

## Rough Proportionality and the City of Austin

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### Introduction

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Recently, there's been a lot of time spent and ink spilled attempting to clarify and understand the potential "change" in the City of Austin from the existing mechanisms of collecting fees for the transportation impacts due to new development. For years, cities throughout Texas have had a rough proportionality standard in their respective ordinances, which have been enforced to various degrees.

Rough proportionality establishes a maximum cost of the additional traffic to the surrounding transportation system. Cities maintain that developers should pay roughly that amount to the jurisdiction to fund either specific improvements or future unidentified improvements. Developers maintain that cities can hold them responsible for no more than the rough proportionality standard.

This paper lays out the case law that created these standards, how these calculations are (and should be) completed for individual development projects, and how the City of Austin has approached this change.

### Case Law

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Two Supreme Court cases have governed land use exactions and shaped impact fee policy throughout the country. These exactions have come in the form of both land and fees, and the judgments included in this section apply to both types of exactions.

The case of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) contested a dispute between the Commission and a family owning beachfront property in California. The Commission conditioned a redevelopment of the Nollan residential dwelling with an easement permitting public access to the beach adjacent to their home. The Court agreed with the Nollan family, who found no relationship between the request for a new structure and the easement requirement.

As a result of this case, the Court determined that a public jurisdiction could demand an easement as a condition of approval for approving a development permit, and that no compensation would be required for the easement, but that this could only be done provided that the easement would be in the best of interest of the jurisdiction, and that without the easement, the jurisdiction would have grounds for denying the development. This created a need for a "nexus" between permit conditions and government interests.

In the case of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), a retail store owner wished to expand the footprint of their store, which the City would permit provided the owner provide land for a new bicycle path and storm drainage. The Court found that while the condition did advance the interests of the government, the condition was not proportionate to the impacts of the project. As such, the case set a standard that the exaction must be “roughly proportional” to the impact of the proposed development. In order to determine the proportionality of the exactions, jurisdictions would not need to make exact calculations, but would need to make individualized determinations of the impact of each proposed development.

Specific to the Supreme Court of Texas, the case of *Town of Flower Mound, Texas v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (2004) examined a requirement by the town for the developer to improve adjacent streets providing access to the Project to meet Town standards. The developer rebuilt the road in order to move forward with its development, but later sued the Town for the recovery of its costs. The court found that the town failed to show that the improvements bore any relationship to the impact of the project or on the town’s roadway system.

### **Planning Transportation Networks**

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Often, developers have paid for only their share of specific improvements identified in transportation impact studies; this manner of collecting for improvements can miss the larger picture regarding the surrounding transportation network and leave identified improvements unfunded and often unbuilt. Transportation impact studies are also limited to the extent of the studied area and do not consider the full impacts of the project on the transportation system.

If developers pay for only their fair share of specific improvements, it can be difficult for jurisdictions to guarantee the remaining funds needed to construct those improvements before developments are occupied and begin generating traffic. This has certainly been the case in Austin for at least the past decade.

Jurisdictions can request that an improvement be fully constructed by a developer instead of collecting the fair share cost of a specific improvement; this is typically done in lieu of payments for other improvements (and this should also be done only if the cost of that improvement is roughly proportional to the impact of the development). This provides security for the governing jurisdiction that improvements are built.

Developers are not under legal obligation within Texas to comply with these requests, though many do comply to improve the communities they are developing within, to show to their new neighbors and other stakeholders their willingness to make improvements, and to help expedite review processes (i.e. eliminate negotiations with the reviewing jurisdiction).

Improvements offered by the developer may include Right-of-Way (ROW) contributions to future improvements or the cost of construction of physical improvements, among others. Collected funds are required to be spent within a certain amount of time on a specifically identified set of transportation improvements; if not, the collected fees are legally required to be refunded within a certain amount of time.

By enforcing rough proportionality, jurisdictions are effectively establishing a cap on an impact fee per development, but are also not tying payments to any specific projects. Under this methodology, some developments can pay nothing if they are not found to directly impact existing facilities, while others foot the bill for significant improvements simply based on their location.

As an alternative, some jurisdictions require payment of impact fees, in addition to determining the appropriateness of improvements specific to the development identified in impact studies. These impact

fees are typically based on Capital Improvement Programs (CIPs) and other long-term planning documents that determine the transportation needs of the surrounding area. Fees are then collected from every development, regardless of their specific impacts.

Impact fee programs are by their definition roughly proportional, and many jurisdictions allow for a credit for the cost of any specific improvements offered by developers or required by the jurisdictions against the impact fee payment.

Under this method of fee collection, jurisdictions take a larger view of their transportation network and can ensure that improvements are consistent with all planning documents applicable, including bicycle and pedestrian master plans, transit plans, and specific area or corridor plans. This also ensures that jurisdictions ensure that their transportation network grows per their local vision and in proportion to their land uses, allowing the transportation network to effectively serve both existing and future citizens and guests.

### **Rough Proportionality and Impact Fee Calculations**

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Impact fees and rough proportionality parameters are determined from the cost of the anticipated projects and the anticipated proportion of the traffic due to future growth. This is an important point – these fees should only include the proportion of the cost that is attributable to growth. It cannot be used to maintain existing facilities or alleviate existing issues.

These fees are then whittled down to a cost per unit, where they represent maximums that can be charged to development as the cost of maintaining the transportation system on account of future growth.

Fees are subject to jurisdiction approval and a public review process. Fees can be per land use unit (square foot or dwelling unit) or per vehicle trip generated by the development.

Both the City of Austin and City of San Antonio have calculated their fees as a cost per vehicle trip generated (more than \$3,400 per peak hour vehicle trip). A 300-unit apartment complex that generates almost 200 peak hour trips could be found responsible for more than \$650,000 worth of improvements. This method of calculation for Project transportation network responsibility makes the trip generation step of a transportation impact analysis all the more important.

### **The Subtleties of Trip Generation**

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Overestimating trips generated by land uses can lead to excessive traffic impacts and related mitigation that can discourage development of otherwise desirable projects, or transportation that is not sized to the setting of the development (leading to inappropriately-large intersections like that shown below). There are many variables to consider for trip generation.

Trip generation estimates for specific land uses are traditionally generated from rates included in the most current version of a handbook entitled *Trip Generation*, produced by the Institute of Transportation Engineers (ITE). Data collected to develop these rates have typically been collected at suburban, single-use, freestanding sites. These defining characteristics limit their applicability to mixed-use development projects, which, given land use mix, design features, and setting, could include characteristics that influence travel behavior differently from typical single-use suburban developments.

Thus, traditional data and methodologies, such as ITE, would not accurately estimate the Project vehicle trip generation for mixed-use development, developments in more dense, urban areas, or developments with

significant opportunity to use alternative modes. A 2011 study found that trip generation at mixed use developments would generate 49 percent more traffic if they were distributed among single-use site in suburban settings, and that the ITE methodology would overestimate peak hour traffic by an average of 35 percent.

Factors that could influence trip generation include:

- Density of development
- Diversity of uses within the development
- Design (including connectivity and walkability)
- Destinations nearby (adjacent land uses)
- Distance to non-auto modes
- Development scale
- Demographic profile

As mentioned, using ITE rates without any adjustments almost assuredly does not take into consideration the context of the development. As a result of the factors listed above, some trips that would otherwise be external vehicle trips may stay internal to the site, or alternative modes may be more attractive for trips within the project site and to surrounding complementary land uses.

Other methodologies exist to develop trip generation estimates. One such methodology was developed from a national study sponsored by the US Environmental Protection Agency (EPA). Travel survey data was gathered from 239 mixed-use developments in six major metropolitan regions, and correlated with the characteristics of the sites and their surroundings. Characteristics listed earlier were related statistically to trip behavior observed at the study development sites, which produced equations allowing better predictions for external vehicle trip reduction as a function of the mixed-use development characteristics. These equations have been approved by the EPA, peer-reviewed by several planning journals and boards, recommended by several planning associations, and used successfully in many certified environmental documents.

These equations have been used for urban, suburban, and exurban mixed-use projects. Some development projects in dense, urban areas have shown reductions of 30 to 50 percent. Mixed-use development projects in suburban areas more often show reductions between 10 and 20 percent. Single-use projects without transit connections, or mixed-use projects without complementary land uses, often show very low reductions.

Many transportation planners and traffic engineers will use the standard ITE rates without questioning their appropriateness. It is important that these planners and engineers take the time to understand the specifics of a project, determine the appropriate trip generation methodology, and compile compelling documentation to support their estimates. Overestimating trip generation can lead to excessively conservative traffic analysis and additional capacity for vehicles that is neither warranted nor consistent with a jurisdiction's vision for their transportation network. Experience helping jurisdictional reviewers understand the subtleties of the advanced methodologies is just as important as technical ability.

At more than \$3,400 per vehicle trip, it is usually well worth the investment to have traffic engineers do the due diligence on individual projects and support all trip generation assumptions, rather than using industry templates.

## City of Austin Standards and Policies

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The City of Austin requires transportation-related improvements from developers as a condition of development approval. The border street policy requires dedication of ROW and/or construction or fees in lieu for streets adjoining proposed development. Per the City's *Rough Proportionality Determination Procedures (August 2015)*, "the amount of ROW and street construction is determined by the adopted thoroughfare criteria in the City of Austin's Austin Metropolitan Area Transportation Plan (AMATP or Transportation Plan) and Transportation Criteria Manual (TCM), an approved collector plan, or an established capital improvement project."

The traffic mitigation policy "authorizes staff to require ROW, construction, and/or fees in lieu to offset the effects generated by development...identified by a Neighborhood Traffic Analysis (NTA) or a Traffic Impact Analysis (TIA)."

The document states that if the requirements are more than five percent higher than the estimated demand generated by the proposed project, they are not roughly proportional and need to be adjusted to meet the rough proportionality standard. Requirements that total less than the rough proportionality demand calculation must still meet the nexus established above in the two City policies. The rough proportionality demand calculation is not a total by which the City can require additional exactions that do not meet the nexus established above. The same document states that the impact of development on the transportation network:

*...is based on the transportation demand in vehicle-miles and the estimated average cost per vehicle mile of roadway in Austin, including costs for construction, engineering and administration, and right-of-way. The estimated average cost per vehicle-mile is calculated for each roadway classification on the Summary of Roadway Costs tab."*

Since this has been introduced, the rough proportionality standard has been enforced to different degrees on development projects. Moving forward, the City will need to be more transparent about how the existing rough proportionality fee per vehicle trip has been calculated, for what collected fees will be used, and what they intend to construct in the future.

The City's calculation for the cost of a vehicle-mile is based on roadway capacities for arterials only. It is also based on the percentage of the existing roadway network that each type of arterial comprises, which allows the City to calculate an average cost per vehicle-mile. There is no clear nexus between the costs of existing roadways and future growth. There is no nexus to the planning documents the City cites in their border street or traffic mitigation policies. How many more arterials is the City of Austin proposing to construct in the future?

New development cannot legally be required to fix issues created by past land use and transportation planning decisions. The City's own presentation to the Mobility Committee in August of 2015 indicates the need for a CIP and a transportation impact fee to effectively enforce this standard. The title of the presentation was "Paying for Growth." Why is the rough proportionality calculation based on costs for infrastructure that has already been built?

The transportation planning and traffic engineering practice has become significantly more savvy in the last five to ten years – more data-driven, more nuanced in its understanding of how people and goods move. We should Imagine Austin with state-of-the-practice solutions for the land use and transportation issues the City faces.