driveway may be prohibited if it would "create an extraordinary traffic hazard or would excessively interfere with the normal use of the street . . . ." In this case, the City determined that, after reviewing the existing traffic in the vicinity and the likely additional traffic from the new development, that the possible mitigation would not adequately address the increased traffic. Then, the City set an acceptable limit on additional traffic from the new development, expressed in peak hour trips, conditioning a building permit on that limitation. The City's position is that any additional traffic would "excessively interfere with the normal use of the street" from which the new project takes access (in this case, a single drive). This decision is analogous to a rough proportionality determination, although the City has presented it as an application of its existing driveway ordinance.

If a municipality limits development to a stated number of peak hour trips, that is an exaction and the municipality must demonstrate rough proportionality via a TIA or similar traffic determination.

Exhibit "B"


Flowchart of San Antonio Rough Proportionality Ordinance
Levels of Analysis
PHT Form and Turn Lane Assessment (< 76 PHT)
Study Level (MDPs & PUDs > 500 ac.)
TIA and Proportional Mitigation Report (76+ PHT)
Complete TIA/ quantify total cost of mitigation improvements necessitated by the project ("Supply")
Determine maximum cost of improvements attributable to the project (Intensity x # of vehicles x trip length x cost) ("Demand")
Rough Proportionality determination (City-promulgated Rough Proportionality Worksheet): Compare Supply and Demand
Complete City-promulgated Rough Proportionality Worksheet
Complete City-promulgated Rough Proportionality Worksheet
If Supply ≤ Demand, then rough proportionality (use Supply)
If Supply > Demand, then no rough proportionality (use Demand)
Submit to City for final determination. Planning & Development Director provides written statement of required exactions.
No appeal
Appeal
- Notice of appeal w/in 30 days
- Hearing before City Council
- Determination w/in 30 days of hearing.

San Antonio Proportionality Worksheet - Basic User Guide

Demand Calculation:

Land Use Type	This drop-down list contains a majority of the land uses within the ITE Trip Generation Manual that are supported by a significant number of historical samples. The land uses on this list are shown in more detail on the 'Land Use Chart' worksheet. If the subject land use for a development is not within the list, or a special trip generation study applies to the land use, a substitute land use with a similar trip generation rate may be substituted.
Development Unit	This column will lookup the development unit applicable to the selected land use; typically this unit is of a type that is known for the development at the time of plat.
Intensity	The intensity is the amount of a development unit for the proposed land use.
Peak Hour Trip Rate	Trip Rate is the trip generation rate and a reduction for pass-by's per the ITE Trip Generation Handbook (as per the 'Land Use Chart' worksheet). When regression equations are used (as per the selection box), the rate is derived from the equation at the given intensity. When this results in a negative value, the rate defers back to the linear method and the cell is shaded blue. For uses without a regression equation, the linear rate is used and the cell is shaded gray.
Internal Capture Rate	This column allows for a reduction in the number of vehicle trips generated by a mixed-use development. For example, a development that includes both residential and retail land uses that are within walking distance of one another may result in a reduction in the number of vehicular trips. This reduction should only be used when following the guidance of the ITE Trip Generation Handbook; or a special study has been prepared for the proposed development supporting an internal capture rate.
Trip Length	Trip length is the distance trips generated by the proposed development travel along the City's roadway network. This value should be based on an examination of the trip characteristics of the proposed development. This trip length can not exceed the average modeled trip length from the San Antonio - Bexar County MPO Regional Model (see 'Land Use Chart - SA / BC MPO Modeled Trip Length' worksheet for these maximum values).; nor can it be below 0.5 miles. It may be possible that the trip lengths to/from land uses within the same development are different (i.e. a gas station may have a lower trip length than a surrounding retail development; or an elementary school may have a lower trip length than a surrounding residential development.)
Demand	The resulting number of vehicle-miles projected to be generated by the land use during the peak hour. A vehicle-mile is one vehicle traveling one mile.
Impact of Development	The impact of the development is determined based on the average cost to provide the necessary vehicular capacity to serve new development. The average cost per vehicle-mile includes construction, engineering, and right-of-way dedication. The calculation of this average value is presented in the 'Summary of Roadway Costs' worksheet.

Supply Calculation:

Roadway Supply:

Roadway Name	The name of the roadway.
Classification	The ultimate classification of the roadway as per the City of San Antonio Major Thoroughfare Plan.
Roadway Length	The length of the roadway being contributed to by the development (e.g. construction, escrow for future construction, and/or dedication for).
Number of Thru Lanes	The number of through lanes provided by the proposed roadway; two-way left-turn lanes and medians increase the capacity of the through lanes, but should not be counted here. The increased capacity provided by two-way left-turn lanes and medians are considered in the capacity of the classification.
Supply Cost Estimate	The cost (construction and engineering) for the proposed facility based on the classification, length, and number of lanes.
Cost Estimate based on Detailed OPCC	This field will default to the Supply Cost Estimate, but can be overridden when a more detailed cost estimate for construction and engineering has been prepared.

Intersection Improvements:

Intersection	The intersection to be improved.
Description of Improvement	A general description of the improvements being performed.
Estimated Cost	The estimated cost to perform the intersection improvements.

Right-of-Way Dedication:

ROW Dedication	The name of the corridor for which right-of-way dedication is required. This value will default to the roadway facilities identified above; although this may be overridden.
General Description of ROW Dedication	A general description of the right-of-way begin dedicated.
Estimated Cost	The estimated value of the the right-of-way being dedicated. This value will default to 15% of the cost of the roadway facilities identified above, although this value may be overridden when appriased values may be available.

Supply / Demand Comparison:

A comparison of the vehicle-miles of supply provided by the development to the demand generated by the development. There are three potential outcomes:

Supply > Demand	In this case, the improvements supplied by the development EXCEED its demand; therefore they are NOT roughly proportional.
Supply = Demand	In this case, the improvements supplied by the development EQUAL its demand, therefore they are roughly proportional.
Supply < Demand	In this case, the demand generated by the development EXCEED its supply; therefore additional improvements may be warranted.

Rough Proportionality Worksheet

for Roadway Infrastructure Improvements
City of San Antonio, Texas

Development Name:

Applicant:

Legal Description (Lot, Block):

Case / Plat Number: Date:

Worksheet Last Updated: 11/16/2009

DEMAND - Traffic Generated by Proposed Development:

Peak Period to Analyze: ☐ AM Peak ☐ PM Peak

Trip Generation Method: ☐ Linear Rates ☐ Regression Equations

Land Use Type[1]:	Development Unit:	Intensity[2]:	Peak Hour Trip Rate[3]:	Internal Capture Rate[4]:	Trip Length[5]: (miles)	Demand: (vehicle-miles)	Impact of Development[6]: ($)

IMPACT OF DEMAND PLACED ON THOROUGHFARE SYSTEM: 0.00 $0

Estimated Average Cost Per Vehicle-Mile[7]: $ 2,291.50

Notes: [1] Per the *ITE Trip Generation Manual*; [2] Intensity is the amount of the development unit that is proposed; [3] Trip Rate is the trip generation rate with a reduction for pass-by's per the *ITE Trip Generation Handbook*. When regression equations are used, the rate is derived from the equation at the given intensity. When this results in a negative value, the rate defers back to the linear method and the cell is shaded blue. For uses without a regression equation, the rate defers back to the linear method and the cell is shaded gray. ITE does not have data available for all land uses during the AM Peak; when data is unavailable the PM Peak Period may be used. [4] Internal Capture should only be used when supported by a traffic study; [5] Trip length shall not (1) exceed the SA/BC MPO Modeled Trip Length, (2) exceed 1.5 miles, or (3) be less than 1.0 mile; [6] Based on an estimated average cost to provide the capacity (construction, engineering, and right-of-way dedication) for one vehicle mile. [7] Estimated average cost per vehicle-mile is derived from the 'Summary of Roadway Costs' worksheet.

Roadway Supply- Off-Site Roads to be Built or Funded by the Applicant:

Roadway Name:	Classification:	Roadway Length: (Feet)	Number of Thru Lanes:	Supply Cost Estimate[7]: ($)	Cost Estimate based on Detailed OPCC[8]: ($)

ROADWAY SUPPLY ADDED TO SYSTEM SUBTOTAL: $0

Intersection Improvements - Specific Improvements to be Built or Funded by the Applicant:

Intersection:	Description of Improvement:	Estimated Cost[9]: ($)

INTERSECTION IMPROVEMENTS ADDED TO SYSTEM SUBTOTAL: $0

Right-of-Way Dedication - ROW to be dedicated by the Applicant:

ROW Dedication:	General Description of ROW Dedication:	Estimated Cost[10]: ($)

RIGHT-OF-WAY DEDICATION SUPPLY ADDED TO SYSTEM SUBTOTAL: $0

TOTAL VALUE OF SUPPLY ADDED TO THOROUGHFARE SYSTEM: $0

Notes: [7] Based on an estimated cost to provide the roadway supply (construction and engineering) based on the classification; [8] Revised cost estimate for construction and engineering based on more detailed preliminary engineering and/or design; [9] Estimated intersection improvement costs; [10] Cost of right-of-way initially estimated to be 15% of roadway construction and engineering; this value can be overwritten based on appraised values as needed.

SUPPLY / DEMAND COMPARISON:

A comparison of the capacity provided by a development against the traffic impacts of the proposed development.

	Cost	Comparison
TOTAL IMPACT OF DEMAND PLACED ON THOROUGHFARE SYSTEM:	$0	
TOTAL VALUE OF CAPACITY (SUPPLY) ADDED TO THOROUGHFARE SYSTEM:	$0	

Note: Minimum Standards for access to and from a development may supersede the results of this analysis.

San Antonio Proportionality Worksheet - Land Use Chart

Land Use Category	ITE Land Use Code	Development Unit	Trip Gen Rate (AM)	Trip Gen Rate (PM)	Fitted Curve Equation (AM)	Fitted Curve Equation (PM)	Pass-by Rate	AM Peak Hour Trip Rate	PM Peak Hour Trip Rate	SA/BC MPO Modeled Trip Length	Modeled Trip Length Source*	Land Use Description
PORT AND TERMINAL												
Truck Terminal	030	Acre	7.28	6.56	n/a	n/a		7.28	6.56	10.02	c	Point of good transfer between trucks or between trucks and rail
INDUSTRIAL												
General Light Industrial	110	1,000 SF GFA	0.92	0.97	T = 1.18(X) - 89.28	T = 1.43(X) - 157.36		0.92	0.97	10.02	c	Emphasis on activities other than manufacturing; typically employing fewer than 500 workers
General Heavy Industrial	120	1,000 SF GFA	0.51	0.68	n/a	n/a		0.51	0.68	10.02	c	Primary activity is conversion of raw materials or parts into finished products
Industrial Park	130	1,000 SF GFA	0.84	0.86	Ln(T) = 0.77 Ln(X) + 1.00	T = 0.77(X) + 42.11		0.84	0.86	10.02	c	Area containing a number of industries or related facilities
Warehousing	150	1,000 SF GFA	0.30	0.32	Ln(T) = 0.85 Ln(X) +1.89	Ln(T) = 0.84 Ln(X) + 1.14		0.30	0.32	5.58	a	Devoted to storage of materials but may included office and maintenance areas
Mini-Warehouse	151	1,000 SF GFA	0.15	0.26	n/a	Ln(T) = 1.02 Ln(X) - 1.40		0.15	0.26	5.58	a	Facilities with a number of units rented to others for the storage of goods
RESIDENTIAL												
Single-Family Detached Housing	210	Dwelling Unit	0.75	1.01	T = 0.70(X) +9.74	Ln(T) = 0.90 Ln(X) + .51		0.75	1.01	10.32	a	Single-family detached homes on individual lots
Apartment/Multi-family	220	Dwelling Unit	0.51	0.62	T = 0.49(X) + 3.73	T = 0.55(X) + 17.65		0.51	0.62	10.32	a	At least 4 rental dwelling units per building
Residential Condominium/Townhome	230	Dwelling Unit	0.44	0.52	Ln(T) = 0.80 Ln(X) + 0.26	Ln(T) = 0.82 Ln(X) + .32		0.44	0.52	10.32	a	Single-family ownership units that have at least one other single-family owned unit within the same building
Mobile Home Park	240	Dwelling Unit	0.44	0.59	Ln(T) = 0.84Ln(X) + 0.06	T = 0.57(X) + 2.06		0.44	0.59	10.32	a	Typically installed on permanent foundations; may have community facilities (e.g. swimming pools, laundry)
Assisted Living	254	Beds	0.14	0.22	n/a	n/a		0.14	0.22	10.32	a	Residential settings that provide either routine general protective oversight or assistance with activities.
LODGING												
Hotel	310	Room	0.56	0.59	Ln(T) = 1.24Ln(X) - 2.0	n/a		0.56	0.59	5.58	a	Lodging facilities that typically have on-site restaurants, lounges, meeting and/or banquet rooms, or other retail shops and services
Motel / Other Lodging Facilities	320	Room	0.45	0.47	Ln(T) = 0.92 Ln(X) - 0.46	T = 0.94(X) - 0.51		0.45	0.47	5.58	a	Lodging facilities that may have small on-site restaurant or buffet area but little or no meeting space
RECREATIONAL												
Driving Range	432	Tee	0.00	1.25	n/a	n/a		0.00	1.25	5.58	a	Facilities with driving tees for practice; may provide individual or group lessons; may have prop shop and/or refreshment facilities
Golf Course	430	Acre	0.21	0.30	Ln (T) = 0.83 Ln(X) +0.40	T = 0.13(X) + 31.30		0.21	0.30	5.58	a	May include municipal courses and private country clubs; may have driving ranges, pro shops, and restaurant/banquet facilities
Health/Rec. Clubs and Facilities	495	1,000 SF GFA	1.82	1.45	n/a	Ln(T) = 0.58 Ln(X) + 2.21		1.82	1.45	5.58	a	Category includes racquet clubs, health/fitness clubs, can include facilities such as YMCA's
Ice Rink	465	1,000 SF GFA	0.00	2.36	n/a	n/a		0.00	2.36	5.58	a	Rinks for ice skating and related sports; may contain spectator areas and refreshment facilities
Miniature Golf	431	Hole	0.00	0.33	n/a	n/a		0.00	0.33	5.58	a	One or more individual putting courses; category should not be used when part of a larger entertainment center(with batting cages, video games, etc)
Multiplex Movie Theater	445	Screens	0.00	13.84	n/a	n/a		0.00	13.84	5.58	a	Movie theater with audience seating, minimum of ten screens, lobby, and refreshment area.
Racquet / Tennis Club	491	Court	1.31	3.35	T = 2.01(X) - 7.55	n/a		1.31	3.35	5.58	a	Indoor or outdoor facilities specifically designed for playing tennis
INSTITUTIONAL												
Church	560	1,000 SF GFA	0.56	0.55	n/a	T = 0.34(X) + 5.24		0.56	0.55	6.00	b	Churches and houses of worship
Day Care Center	565	1,000 SF GFA	12.26	12.46	n/a	n/a	30%	8.58	8.72	4.20	c	Generally includes facilities for care of pre-school aged children, generally includes classrooms, offices, eating areas, and playgrounds
Primary/Middle School (1-8)	522	Students	0.54	0.16	n.a	n/a		0.54	0.16	4.41	a	
High School (9-12)	530	Students	0.42	0.13	n/a	n/a		0.42	0.13	4.41	a	
Jr / Community College	540	Students	0.12	0.12	Ln(T) = 0.84 Ln(X) + 1.31	Ln(T) = 0.69 Ln(X) + 2.26		0.12	0.12	11.01	a	
University / College	550	Students	0.21	0.21	T = 0.21(X) - 68.14	T = 0.19(X) + 118.59		0.21	0.21	11.01	a	
MEDICAL												
Clinic	630	1,000 SF GFA	0.00	5.18	n/a	n/a		0.00	5.18	7.55	c	Facilities with limited diagnostic and outpatient care
Hospital	610	Beds	1.14	1.31	T = 1.33(X) -60.91	T = 1.38(X) - 21.17		1.14	1.31	7.55	c	Medical and surgical facilities with overnight accommodations
Nursing Home	620	Beds	0.17	0.22	n/a	n/a		0.17	0.22	7.55	c	Rest and convalescent homes with residents who do little or no driving
OFFICE												
Corporate Headquarters Building	714	1,000 SF GFA	1.40	1.40	Ln(T) = 0.95 Ln(X) + 0.66	Ln(T) = 0.87 Ln(X) + 1.01		1.40	1.40	10.92	c	Office building housing corporate headquarters of a single company or organization
General Office Building	710	1,000 SF GFA	1.55	1.49	Ln(T) = 0.80 Ln(X) + 1.55	T = 1.12(X) + 78.81		1.55	1.49	10.92	c	Office buildings which house multiple tenants
Medical/Dental Office	720	1,000 SF GFA	2.30	3.46	n/a	Ln(T) = 0.88 Ln(X) + 1.56		2.30	3.46	10.92	c	Multi-tenant building with offices for physicians and/or dentists
Single Tenant Office Building	715	1,000 SF GFA	1.80	1.73	T = 1.08(X) + 22.94	T = 1.52(X) + 34.80		1.80	1.73	10.92	c	Single tenant office buildings other than corporate headquarters
Office/Business Park	750	1,000 SF GFA	1.71	1.48	Ln(T) = 1.37 Ln(X) +124.36	T = 1.22(X) + 95.63		1.71	1.48	10.02	c	Office buildings (typically low-rise) in a campus setting and served by a common roadway system
COMMERCIAL												
AUTOMOBILE RELATED												
Automobile Care Center	942	1,000 SF GFA	2.94	3.36	n/a	Ln(T) = 0.84 Ln(X) + 1.33	40%	1.76	2.02	5.58	a	Automobile repair and servicing including stereo installations and upholstering
Automobile Parts Sales	843	1,000 SF GFA	2.21	5.99	T = 2.79(X) - 4.34	T = 7.07(X) - 14.66	43%	1.26	3.41	5.58	a	Retail sale of auto parts but no on-site vehicle repair
Gasoline/Service Station	944	Fueling Position	12.10	13.87	T = 10.27(X) + 13.99	n/a	42%	7.06	8.04	1.20	c	Gasoline sales without convenience store or car wash; may include repair
Gasoline/Service Station w/ Conv Market	945	Fueling Position	10.16	13.38	n/a	n/a	56%	4.47	5.89	1.20	c	Gasoline sales with convenience store where the primary business is gasoline sales
Service Station w/ Market and Car Wash	946	Fueling Position	11.93	13.94	n/a	n/a	56%	5.25	6.13	1.20	c	Gasoline sales with convenience store and car washes where the primary business is gasoline sales
New and Used Car Sales	841	1,000 SF GFA	2.03	2.59	n/a	T = 1.74(X) + 26.91	20%	1.02	2.07	5.58	a	New car dealerships, typically with automobile servicing, part sales, and used car sales
Quick Lubrication Vehicle Center	941	Service Position	0.00	5.19	n/a	Ln(T) = 1.44 Ln(X) + 1.13	40%	0.00	3.11	5.58	a	Primary business is to perform oil changes and fluid/filter changes with other repair services not provided
Self-Service Car Wash	947	Stall	0.00	5.54	n/a	n/a	40%	0.00	3.32	1.20	c	Has stalls for driver to park and wash the vehicle
Tire Store	848	1,000 SF GFA	2.89	4.15	n/a	n/a	28%	2.08	2.99	5.58	a	Primary business is sales and installation of tires; usually do not have large storage or warehouse area
DINING												
Fast Food Restaurant with Drive-Thru	934	1,000 SF GFA	49.35	33.84	n/a	n/a	50%	24.68	16.92	4.70	c	High-turnover fast food restaurant for carry-out and eat-in customers with a drive-thru window
Fast Food Restaurant without Drive-Thru	933	1,000 SF GFA	43.87	29.15	n/a	n/a	50%	21.94	13.08	4.70	c	High-turnover fast food restaurant for carry-out and eat-in customers, but without a drive-thru window
High Turnover (Sit-Down) Restaurant	932	1,000 SF GFA	11.52	11.15	n/a	n/a	43%	6.57	6.36	4.70	c	Restaurants with turnover rates less than one hour; typically includes moderately-priced chain restaurants
Sit Down Restaurant	931	1,000 SF GFA	8.81	7.49	n/a	n/a	44%	5.45	4.19	4.70	c	Restaurants with turnover rates of one hour or longer; typically require reservations
OTHER RETAIL												
Free-Standing Retail Store	815	1,000 SF GFA	1.06	3.00	n/a	n/a	30%	0.74	3.50	5.58	a	Category includes free-standing stores with off-street parking; typically offer a variety of products and services with long store hours
Garden Center (Nursery)	817	1,000 SF GFA	1.31	3.80	n/a	n/a	30%	0.92	2.66	5.58	a	Building with a yard of planting or landscape stock; may have office, storage, shipping or greenhouse facilities
Home Improvement Superstore	862	1,000 SF GFA	1.28	2.37	n/a	n/a	48%	0.66	1.23	5.58	a	Warehouse-type facilities offering a large variety of products and services including lumber, tool, paint, lighting, and fixtures, among other items.
Pharmacy/Drugstore	881	1,000 SF GFA	2.66	10.35	n/a	n/a	49%	1.36	5.28	5.58	a	Includes facilities with and without drive-thru windows
Shopping Center	820	1,000 SF GFA	1.00	3.73	Ln(T) = 0.59 Ln(X) + 2.32	Ln(T) = 0.67 Ln(X) + 3.37	34%	0.66	2.46	5.58	a	Integrated group of commercial establishments; planning, owned, and managed as a unit
Supermarket	850	1,000 SF GFA	3.60	10.50	n/a	Ln(T) = 0.81 Ln(X) + 3.95	30%	2.30	8.72	5.58	a	Primary business is sale of groceries, food, and household cleaning items; may include photo, pharmacy, video rental, and/or ATM.
Toy/Children's Superstore	864	1,000 SF GFA	0.00	4.90	n/a	n/a	30%	0.00	3.40	5.58	a	Businesses specializing in child-oriented merchandise
Video Rental Store	896	1,000 SF GFA	0.00	13.60	n/a	Ln(T) = 0.93 Ln(X) + 2.61	50%	0.00	0.80	5.58	a	Businesses specializing in retail of movies and games
SERVICES												
Bank (Walk-In)	911	1,000 SF GFA	0.00	12.13	n/a	n/a	40%	0.00	7.28	3.30	c	Bank without drive-thru lanes
Bank (Drive-In)	912	Drive-In Lanes	9.44	27.41	n/a	n/a	47%	5.00	14.53	3.30	c	Bank with drive-thru lanes

* Model Trip Length Source: a = SA / BC MPO Modeled Trip Length; b = 2001 National Household Travel Survey; c = Kimley-Horn estimated values based on SA / BC MPO values, the 2001 NHTS, and similar Texas metropolitan area data.

Exhibit "C"

DRIVEWAY PERMIT ORDINANCE

Sec. 40-86. Permit for construction of driveways.

(a) No person shall construct, or cause to be constructed, any driveway connecting private property with a public street without first obtaining a written permit therefore from the city engineer.

(b) Upon receipt of an application for a driveway permit, the city engineer shall make a determination as to whether the driveway applied for is necessary to provide reasonable access to the private property consistent with the safety and convenience of the public, taking into account the following matters:

(1) The nature and volume of traffic on the street on which the private property abuts.

(2) The dimensions and type of construction of the street on which the private property abuts.

(3) The effect that the passage of vehicles to and from the private property will have on the safety of the traveling public and on the movement of traffic in the street to which the driveway connects.

(4) The use to be made of the private property.

(5) The dimensions of the private property, and the type and location of improvements thereon or to be placed thereon.

(6) The extent of the access which the private property has or will have to other public streets, if any.

(c) After making such determination, the city engineer shall grant or refuse the application in accordance with the following rules:

(1) He shall refuse to issue a permit for a single driveway opening unless it shall have been found to be necessary for reasonable access.

(2) If the application is for more than one driveway opening into the same premises, he shall allow no more such openings than the minimum number necessary to provide reasonable access.

(3) He shall refuse to issue a permit for any driveway opening as to which it has been found that the proposed use of the driveway would create an extraordinary traffic hazard or would excessively interfere with the normal use of the street right-of-way.

(4) Every permit issued shall specify the maximum width of the driveway opening for which the permit is granted and such width shall be no greater than the minimum necessary to provide reasonable access.

(5) If a permit is granted for more than one driveway opening into the same premises, it shall specify that each such opening shall be separated from the others by a distance of not less than 20 feet, and that an upright curb must be constructed along the edge of the area of separation next to the improved portion of the street.