**Oklahoma Law Review**

Volume 66 | Number 1

2013

# Spoiled Broth? Section 895 of the Oklahoma Economic Development Pooled Finances Act Bounces between Committees and Co-opts Terms to defend your New Back Yard

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# Spoiled Broth? Section 895 of the Oklahoma Economic Development Pooled Finances Act Bounces Between Committees and Co-opts Terms to Defend Your New Back Yard

## *I. Introduction*

Development fees (also called impact fees) have traditionally been utilized by municipalities to address infrastructure costs associated with new development, and reflect the burden that additional development imposes on municipal infrastructure.[1] Municipal development fees are often assessed through a conferred taxation power from the state or tied to a municipality's zoning power.[2] Specific to this comment, section 895 of the Oklahoma Economic Development Pooled Finances Act (section 895) addresses development fees assessed through a zoning or permitting power.[3] Though development fees have historically been utilized to offset the direct costs associated with new development (for example, water and wastewater service, police and fire protection, or roadways), contemporarily many municipalities that occupy large land areas have turned to development fees to address city sprawl.[4] These municipalities have ratcheted up such fees in attempts to encourage density in new construction, arguing that new developments should pay for their actual costs to the municipalities.[5] At a minimum, development fees serve to ensure that new development absorbs all infrastructure costs associated with the construction, rather than passing costs to the already existing community.[6]

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1. 1 JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT § 6:31 (2d ed. 2012). The term "development fee" will be used in this comment as used in 62 OKLA. STAT. § 895 (2011).

2. Benjamin S. Kingsley, Note, *Making It Easy to Be Green: Using Impact Fees to Encourage Green Building*, 83 N.Y.U. L. REV. 532, 553 (2008).

3. 62 OKLA. STAT. § 895(A)(1).

4. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 180-82 (2006).

5. *See* Richard L. Settle & Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867 (1993) (surveying the State of Washington's statutory growth management scheme).

6. David L. Callies & Malcolm Grant, *Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements*, 23 URB. LAW. 221, 222-23 (1991) ("Under the schemes for 'impact fees,' now operated in several states, the developer is charged a fee that is calculated in accordance with the type, scale and location of the proposed development and is applied to mitigate its impact

Oklahoma Senate Bill 708 establishes the standards Oklahoma's municipalities must meet in adopting development fees.[7] This comment focuses on the constitutional requirements for such fees, the judicial background in Oklahoma, and changes the bill makes in this field. This comment also attempts to reconcile seemingly discordant portions of the bill, and predict how a court tasked with analyzing the statute would rule.

Part II of this comment presents the statute itself and pinpoints issues within the text, focusing on subsections (B) and (K). In contrast to the majority of the bill, which focuses on matters of administration, these subsections set out the standards that courts must use to determine the propriety of an enacted development fee. Part III presents the federal constitutional background; specifically, this section focuses on *Nollan v. California Coastal Commission*[8] and *Dolan v. City of Tigard*.[9] Though these cases addressed property exactions, their holdings have been extended in many jurisdictions to development fees. Part IV addresses state and federal interpretations of the constitutional framework, with an appropriate focus on Oklahoma courts. This section highlights the commonalities (though they are few) between the *Nollan*/*Dolan* line of cases and Oklahoma case law. These similarities will color the manner in which the statute must be interpreted. Part V presents statutory construction and interpretive issues through the appropriate lens of the foundational case law. As a relevant aside, this section also addresses the manner in which Oklahoma maintains legislative history and its effects on statutory interpretation. Part VI notes other minor but potentially serious issues in reconciling the text, with a focus on the definitions provided in the beginning of the text and the method through which development fees are assessed in the statute.

### *II. Background and History, Oklahoma City as an Example*

Oklahoma City is colossal. By land area, it is the third-largest city in the United States among cities with populations of at least 100,000 citizens.[10]

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on the community. A properly designed fees system attempts to allocate infrastructure costs equitably between developers in accordance with an adopted schedule of capital facilities, and to offer a guarantee that the infrastructure will actually be provided within a specified time, or the fee returned.").

7. 62 OKLA. STAT. § 895.

8. 483 U.S. 825 (1987).

9. 512 U.S. 374 (1994).

10. *Cities with 100,000 or More Population in 2000 Ranked by Land Area*, U.S. CENSUS BUREAU, http://www.census.gov/statab/ccdb/cit1010r.txt (last visited Aug. 18, 2013).

Its more than 600 square miles, however, are home to only around half of a million citizens.[11] As a consequence, the cost of municipal infrastructure and public service in Oklahoma City is much higher per capita than in cities of similar population with higher population densities. In 2003, the City of Oklahoma City unsuccessfully proposed increasing development fees to curtail municipal layoffs;[12] in 2008, the city again proposed levying additional development fees, estimating that each new residential unit placed a $4856 burden on the municipality's infrastructure.[13] Though the movement toward increasing development fees has not gained traction, perhaps due to a downturn in residential construction[14] or a concern that new development would move to neighboring municipalities,[15] Senate Bill 708 passed the Oklahoma legislature in May 2011 and was codified at title 62, section 895 of the Oklahoma Statutes.[16]

Despite the ease of its passage, codification of the statute was not an efficient process. It is notable that the bill moved through numerous committees prior to its codification, which is perhaps the cause of the internal conflicts noted in this comment.[17] Chronologically, the bill was referred to the General Government Committee; referred to the Judiciary Committee; referred to the Economic Development, Tourism, and Financial Services Committee; again referred to the Judiciary Committee; and again referred to the Economic Development, Tourism, and Financial Services Committee.[18] In all, there were eight iterations of the bill.[19] Indeed, many legislators had input during the course of the bill's passage.

Though the measure was criticized by some Oklahoma state senators as taking away "local control," the bill passed the Oklahoma Senate handily.[20]

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11. *About Oklahoma City*, CITY OF OKLA. CITY, http://www.okc.gov/about/index.html (last visited Aug. 18, 2013).

12. Bryan Dean, *Raising Building Fees Touted as a Way for City to Avoid Cutting Jobs*, OKLAHOMAN, May 14, 2003, at B1.

13. Richard Mize, *City Mulls Construction Fee*, OKLAHOMAN, Nov. 22, 2008, at B6.

14. *Id.*

15. Bryan Dean, *How to Pay for City Growth? Builder Fees, Council Told*, OKLAHOMAN, Apr. 18, 2007, at A12.

16. *See* S.B. 708, 2011 Leg., 53rd Sess. (Okla. 2011); *see also* 62 OKLA. STAT. § 895 (2011).

17. State of Oklahoma History of a Bill: Measure Number(s) SB 708, 2012 Regular Session (Nov. 7, 2011) [hereinafter History of a Bill: SB708] (on file with the *Oklahoma Law Review*).

18. *Id.*

19. *Id.*

20. *Development Impact Fee Bill Heads to Governor*, 23RD & LINCOLN (May 3, 2011), http://jrlr.net/23rd-and-Lincoln/2011/05/03/development-impact-fee-bill-heads-to-governor/. The

Certainly, developers wished to maintain the low development fees in the State of Oklahoma as compared to other jurisdictions.[21] And, though no immediate threat loomed on the horizon, the bill may turn out to be a prescient maneuver by the construction community as curtailment of city sprawl and equitable division of infrastructure costs gain support in Oklahoma City.[22] As the gap widens between city expenses and revenue, as is projected, Oklahoma City may have to look beyond development fees to address growing costs.[23]

## *III. Section 895: The Text and Its Issues*

Oklahoma Senate Bill 708 of the first session of the fifty-third legislature (that is, section 895) was first read on February 7, 2011,[24] and was signed into law on May 10, 2011, by Governor Mary Fallin.[25]

### *A. A Brief Survey of the Text*

The text of the statute is exhaustive, but it will be advantageous to have at least a flavor of the measure in the reading of this comment. The statute begins by mandating that municipalities that adopt development fees comply with the statute, and it continues with statutory definitions.[26] The purposive definition of "development fee" is particularly worth noting; in full, the definition states:

> "Development fee" means any payment of money imposed, in whole or in part, as a condition of approval of any building permit, plat approval, or zoning change, to the extent the fee is to

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Senate passed the House amendments with thirty-four in favor and only eight opposed (six senators were excused). S. JOURNAL, 53rd Leg., 1st Sess. 1056 (Okla. 2011), *available at* http://www.oksenate.gov/publications/senate_journals/sj2011/sj20110503.pdf.

21. Mize, *supra* note 14.

22. *See* Michael Kimball, *OKC Meeting Draws 500 to Discuss Urban Sprawl*, OKLAHOMAN, Sept. 7, 2011, at A10.

23. On its current course, Oklahoma City is projected to have a budget shortfall of $18.7 million by 2017. Clifton Adcock, *The Gap Trap*, OKLA. GAZETTE, Feb. 8, 2012, at 14, *available at* http://npaper-wehaa.com/oklahoma-gazette/2012/02/08/#?article=1512635.

24. S. JOURNAL, 53rd Leg., 1st Sess. 206 (Okla. 2011), *available at* http://www.oksenate.gov/publications/senate_journals/sj2011/sj20110207.pdf.

25. S. JOURNAL, 53rd Leg., 1st Sess. 1103 (Okla. 2011), *available at* http://www.oksenate.gov/publications/senate_journals/sj2011/sj20110510.pdf.

26. *See* 62 OKLA. STAT. § 895(A) (2011).

> pay for public infrastructure systems that are attributable to new development or to expand or modify existing development.[27]

Subsection (B) provides that new and expanded or modified development can only be charged for capital improvement that "increases or expan[ds] . . . the capacity of public infrastructure systems attributable to that development."[28] The subsection mandates that "[d]evelopment fees shall not exceed a clear, ascertainable, and reasonably determined proportionate share of the cost" of the infrastructure improvement attributable to the increase or expansion of the service capacity; requires "a clearly established functional nexus between the purpose and amount of the development fee being charged and the development against which the fee is charged;" and establishes a documentation requirement that the "development fee is reasonably and roughly proportional to the nature and extent of the impact of development."[29] This subsection also provides that development fees cannot be assessed for repairs, that the fees must be based upon actual costs or "reliable, ascertainable and reasonable projected estimates," and that development fees are limited to "public infrastructure system capital improvements."[30]

Subsection (C) mandates the provision of a development fee schedule based upon land use, the purpose of the fee, and termination upon funding of the purpose of the fee.[31] Additionally, a capital improvement plan that lists the necessary public infrastructure improvements, provides notice to developers, and delineates among property locations is required.[32] Alternatively, municipalities may establish geographic "service areas for the collection of development fees."[33] The final portion of subsection (C) requires both "a public hearing before the municipal planning commission" and "a subsequent public hearing before the municipal governing body" prior to the adoption of "any development fees, capital improvement plan, service plan, or creation of service areas."[34] The subsection also includes a grandfathering provision for previously adopted development fee schemes,

27. *Id.* § 895(A)(1).
28. *Id.* § 895(B).
29. *Id.* § 895(B)(1).
30. *Id.* § 895(B)(2)-(4).
31. *Id.* § 895(C)(1).
32. *Id.* § 895(C)(2).
33. *Id.*
34. *Id.* § 895(C)(3).

but makes clear that any modification to such schemes must be in accordance with the new statutory scheme.[35]

Subsection (D) reiterates that development fees must be limited to capital improvements to infrastructure and provides that the assessment of fees must be with significant detail and in writing.[36] The subsection also provides for proportionality when changes are made in capital improvement plans or service areas and notes that such changes are also subject to the previously mentioned hearing process.[37] Subsection (E) requires detailed annual reporting to the municipality's governing body and allows for either the return of funds if the body determines the purpose for which the development fee was adopted has been fully funded or for a repurposing of the funds through the hearing process set out in Subsection (C)(3).[38] Subsection (F) requires that fees not be collected prior to issuance of a building permit.[39] Subsection (G) allows municipalities to contract with developers for the construction of the necessary infrastructure improvements and to credit the improvements made against the assessed development fee.[40]

Subsection (H) clarifies that the statute is not meant to preclude real estate exactions.[41] Subsection (I) makes credits against development fees nontransferable.[42] Subsection (J) establishes accounting standards and the level of detail required to be available as public record.[43] Subsection (K) defines the standard by which a reviewing court will uphold a challenged development fee scheme.[44] Specifically, the subsection provides that a development fee scheme will be reviewed through "rational-basis scrutiny," and that the fee will be upheld if it "substantially complies with this section and if the municipality documented reasonably conceivable facts that provided a rational basis for the adoption."[45]

Subsection (L) clarifies that imposition of development fees is not required and illustrates the standards through which a governing body can

35. *Id.*
36. *See id.* § 895(D).
37. *Id.* § 895(D)(2).
38. *See id.* § 895(E).
39. *Id.* § 895(F).
40. *Id.* § 895(G).
41. *See id.* § 895(H).
42. *Id.* § 895(I).
43. *Id.* § 895(J).
44. *Id.* § 895(K).
45. *Id.*

allow a developer to apply for exemption from the imposition of a fee.[46] Subsection (M) makes clear that payment of a development fee will not be deemed a waiver of the right to challenge the imposition of the fee at a later time.[47] Subsection (N) precludes a municipality from recovering infrastructure costs through the imposition of connection fees in addition to development fees.[48] Subsection (O) clarifies that municipalities can self-fund infrastructure improvements through methods other than development fees, reiterating the notion that the act is not preclusive concerning municipal choice for infrastructure.[49]

Clearly, the statute imposes an onerous framework with which a municipality must comply if it is to assess development fees. This comment does not address the potential implications of the burdens of this taxation system (for example, that the scheme might lead a municipality to altogether abandon development fees), but instead seeks to predict what a court will find necessary for compliance in a few key areas and how much greater of a burden is placed upon municipalities above the extended constitutional baseline. Additionally, this comment seeks to gauge how a court will address vague, misleading, and conflicting language within the statute, as some of the language, if given its traditional importance, conflicts with the whole of the statutory requirements. Should this statute come under court scrutiny, significant harmonization will be necessary. With the striking demographic changes within Oklahoma's major cities, this will become an issue as urban and suburban interests diverge.[50]

*B. Adjudicative Issues*

Most of section 895 addresses administrative procedure.[51] As well, it unequivocally limits development fees to "public infrastructure system capital improvements."[52] It is worth noting though that development fees in the context of the statue do not simply mean fees assessed upon new development as a result of the impact of the new development. For the purposes of the statute, a development fee is "payment of money

46. *Id.* § 895(L).
47. *Id.* § 895(M).
48. *Id.* § 895(N).
49. *See id.* § 895(O).
50. *See generally* Dale Funk, *Oklahoma City's Rebound*, ELEC. WHOLESALING, Apr. 2011, at 22-24; D. Ray Tuttle, *Timing Success in Tulsa: Developers Assess Downtown's Growth, Potential*, J. REC. (Nov. 8, 2011, 6:27 PM) http://journalrecord.com/2011/11/08/timing-success-in-tulsa-developers-assess-downtown's-growth-potential-real-estate/.
51. *See* 62 OKLA. STAT. § 895.
52. *Id.* § 895(B)(4).

imposed . . . as a condition of approval of any building permit, plat approval, or zoning change, *to the extent the fee is to pay for public infrastructure systems that are attributable to new development or to expand or modify existing development*."[53] However, two subsections stand out among the others as most important to adjudicative determinations: subsection (B)(1) and subsection (K).

Subsection (B)(1) states:

> B. New development and expanded or modified existing development may only be charged the development fee for capital improvement costs for increases or expansion to the capacity of public infrastructure systems attributable to that development.
>
> 1. Development fees *shall not exceed a clear, ascertainable, and reasonably determined proportionate share* of the cost of capital improvement to the public infrastructure system attributable to the expansion or increase in functional service capacity generated, or to be generated by, the development being charged the fee. There shall be a *clearly established functional nexus* between the purpose and amount of the development fee being charged and the development against which the fee is charged. In determining the development fee, the municipality shall make a documented effort to quantify the projected impact from development and determine that the proposed development fee is *reasonably and roughly proportional to the nature and extent of the impact of development*.[54]

The particularly important phrases are emphasized above. The subsection mandates that "[d]evelopment fees shall not exceed a clear, ascertainable, and reasonably determined proportionate share of the cost of [infrastructure] capital improvement."[55] Though the statute requires the municipality to document estimates and costs,[56] precision and proportionality will be a judicial determination if challenged. The subsection also provides that there must be a "clearly established functional nexus between the purpose and amount of the development fee being

53. Id. § 895(A)(1) (emphasis added).
54. *Id.* § 895(B) (emphases added).
55. *Id.* § 895(B)(1).
56. *See id.* § 895(B)(1), (3).

charged" and the new development.[57] This standard will also need to be clarified by the courts and will likely be compared to the "essential nexus" test developed by the United States Supreme Court in *Nollan v. California Coastal Commission*.[58] Finally, the subsection establishes that a proposed development fee must be "reasonably and roughly proportional to the nature and extent of the impact of development," again making degree of proportionality a matter of judicial concern.[59]

Subsection (K) requires:

> K. Any ordinance, resolution, or regulation adopted in compliance with this section which is thereafter challenged in any future court action shall be *reviewed through rational-basis scrutiny*, such that it shall be upheld if it substantially complies with this section and if the municipality documented reasonably conceivable facts that provided a rational basis for the adoption.[60]

Again, the significant language is emphasized. This subsection also presents unique problems, both announcing "rational-basis scrutiny" for judicial review and mandating substantial compliance with the statute.[61] However, development fee assessments or schemes that would be permissible under rational basis scrutiny are foreclosed by the statute. It will be necessary for a court to harmonize this subsection with the whole of the statute and to clarify the meaning of the statutory judicial review requirements, likely limiting the application of rational basis scrutiny.

### *IV. Constitutional Background*

The Takings Clause of the United States Constitution provides that private property shall not "be taken for public use, without just compensation."[62] As the language of section 895 bears much in common with the United States Supreme Court's rulings on property exactions, a court ruling on the statute would likely at least look to those rulings for comparison. Though the Supreme Court has ruled on similar taxation schemes involving Fifth Amendment Takings Clause concerns, the case law has not addressed impact or development fees. Instead, Takings Clause

57. *Id.* § 895(B)(1).
58. *See* 483 U.S. 825, 836-37 (1987).
59. *See* 62 OKLA. STAT. § 895(B)(1).
60. *Id.* § 895(K) (emphasis added).
61. *Id.*
62. U.S. CONST. amend. V.

rulings by the Supreme Court have dealt with property exactions.[63] In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Supreme Court established a test beyond simple rational basis to determine the constitutionality of municipal property exactions.[64] Thereafter, lower courts divided in applying the Supreme Court rulings concerning exactions to development fees.[65] As the property exaction cases have been widely analyzed, their presentation here will be concise.[66]

### *A.* Nollan v. California Coastal Commission*: The Supreme Court Decides Rational Basis Just Is Not Enough*

*Nollan* was the first case decided by the Supreme Court directly addressing real estate exactions and the Takings Clause of the Fifth Amendment.[67] In the case, the California Coastal Commission required the Nollans to deed the public an easement for beach access across their beachfront property in order to obtain a permit to demolish a bungalow on

63. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); *Nollan*, 483 U.S. 825.

64. Though not wholly accurate, the *Nollan*/*Dolan* standard is often characterized as "intermediate scrutiny" or "heightened scrutiny." *See, e.g.*, Loyola Marymount Univ. v. L.A. Unified Sch. Dist., 53 Cal. Rptr. 2d 424, 433 (Ct. App. 1996); Smith v. Town of Mendon, 822 N.E.2d 1214, 1223-24 (N.Y. 2004); Dudek v. Umatilla Cnty., 69 P.3d 751, 754 (Or. Ct. App. 2003).

65. Some cases decline to extend Supreme Court exactions jurisprudence to development fees. *See, e.g.,* Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) (holding that exaction case law is only applicable to physical intrusions or the functional equivalent thereof onto private property); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 698 (Colo. 2001) (en banc) (holding a generally applicable service fee is not subject to the *Nollan*/*Dolan* three-pronged test). Other cases extend the exactions jurisprudence. *See, e.g.*, Ehrlich v. City of Culver City, 911 P.2d 429, 447 (Cal. 1996) (holding a discretionary zoning permit conditioned upon the payment of fees imposed on an individual property owner implicated the heightened scrutiny of *Nollan*/*Dolan*); Ocean Harbor House Homeowners Ass'n v. Cal. Coastal Comm'n, 77 Cal. Rptr. 3d 432, 449-50 (Ct. App. 2008) (refusing to overturn a mitigation fee despite appellant's assertion of unconstitutionality under *Dolan*); Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 355 (Ohio 2000) ("[I]mpact fees are closer in form to land use exactions than to zoning laws.").

66. For a broad discussion of exactions and their space in the spectrum of Supreme Court Takings Clause jurisprudence, see Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 366-70 (2007).

67. By the time *Nollan* was decided, the Court had, of course, long recognized permanent physical occupation of property (for example, a traditional overland lateral easement) as a taking. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982) (describing the landowner's right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property" (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)) (internal quotation marks omitted)).

the property and replace the structure with a house.[68] The California Coastal Commission reasoned that the new, larger structure would contribute to a psychological barrier of homes that would discourage citizens from utilizing the public beach.[69]

The Court reaffirmed that "land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,'"[70] and found that conditioning a building permit upon allowing an easement for public beach access fit this rubric.[71] In addition, the Court required an "essential nexus" between the exaction and the harm created by the development.[72] When the exaction "utterly fails" to alleviate the harm provided as justification for the exaction, constitutional propriety evaporates.[73]

Therefore, the test at that time became two-pronged. First, the Court reaffirmed that an exaction by a state must satisfy the traditional substantive

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68. *Nollan*, 483 U.S. at 828.

69. *Id.*

70. *Id.* at 834 (alterations in original) (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

71. *Id.* at 836-37. The Court expressly confirmed that a property exaction is not necessarily a taking despite appearances. *Id.* at 836. The Court provided its own hypothetical, requiring the Nollans to create a public viewing spot on their property, and stated that the power to deny or regulate construction derived from the state police power "include[s] the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Id.*

72. *Id.* at 837. The Court stated, "If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not." *Id.* at 836-37. However, the Court defined an essential nexus in large part in the negative: "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." See *id.* at 837. This method of definition has led to voluminous scholarly commentary. *See, e.g.*, J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 378 (2002) (defining an essential nexus as requiring "(1) a legitimate state interest or purpose; (2) a connection between that interest and the land use exaction chosen to address it; and (3) a minimal connection between the impacts of the proposed development and the land use exaction"); J. David Breemer, *What Property Rights: The California Coastal Commission's History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 UCLA J. ENVTL. L. & POL'Y 247, 264 (2004) (representing an essential nexus as a "direct connection"); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1612 (1988) (characterizing an essential nexus as "the Court's insistence on being satisfied that the claimed nexus was sufficiently apparent and credible to counteract suspicion of taking by subterfuge").

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

due process inquiry of a legitimate state interest under rational basis examination,[74] and clarified that a broad array of government purposes satisfy such examination.[75] Second, the essential nexus test must be satisfied.[76] Under this new test, the Court found that the California Coastal Commission's asserted purpose of public beach access failed to meet the essential nexus requirement;[77] the concern that the structure created a psychological barrier to public use of the beach would not be alleviated by granting a lateral easement across the Nollans' property.[78] The Court noted, simply, that if the Commission wanted an easement across the petitioner's property, "it must pay for it."[79]

*B.* Dolan v. City of Tigard*: The Supreme Court Clarifies that Left Unclear*

*Dolan*, the successor to *Nollan*, added a third element to the inquiry.[80] In *Dolan*, the City of Tigard conditioned the petitioner's building permit upon devotion of space to a greenbelt and bike path.[81] The petitioner was required to dedicate a portion of her land that occupied a 100-year flood plain to drainage, as well as for a bike path pursuant to a state statute.[82] Despite her application, the petitioner was denied an exception from these exactions.[83] The Court heard the case to clarify whether the "essential nexus" test had supplanted other determinations of causality when evaluating government exactions.[84]

Though the Court found an "essential nexus" between the development and the exactions, it still struck down the exaction based upon an added

74. *See id.* at 834.

75. *Id.* at 835. The Court surveyed prior case law, listing scenic zoning, landmark preservation, and residential zoning as permissible purposes upheld in prior cases. *Id.*

76. *See id.* at 837-42.

77. *See id.*

78. *Id.* at 838-39.

79. *Id.* at 842.

80. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994). Commentary widely discusses Takings Clause property exaction analysis as a "three-pronged" or "three part" inquiry. *See, e.g.*, Jack Estill et. al., *Taxing Development: The Law and Economics of Traffic Impact Fees*, 16 B.U. PUB. INT. L.J. 1, 7 (2006); James H. Freis, Jr. & Stefan V. Reyniak, *Putting Takings Back into the Fifth Amendment: Land Use Planning After* Dolan v. City of Tigard, 21 COLUM. J. ENVTL. L. 103, 116 (1996); Lawrence Watters, Dolan v. City of Tigard*: Introduction and Decision*, 25 ENVTL. L. 111, 117 (1995).

81. *Dolan*, 512 U.S. at 379-80.

82. *Id.* at 380.

83. *Id.* at 381-83.

84. *Id.* at 383.

"rough proportionality" consideration.[85] The Court split the difference in what it perceived as a wide variance among states in determining the constitutionality of the relationship between the government exaction and the impact of development pursuant to its allusion in *Nollan*.[86] The Court rejected both weak, general connection tests and stringent "specifi[c] and uniquely attributable" tests, instead favoring a middle ground of rough proportionality.[87] Under this test "[n]o precise mathematical calculation is required, but [a government] 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."[88]

Thus, with the inclusion of rough proportionality, the test became three-pronged: (1) the exaction must advance a legitimate state interest, (2) there must be an essential nexus between the exaction and the harm advanced as the impetus for the exaction, and (3) the exaction must be roughly proportional in nature and extent to the harm of the development.[89] The Court remanded the case for a ruling consistent with the opinion, accompanied by a finding that the city's requirement of public dedication of the proposed greenbelt did not meet the "rough proportionality" standard and suspicion of the lack of factual findings that the bike path would reduce traffic.[90]

As a coda, the Court has significantly returned only once to its property exactions Takings Clause jurisprudence, in *Lingle v. Chevron U.S.A. Inc.*[91] In the case, the Court abrogated the "substantial advancement" test derived from *Agins v. City of Tiburon*.[92] As *Nollan* and *Dolan* had cited and adopted

85. *See id.* at 391, 394-96.

86. See *id.* at 391. To reiterate, the Court in *Nollan* did not comment upon the nature of the connection necessary in exactions evaluations as the easement requirement in that case did not meet "even the most untailored standards." Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 838 (1987).

87. *Dolan*, 512 U.S. at 389-91 (alteration in original) (quoting Pioneer Trust & Sav. Bank v. Vill. of Mount Prospect, 176 N.E. 2d 799, 802 (Ill. 1961)) (internal quotation marks omitted).

88. *Id.* at 391.

89. *See supra* note 80 and accompanying text.

90. *Dolan*, 512 U.S. at 394-96.

91. 544 U.S. 528, 546-48 (2005).

92. *Id.* at 532. Though not of consequence in this matter, the "substantial advancement" test provided that government regulation of property effects a taking if it does not substantially advance a legitimate government interest. *Id.* at 531; Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), *overruled by Lingle*, 544 U.S. at 548.

the language of *Agins*,[93] the Court determined it necessary to reevaluate the status of its property exaction Takings Clause jurisprudence.[94] Though the Court noted similarities in language, the Court found the two tests incomparable, characterizing the *Nollan*/*Dolan* test as a determination "whether the exactions substantially advanced the same interests that land-use authorities asserted would allow them to deny the permit altogether."[95] Thereafter the Court declared that *Lingle* "should not be read to disturb these precedents."[96]

## *V. Lower Courts*

Lower courts have struggled considerably in determining the extent to which *Nollan* and *Dolan* are applicable beyond property exactions. In addition, when courts find that the cases apply to monetary fees, there is disagreement when the manner of imposition differs (i.e., whether the imposition is made on an individual basis or a jurisdiction-wide basis). Though some older Oklahoma cases suggest how an Oklahoma court might rule, the developments in higher courts since these decisions make their implications hardly determinative; furthermore, Oklahoma courts have not issued an instructive opinion since the issuance of relevant Supreme Court decisions.

### *A. Lower Court Confusion: Supreme Court Dicta Breeds Chaos*

There has been ambiguous indication from the Supreme Court that the *Nollan*/*Dolan* decisions should not be extended beyond exactions of real property for public use. The Court stated in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*: "[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use."[97] The Court continued, stating that "the rough-proportionality test of *Dolan* is inapposite to a case such as this one," and that the *Dolan* test "was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the

93. *Dolan*, 512 U.S. at 385; Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834-35 (1987).

94. *See Lingle*, 544 U.S. at 546.

95. *Id.* at 547 (emphasis omitted).

96. *Id.* at 548.

97. 526 U.S. 687, 702 (1999).

landowner's challenge is based not on excessive exactions but on denial of development."[98]

In *Del Monte Dunes*, the City of Monterey had repeatedly denied a real estate developer's plans to improve a parcel of land.[99] The Court found it necessary to address *Dolan only* because the intermediate court had cited the case in its decision, and the Court found that the case was inapplicable to denial of land use by regulation.[100] *Del Monte Dunes*, therefore, is properly read only as making clear the distinction between land use regulation and exaction. As exactions and development fees are kindred, it is not appropriate to apply this differentiation to development fees.[101] Thus, though cases following *Nollan* and *Dolan* have been suggestive, they have hardly been on point regarding fees. Thereby, lower courts have been in conflict determining whether the Supreme Court's rulings in *Nollan* and *Dolan* apply when a party's real property is not taken, but merely assessed a fee.

Some courts have declined to extend the three-pronged test to impact fees. For example, in *Krupp v. Breckenridge Sanitation District*, the Supreme Court of Colorado declared *Nollan* and *Dolan* inapplicable to monetary impositions as a class of state actions.[102] In that case, the Breckenridge Sanitation District assessed a plant investment fee upon new development, which was challenged under the principles of *Nollan* and *Dolan*.[103] After surveying the development of Supreme Court exactions jurisprudence and noting the above pronouncement in the Supreme Court's ruling in *Del Monte Dunes*,[104] the court stated, "Because *Nollan, Dolan,* and their progeny applied heightened scrutiny only where the government demanded real property as a condition of development, we find that they

98. *Id.* at 703.

99. *Id.* at 693-94.

100. *Id.* at 702-03.

101. As a historical note, development fees began as "in lieu of" fees and are often still presented in this manner. Rosenberg, *supra* note 4, at 202. Under this characterization, development fees are an alternative to or replacement for exactions and are fundamentally tied to the exaction process. *Id.* Such a conception of development fees would give assurance to a reviewing court that it was not overreaching in applying a taxation scheme tied in essence to the exaction process. *See id.*

102. 19 P.3d 687, 697 (Colo. 2001) (en banc).

103. *Id.* at 691-92.

104. *Id.* at 695-97.

are not applicable to a general development fee."[105] This sentiment has been reiterated by many state courts.[106]

Some courts, however, have found the test applicable to fees. For example, in *Ehrlich v. City of Culver City*, the Supreme Court of California rejected the notion that *Nollan* and *Dolan* do not apply to "monetary exactions."[107] In that case, the petitioner was required to pay a $280,000 recreation fee in order to acquire the necessary permits to demolish a recreation center and to construct a condominium complex.[108] That court explained, "When such exactions are imposed . . . we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered."[109] The court ruled that the city could not measure its loss based on the value of property that it had no right to control,[110] and reaffirmed that "when a local government imposes special, discretionary permit conditions on development by individual property owners . . . *Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard."[111] This holding is also echoed in other lower court cases.[112]

Additionally, courts have distinguished fees (and exactions) which are assessed individually by a regulatory body from general, statutorily applied impact fees,[113] deriving this distinction from the *Dolan* Court's instruction that rough proportionality and the essential nexus require "some sort of individualized determination."[114] Some courts have applied the

105. *Id.* at 697.

106. *See, e.g.*, Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 999-1000 (Ariz. 1997) (en banc) (upholding the imposition of a water resource development fee); McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995) (upholding an impact fee assessed for the purpose of road improvements based upon increase in traffic caused by development); Waters Landing Ltd. P'ship v. Montgomery Cnty., 650 A.2d 712, 724 (Md. 1994) (upholding, relevantly, municipal impact fees, the proceeds of which were allotted to improvements in the area of development).

107. 911 P.2d 429, 444 (Cal. 1996).

108. *Id.* at 434-35.

109. *Id.* at 444.

110. *Id.* at 449.

111. *Id.* at 447.

112. *See, e.g.*, Hollywood, Inc. v. Broward Cnty., 431 So. 2d 606, 614 (Fla. Dist. Ct. App. 1983); Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 355 (Ohio 2000) ("[I]mpact fees are closer in form to land use exactions than to zoning laws.").

113. Benjamin S. Kingsley, Note, *Making It Easy to Be Green: Using Impact Fees to Encourage Green Building*, 83 N.Y.U. L. REV. 532, 559 (2008).

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

*Nollan*/*Dolan* line of cases to municipal codes without reference to or reliance upon regulatory board decisions.[115] In contrast, other courts have maintained that *Dolan* was specific in distinguishing particular, adjudicative exactions from broad statutory impositions, and thus have found the line of cases to be inapplicable to legislative impositions.[116] This notion only further exemplifies the confusion of lower courts concerning the constitutional requirements of the Takings Clause as the clause applies to municipal fees. It is this considerable void that section 895 seeks, in part, to address. In light of the great degree of conflict, the text of the Oklahoma statute must legislatively impose a higher level of scrutiny resembling the *Nollan*/*Dolan* standard to ensure that the statute is in line with current jurisprudence.

*B. Oklahoma Rulings: The Sparse Prologue to the Statute*

As of April 2013, no apparent Oklahoma state court cases have directly addressed the implications of *Nollan*/*Dolan* after the handing down of those cases. Case law in this area has seen challenges to determine whether substantial interference with land ownership by the government constituting a taking has occurred.[117] Challenges under the Oklahoma Constitution for fee assessments by municipalities to repay private dedication of utilities infrastructure have been brought as well.[118] However, Oklahoma courts have neither had the occasion to interpret the *Nollan*/*Dolan* "essential nexus" and "rough proportionality" tests, nor had the occasion to consider the tests as applied to municipal fees.

Prior to the *Nollan*/*Dolan* rulings, the Supreme Court of Oklahoma addressed the notion of proportionality.[119] In *Public Service Co. of Oklahoma v. Northwest Rogers County Fire Protection District*, the court determined that a fire protection tax assessment scheme based upon

115. *See, e.g.*, Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200, 202 (Ga. 1994); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641-42 (Tex. 2004).

116. *See, e.g.*, San Remo Hotel L.P. v. City & Cnty. of S.F., 41 P.3d 87, 105 (Cal. 2002); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 695 (Colo. 2001) (en banc). For discussion, see Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 252-57 (2000).

117. *See, e.g.*, Mattoon v. City of Norman, 1980 OK 137, ¶ 4, 617 P.2d 1347, 1348; Frost v. Ponca City, 1975 OK 141, ¶ 12, 541 P.2d 1321, 1323-24.

118. *See* Willow Wind, Inc. v. City of Midwest City, 1989 OK 171, ¶ 1, 790 P.2d 1067, 1068.

119. *See* Pub. Serv. Co. of Okla. v. Nw. Rogers Cnty. Fire Prot. Dist., 1983 OK 96, ¶¶ 31-36, 675 P.2d 134, 141-42.

property value bore the required "rational relationship" for constitutional propriety.[120] The court stated, "If the value-based assessment has a rational relationship to the question of benefit conferred, it is not unconstitutional."[121] It is worth noting that the court also used language describing a "rational nexus" to determine constitutional propriety.[122] Such a nexus, though, in this context, was only a method of describing proportionality and was not a nexus inquiry in line with *Nollan*.

The importance of this decision is that it falls within the middle ground line of state cases referenced in *Dolan* to develop the rough proportionality test, though not in an exactions context.[123] In *Dolan*, the Supreme Court recognized a collection of state court cases which characterized proportionality in exaction cases as a determination of "whether the requirement has some reasonable relationship . . . to the use to which the property is being made."[124] The Court adopted this view as the rough proportionality test.[125] Though in a benefit context, rather than a harm context, this parallel suggests that faced with the opportunity, an Oklahoma court might apply the *Nollan*/*Dolan* line of cases to development fees. At the least, it supports the notion that an Oklahoma court would find commonalities where proportionality is concerned. However, this assumption is made both in absence of reference to the statute in question and without respect for the interim developments between the decision and the statute.

The Tenth Circuit addressed the issue in *Clajon Production Corp. v. Petera*, which limited the applicability of the *Nollan*/*Dolan* analysis to situations involving developmental exactions.[126] In that case, the petitioner challenged the Wyoming hunting and fishing licensing scheme.[127] The Tenth Circuit denied the petitioner's Takings Clause claims, noting the "distinctions between general police power regulations and development exactions, and the resemblance of development exactions to physical takings cases."[128] The court stated: "[W]e believe that the 'essential nexus' and 'rough proportionality' tests are properly limited to the context of

120. *Id.* ¶ 36, 675 P.2d at 142.

121. *Id.*

122. *Id.*

123. *See* Dolan v. City of Tigard, 512 U.S. 374, 390 (1994).

124. *Id.* (quoting Simpson v. N. Platte, 292 N.W.2d 297, 301 (Neb. 1980)) (internal quotation marks omitted).

125. *Id.* at 391.

126. 70 F.3d 1566, 1578-79 (10th Cir. 1995).

127. *Id.* at 1570-71.

128. *Id.* at 1579.

development exactions."[129] However, this decision is not instructive for multiple reasons. First, though development fees are similar to the licensing fees in *Clajon Production*, in that both are monetary impositions, development fees are analogous both in nature and purpose to property exactions. Therefore, development fees and property exactions bear a stronger analogy. Second, *Clajon Production* dealt specifically with a Wyoming statute and thus is not necessarily applicable or instructive in interpreting Oklahoma's statutory provisions.[130] Finally, and most importantly, the fundamental holding of the case was a decision based in regulatory takings law, rather than property exactions law.[131] Though the Tenth Circuit made the blanket statement that the *Nollan*/*Dolan* holdings "are properly limited to the context of development exactions," development fees are not imposed under the same general police powers involved in the imposition of licensing fees considered by the court.[132]

Oklahoma federal district courts have only referenced the *Nollan*/*Dolan* decisions in a single reported case, *ConocoPhillips Co. v. Henry*,[133] which was subsequently overturned by the Tenth Circuit.[134] Even disregarding the procedural history, *ConocoPhillips* and the Tenth Circuit's reversal of the case lend little clarification as the matter at issue was a state statute outlawing property holders' rights to ban entrants from keeping firearms in locked vehicles.[135] The heart of the issue was the extension of Takings Clause jurisprudence to a property use restriction, which the Tenth Circuit declined to do.[136] Therefore the case is not instructive, as neither exactions nor development fees are concerned with the question of how restrictive of property rights a statute must be to impose a taking. Exactions and fees are obvious complete deprivations.

Simply, there is a dearth of precedent regarding the application and extension of the *Nollan*/*Dolan* line of cases in Oklahoma. Though *Public Service Co.* is suggestive of extension, it is hardly determinative considering the subsequent developments. Therefore, it is reasonable to

129. *Id.*
130. *See id.* at 1579-80.
131. Id. at 1580.
132. *Id.* at 1579.
133. *See* ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282 (N.D. Okla. 2007), *rev'd sub nom.*, Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009).
134. *Ramsey Winch Inc.*, 555 F.3d at 1211.
135. *Id.* at 1202.
136. *Id.* at 1209.

view section 895 as a legislative extension into this void, in a move to avoid the muddled mess that has washed over other jurisdictions.

Arguably, section 895(B)(1), which requires "a clearly established functional nexus between the purpose and amount of the development fee being charged and the development against which the fee is charged"[137] resembles the "essential nexus" test of *Nollan*.[138] The standard that "[d]evelopment fees shall not exceed a clear, ascertainable, and reasonably determined proportionate share"[139] of the infrastructure improvement aligns with the "rough proportionality" of *Dolan*.[140] "Reasonably and roughly proportional to the nature and extent of the impact of development"[141] more closely resembles the "rough proportionality" of *Dolan*,[142] but addresses a determination standard for the municipality in assessment, rather than the court.[143] Therefore, the issue to be determined is what standard, in comparison to the constitutional baseline, the statute intends to impose.

However, any judicial determination will necessarily have to address section 895(K) as well. The subsection provides that a development fee scheme is subject to "rational-basis scrutiny" when evaluated by a court.[144] This notion, if taken at its traditional constitutional meaning, is antithetical to the entirety of the statute. The statute seeks to impose a burden upon municipalities far above "rational basis" when imposing development fees. Therefore, to square this provision with the remainder of the statute, a court must interpret this provision in light of the whole bill.

### *VI. Statutory Construction*

Should a development fee scheme be challenged in an Oklahoma court, several of the provisions in section 895 will need to be clarified, and a variety of statutory interpretation principles will govern the outcome. Additionally, some of these provisions are in conflict with each other when applied to the statute. Thus, priority among the principles must be determined and applied, giving the highest deference to the principle that legislative intent is supreme.

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137. 62 OKLA. STAT. § 895(B)(1) (2011).
138. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).
139. 62 OKLA. STAT. § 895(B)(1).
140. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
141. 62 OKLA. STAT. § 895(B)(1).
142. *See Dolan*, 512 U.S. at 391.
143. *See* 62 OKLA. STAT. § 895(B)(1).
144. *Id.* § 895(K).

*A. Principles of Statutory Construction as Outlined by the Supreme Court of Oklahoma*

Before the rules of statutory construction are applied, there must be a determination that a statute is ambiguous or that the intent of the legislature is not clearly expressed.[145] In accord, "When the Legislature has clearly expressed its intent, the use of additional rules of construction are almost always unnecessary and a statute will be applied as written."[146] The highlighted ambiguities and contradictions in section 895, however, easily meet this initial burden.

As a first priority when interpreting and applying a statute, a court must determine the intent of the legislature: "The primary goal of statutory construction is to ascertain and follow the intent of the legislature."[147] It follows that, concerning section 895, the Oklahoma legislature intended to impose a comprehensive scheme for the adoption of development fees, and to limit such fees to public infrastructure capital improvements.[148]

Secondarily, a court must determine the meaning of a statute in its direct language. According to case law, "The words of a statute will be given their plain and ordinary meaning *unless it is contrary to the purpose and intent of the statute when considered as a whole*."[149] This consideration will primarily be of importance in evaluation of subsection (K), which imposes "rational-basis scrutiny" on reviewing courts when considering section 895,[150] but will also be important in evaluating subsection (B). As previously mentioned, the plain meaning of this "rational basis" is antithetical to the intent of the statute and cannot be given its traditional constitutional definition, at least not in a broad sense.

Additionally, "In order to avoid judicially imposing a different meaning from that the Legislature intended, [courts] will not place a strained

145. *See* Samman v. Multiple Injury Trust Fund, 2001 OK 71, ¶ 13, 33 P.3d 302, 307; Bruner v. Sobel, 1998 OK 60, ¶ 9, 961 P.2d 815, 817; *cf.* Fuller v. Odom, 1987 OK 64, ¶ 4, 741 P.2d 449, 452 ("[I]t is unnecessary to apply rules of construction to discern Legislative intent if the will is clearly expressed.").

146. *Samman*, ¶ 13, 33 P.3d at 307.

147. Stump v. Cheek, 2007 OK 97, ¶ 9, 179 P.3d 606, 609; *accord* Hurst v. Empie, 1993 OK 47, ¶ 18, 852 P.2d 701, 706; State *ex rel.* Cartwright v. Ga.-Pac. Corp., 1982 OK 148, ¶ 20, 663 P.2d 718, 722.

148. *See* 62 OKLA. STAT. § 895(B)(4).

149. *Stump*, ¶ 9, 179 P.3d at 609 (emphasis added); *accord* Naylor v. Petuskey, 1992 OK 88, ¶ 4, 834 P.2d 439, 440-41; Keck v. Okla. Tax Comm'n, 1940 OK 357, ¶ 7, 108 P.2d 162, 164.

150. *See* 62 OKLA. STAT. § 895(K).

construction on the plain words of a statute."[151] This requirement will also be of importance when determining what interpretation a court must give to subsection (K). This limiting mandate must be subordinate to the prior considerations though. Also, legislative intent is not recorded in Oklahoma in any manner in which a reviewing court would be comfortable citing in an opinion. As well, disharmony may be avoided by the provision that "[g]eneral words in a statute must receive general construction, *unless restrained, explained, or amplified by particular words*."[152] The extensive use of modifying words and phrases within the statute will make this provision instructive in the interpretation of the statute.

Finally, "statutes must be interpreted to render every word and sentence operative, rather than in a manner which would render a specific statutory provision nugatory."[153] This will be of importance both in interpreting the provisions of subsection (B) as they compare with the *Nollan*/*Dolan* line of cases and in determining how a court will render the operation of subsection (K). This notion bolsters the presumption that the statute intends to impose strict standards beyond the baseline constitutional requirements.

*B. Application of the Principles to the Statute*

It is first necessary to determine the interpretation an Oklahoma court will likely give to the provisions of subsection (B), and how these provisions compare with the constitutional baseline. In *Dolan*, the Court clarified concerning "rough proportionality" that "[n]o precise mathematical calculation is required, but [a municipality] 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."[154] From *Nollan*, a Court will likely find a lack of an "essential nexus" when the exaction "utterly fails" to advance the claimed legitimate interest.[155] Therefore, the "clearly established functional nexus" required by the statute may impose a more stringent burden of proof on the municipality prior to imposition of a development fee.

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151. Crutchfield v. Marine Power Engine Co., 2009 OK 27, ¶ 27, 209 P.3d 295, 305; *accord Stump*, ¶ 14, 179 P.3d at 613; Thornton v. Woodson, 1977 OK 185, ¶ 10, 570 P.2d 340, 342.

152. *Stump*, ¶ 14, 179 P.3d at 613 (emphasis added); *accord* Okla. Tax Comm'n v. Fortinberry Co., 1949 OK 75, ¶ 14, 207 P.2d 301, 305.

153. State *ex rel.* Thompson v. Ekberg, 1980 OK 91, ¶ 7, 613 P.2d 466, 467; *accord Stump*, ¶ 14, 179 P.3d at 613; Matthews v. Rucker, 1918 OK 29, ¶ 5, 170 P. 492, 493.

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

155. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

*1. "[C]lear, ascertainable, and reasonably determined proportionate share"*[156]

The first provision of section 895(B) that evokes the *Nollan*/*Dolan* line of cases is the provision that "[d]evelopment fees shall not exceed a clear, ascertainable, and reasonably determined proportionate share of the costs of capital improvement to the public infrastructure system attributable to . . . the development."[157] This standard readily brings to mind the standard of "rough proportionality" imposed by the Court in *Dolan*;[158] however, this provision is a determination of the relationship of the amount of the assessed fee and the impact of the development, rather than a determination of the relationship of the proposed remedy (in *Dolan*, an exaction) and the impact of the development.[159] Under rough proportionality, no "mathematical calculation" is required.[160] However, "clear" and "ascertainable" carry a notion of precision and positive determination.[161]

In *Dolan*, the Court surveyed many state approaches to proportionality, settling on what it found to be the constitutionally proper middle ground of a "reasonable relationship," which the Court recoined as "rough proportionality" to avoid confusion with the rational basis standard of review.[162] Oklahoma would likely have fallen into this middle path.[163] Certainly, the standard of "clear, ascertainable, and reasonably determined proportionate share" does not bear resemblance to the slack, generalized standards that the Court rejected as not sufficiently protective of property rights.[164] However, it is possible that this language imposes by statute the proportional burden that the Court rejected as too stringent for a constitutional baseline.[165] The Court called the heightened relationship requirement "the 'specifi[c] and uniquely attributable' test."[166] Under this test, "[I]f the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes

156. 62 OKLA. STAT. § 895(B)(1) (2011).
157. *Id.*
158. *See Dolan*, 512 U.S. at 391.
159. 62 OKLA. STAT. § 895(B)(1).
160. *Dolan*, 512 U.S. at 391.
161. *See* 62 OKLA. STAT. § 895 (B)(1).
162. *Dolan*, 512 U.S. at 389-91.
163. *See supra* Part V.B.
164. *See Dolan*, 512 U.S. at 389.
165. *See id.* at 389-90.
166. *Id.* at 389 (alteration in original) (quoting Pioneer Trust & Sav. Bank v. Vill. of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961)).

'a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.'"[167]

In the case discussed by the Supreme Court as illustrative of the heightened standard, *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, the Supreme Court of Illinois considered whether an exaction imposed upon a developer for the purposes of school and recreational facilities was constitutionally permissible.[168] Though the court recognized that the need for the facilities was due in great part to the addition of 250 residential units made by the development, it found that the need could not be solely attributable to the development.[169] Therefore, the court decided any exaction not made necessary specifically and uniquely by a new development amounted to an unconstitutional taking.[170]

Determining which standard is more appropriate is difficult. The terms "clear" and "ascertainable" align with the concept of "direct proportionality" under what the Court termed the "specific and uniquely attributable test;" however, a "reasonably determined proportionate share" is certainly evocative of the "reasonable relationship" which the Court later termed "rough proportionality."[171] Because the statute readdresses the issue, imposing "reasonabl[e] and rough[] proportional[ity]" at the end of the same subsection,[172] and because the tenets of statutory interpretation mandate a statute be considered in full,[173] the "clear, ascertainable, and reasonably determined proportionate share"[174] will likely be determined akin to "rough proportionality."

However, there is no certainty an Oklahoma court will draw this correlation, despite the congruous language between *Dolan* and section 895(B)(1); the statute (in this subsection and as a whole) certainly imposes a degree of specificity beyond *Dolan*. Likely, a reviewing court will look to the outgrowth of case law from *Dolan* in applying the statute, while also requiring specificity in the measurement of the impact itself. That is to say, the proportionality may be "rough," but the variables must be exact.

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167. *Id.* at 390 (quoting *Pioneer Trust*, 176 N.E.2d at 802).
168. *Pioneer Trust*, 176 N.E.2d at 800-01.
169. *Id.* at 802.
170. *Id.*
171. *Dolan*, 512 U.S. at 389-90.
172. 62 OKLA. STAT. § 895(B)(1) (2011).
173. Stump v. Cheek, 2007 OK 97, ¶ 14, 179 P.3d 606, 609.
174. 62 OKLA. STAT. § 895(B)(1).

*2. "[R]easonably and roughly proportional to the nature and extent of the impact of development"*[175]

This language is the standard under which a municipality must determine the cost of a fee, and the standard under which a fee will be upheld.[176] Certainly, based on plain language analysis, "reasonably and roughly proportional" invokes the "rough proportionality" standard of *Dolan*; and the standard establishes that "[n]o precise mathematical calculation is required."[177] Though the standard itself requires no mathematical determinations, the subsequent text of the statute establishes various estimate and cost invoicing requirements for municipalities.[178] The practical effect of this provision is that no specific ratio is to be imposed upon municipalities instituting a development fee system, but a clear system of attribution must be in place. Perhaps it would be best to characterize this standard as "rough proportionality with details," meaning the precise extent of the connection of the development to the infrastructure system need not be determined, but the amount or percentage to be required of a new development must be determined with the previously unrequired "mathematical precision."

*3. "[C]learly established functional nexus"*[179]

Subsection (B)(1) provides that development fees and impact of development must evince a "clearly established functional nexus;"[180] this standard is readily evocative of the "essential nexus" of *Nollan*. The entire phrase—"clearly established functional nexus"—does not appear significantly in real property law; therefore, a reviewing court will not have instructive case law on which to base its ruling.[181] A court will have to compare the term "functional nexus" and the *Nollan* case law, and determine whether emphasis should be placed on terminology or proximity in subject matter.

175. *Id.*
176. *See id.* § 895(B)(1), (K).
177. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).
178. *See* 62 OKLA. STAT. § 895(C).
179. *Id.* § 895(B)(1).
180. *Id.*
181. A quick search of legal databases reveals that the statute is the only place in the law where this string of terms appears.

The exact term "functional nexus" is commonly found in bankruptcy law when determining whether an item is a household good.[182] Specifically, the Fourth Circuit held in *In re McGreevy*:

> [T]he requisite functional nexus exists where—and only where—the good is used to support and facilitate daily life within the house. It is the household good's use *for these purposes* that distinguishes it from a good that is merely located and used within the house. Pots and pans are household goods *because* they are used to support and facilitate daily household living; a model car collection, by contrast, is not a household good because it serves no such purpose.[183]

Through this analogy, it is arguable that a functional nexus is fundamentally different from an essential nexus, as an essential nexus only requires a connection between a state's legitimate aim and the exaction imposed.[184] A functional nexus requires a much more existential connection, requiring items of property to be fundamentally tied together in nature.[185] Under a functional nexus inquiry, the purpose of the development fee (the public infrastructure system) would necessarily support and facilitate the development itself.

If the comparison holds, a functional nexus likely would require a stronger tie to the development than the essential nexus standard. This notion is bolstered by section 895(B)(4), which states that "[d]evelopment fees may only be imposed to recover or fund the costs of public infrastructure system capital improvements, including, but not limited to, the cost of real property interest acquisitions, rights-of-ways, capital improvements, design, construction, inspection, and capital improvement construction administration, related to one or more public infrastructure systems."[186] This notion is also supported by the statute's aim of attempting to completely preclude a variety of constitutionally sound purposes for development fees not tied in function to development.

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182. *See, e.g.*, *In re* McGreevy, 955 F.2d 957, 961 (4th Cir. 1992); Fraley v. Commercial Credit (*In re* Fraley), 189 B.R. 398, 401 (W.D. Ky. 1995). The term is also used in the First Amendment context for government actors, but the term is used in an interchangeable, non-exclusive manner. *See* Hall v. Am. Nat'l Red Cross, 86 F.3d 919, 921 (9th Cir. 1996).

183. *McGreevy*, 955 F.2d at 961.

184. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 839 (1987).

185. *Cf. McGreevy*, 955 F.2d at 962; Michael G. Hillinger, *How Fresh a Start?: What Are "Household Goods" for Purposes of Section 522(f)(1)(b)(i) Lien Avoidance?*, 15 BANKR. DEV. J. 1, 46-47 (1998).

186. 62 OKLA. STAT. § 895(B)(4) (2011).

However, this determination necessarily raises an additional issue: What is the range of public infrastructure improvements that support and facilitate a development? By statutory definition, the improvements must be real property improvements,[187] but this is where the clarity ends. It is unclear whether educational or recreational facilities would be fundable through development fees. Curiously, they are absent from the list of acceptable real property improvements contained within the statutory definition of public infrastructure systems, though the definition does not purport to be exclusive.[188]

Some courts have found these improvements within the acceptable range of public infrastructure systems while others have not,[189] but it is arguable that such improvements are not tied to a development on a baseline, existential level. This disagreement among Oklahoma's peers also supports a stricter definition of functional nexus as a legislative attempt to avoid confusion. If a functional nexus were interpreted to impose a connection to the degree that a public infrastructure system must be essential to the operation of a development, then educational and recreational facilities may fall outside of this requirement. However, under a broad interpretation of the standard of supporting and facilitating, such improvements might still be deemed acceptable under the statutory development fee scheme.

Also at issue is the "clearly established" standard. In other contexts, this standard commonly arises in civil rights violation and qualified immunity cases.[190] Such a comparison is unhelpful, however, as the term in the qualified immunity context deals with the degree to which an individual's substantive statutory or constitutional rights are firmly rooted in the law.[191] Rather, in the context of the statute, "clearly established" concerns the degree to which the municipality must connect a development fee and a development. This language mostly serves to bolster the notion that the

187. *Id.*

188. *Id.* § 895(A)(3) ("'Public infrastructure system' includes any real property improvement, fixture, or accession that is included within, but not limited to, any of the following categories of public systems.").

189. *Compare* Wellington River Hollow, LLC v. King Cnty., 54 P.3d 213, 215 (Wash. Ct. App. 2002) (approving of impact fees assessed for the benefit of a school), *with* Bldg. Indus. Ass'n of Cleveland & Suburban Cntys. v. City of Westlake, 660 N.E.2d 501, 506 (Ohio Ct. App. 1995) (striking down a fee assessed for park services as an unconstitutional tax).

190. For discussion, see Miranda Creviston Motter, *The Clearly Established Test: What Is the Standard and Why It Wasn't Followed in* Wilson v. Layne, 29 CAP. U. L. REV. 513, 516 (2001).

191. *Id.*

"clearly established functional nexus" standard is more stringent than the "essential nexus" standard of *Nollan*.

In sum, the choice of the legislature to mandate a "clearly established functional nexus," rather than to employ the available "essential nexus" terminology will place a reviewing court in the awkward position of weighing relevant legal subject matter against identical legal language that has specific and well-defined meaning. Interpreting legislative intent is paramount, but when competing interpretations are differing shades of the same aim (unlike the rational basis scrutiny question), rather than competing concepts, the plain meaning must be settled upon.[192] The application of words' "plain and ordinary" meaning that is required under the principles of statutory construction makes the phrase "functional nexus" analogous to the stringent definition that has been discussed and affirmed repeatedly in bankruptcy proceedings.[193] This view is supported by the requirement that courts not place a strained meaning on a word or phrase.[194]

If this interpretation is accepted by a reviewing court, an additional facet is added to the statute: not only are the acceptable purposes for development fees limited in kind, but they are also limited in nature and scope. It is hard to imagine that a roadway or transportation system, for example, that is specifically included within the ambit of the statute will satisfy the requirement of support and facilitation unless it directly services the development; the same can be said about police and fire protection. This distinction also calls into question the recreational infrastructure that is specifically mentioned within the statute.[195] Regrettably, this is what a "functional nexus" necessarily requires.[196] A court will have much to weigh in this consideration.

*4. "[R]ational-basis scrutiny"*[197]

The most problematic part of the statute is subsection (K), which provides that a fee scheme instituted in accordance with the statute "shall be reviewed through rational-basis scrutiny, such that it shall be upheld if it substantially complies with this section and if the municipality documented

192. Stump v. Cheek, 2007 OK 97, ¶ 14, 179 P.3d 606, 609.

193. *See, e.g.*, Local Union No. 38 v. Andershonis (*In re* Andershonis), 324 B.R. 247, 249-50 (Bankr. M.D. Pa. 2004); *In re* Mason, 254 B.R. 764, 772 (Bankr. D. Idaho 2000).

194. *Stump*, ¶ 14, 179 P.3d at 609.

195. 62 OKLA. STAT. § 895(A)(3)(e) (2011).

196. *Cf.* N. Ill. Home Builders Ass'n v. Cnty. of Du Page, 649 N.E.2d 384, 389 (Ill. 1995) (noting that a need to ease traffic satisfied the essential nexus standard).

197. 62 OKLA. STAT. § 895(K).

reasonably conceivable facts that provided a rational basis for the adoption."[198] A development fee subject only to the constitutional baseline review of rational basis, however, might be far broader than the preceding subsections of the act allow. In addition, such a review will fail to meet the constitutional standard of *Nollan*/*Dolan* if a court applies the statutory standard to fees.[199] Indeed, *Nollan* referenced prior California Coastal Commission cases based upon rational basis review that were to become inconsistent with the holding of that case.[200] Therefore, this phrasing must have separate importance from the traditional rational basis review, which will require torsion from a reviewing court.

In defining rational basis, the Supreme Court stated, "[T]his Court's cases are clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest."[201] In this context, under rational basis, a development fee will be upheld if it rationally furthers a legitimate state interest. However, the limiting nature of the act may seek to preclude a variety of purposes that would be valid under this analysis (for example, fees for educational facilities). As well, rational basis is only one of three total test prongs that a property exaction must satisfy in Supreme Court Takings Clause analysis.

The Supreme Court of Oklahoma has interpreted rational basis in the same light. For example, in *Gladstone v. Bartlesville Independent School District No. 30*, the court interpreted the rational basis test as a "highly deferential standard that proscribes only that which clearly lies beyond the outer limit of a legislature's power."[202] The Supreme Court of Oklahoma has characterized "arbitrary, capricious, [or] irrational" statutes as falling

198. *Id.*

199. The holdings of *Nollan* and *Dolan* are in addition to the requirement of meeting rational basis review. Necessarily, the constitutional baseline is beyond rational basis. *See supra* Part IV.

200. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 830 (1987) (citing Grupe v. Cal. Coastal Comm'n, 212 Cal. Rptr. 578, 587-90 (Ct. App. 1985); Remmenga v. Cal. Coastal Comm'n, 209 Cal. Rptr. 628, 631 (Ct. App. 1985)).

201. Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

202. 2003 OK 30, ¶ 12, 66 P.3d 442, 448; *accord* Black v. Ball Janitorial Serv., Inc., 1986 OK 75, ¶ 7 n.8, 730 P.2d 510, 513 n.8 (recounting the court's application of the rational basis standard in a case involving neither suspect classification nor fundamental rights).

outside the bounds of rational basis.[203] Thus, Oklahoma's interpretation of this broad standard is in line with the traditional interpretation of rational basis scrutiny.[204] A reviewing court will therefore have to harmonize the traditional function of the term with the goals of the statute.

Again, according to Oklahoma case law, "The words of a statute will be given their plain and ordinary meaning *unless it is contrary to the purpose and intent of the statute when considered as a whole*."[205] Therefore, a reviewing court will necessarily need to construe the provision for "rational-basis scrutiny" with the aid of the subsequent clause which provides that a development fee scheme will be ratified "if it substantially complies with [the statute] and if the municipality documented reasonably conceivable facts that provided a rational basis for the adoption."[206] Rational basis, in the context of the statute, must be taken to mean (1) compliance with the statute, and (2) a rational basis for adoption. Therefore, "rational basis" will be taken as meeting rational basis scrutiny within the enumerated categories.

Though it may seem counterintuitive to render a phrase virtually inoperable in this manner, such a conclusion is supported by case law. For example, in *Oklahoma Natural Gas Co. v. Corporation Commission*, the court stated:

> It is a cardinal rule that in the construction of statutes the legislative intent must govern, and to arrive at the legislative intent the entire act must be considered, together with all other enactments upon the same subject, and *when the intention of the Legislature can be gathered from the entire statute, words may be modified, altered, or supplied to give the statute the force and effect which the Legislature intended*.[207]

Therefore, even traditional, widely-recognized meanings can be altered or appended if the intent of the legislature makes such action necessary.

An unlikely but frustrating possibility also exists. In viewing the imposition of rational basis scrutiny, a reviewing court might take subsection (K) as a cue from the legislature that it did not intend to connect development fees to the *Nollan*/*Dolan* line of cases. This outcome would

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203. Ross v. Peters, 1993 OK 8, ¶ 19, 846 P.2d 1107, 1116 (internal quotation marks omitted).

204. *See Nordlinger*, 505 U.S. at 10.

205. Stump v. Cheek, 2007 OK 97, ¶ 9, 179 P.3d 606, 609 (emphasis added).

206. 62 OKLA. STAT. § 895(K) (2011).

207. 1923 OK 400, ¶ 16, 216 P. 917, 921 (emphasis added).

severely jeopardize any certainty, beyond the statute itself, a municipality might have in structuring its development fee scheme. However, because of the multiple connections between *Nollan*/*Dolan* and section 895, and the conflict of rational basis scrutiny with the aim of the statute, this seems implausible.

A reviewing court will necessarily have to interpret the provision as beyond true rational basis; and, regrettably, this subsection realistically is of spurious value. The rational basis review provision can only be meaningfully applied to the purpose inquiry and cannot be applied to the extent inquiry, as the extent inquiry is a constitutionally (and now statutorily) mandated standard beyond rational basis. A provision mandating rational basis review is valueless when the remainder of the statute clearly imposes a burden beyond that standard for upholding a development fee scheme. This subsection only serves to confuse and is antithetical to the aims of the statute.

### *C. Legislative History in Oklahoma, a Puzzling Contradiction*

When a statute is found to be ambiguous and statutory construction principles are not determinative, a court may look to the legislative history of a bill for direction in its interpretation. Substantive legislative history typically includes committee reports, official minutes, and transcripts of floor debates; Oklahoma courts have not shied from turning to legislative history when available in interpreting statutes.[208] For example, in *In re Estate of Little Bear*, the Supreme Court of Oklahoma noted that legislative history may be accessed "in order to clear up doubt and to determine legislative intent."[209] Though the case dealt with an inapposite matter of American Indian law, it is beneficial to note that the Supreme Court of Oklahoma not only made the pronouncement of the propriety of interpreting legislative history, but also based its decision in part upon committee reports concerning the legislation.[210]

However, it is important to reiterate that evaluation of legislative intent by an Oklahoma court is predicated on the court first finding that a statute is

208. *See, e.g.*, *In re* Estate of Little Bear, 1995 OK 134, ¶ 28, 909 P.2d 42, 52; *In re* Martin's Estate, 1938 OK 322, ¶ 29, 80 P.2d 561, 565-66; *cf.* Todd v. Frank's Tong Serv., Inc., 1989 OK 121, ¶ 5, 784 P.2d 47, 49 (explaining that when evaluating conspicuous federal law intent to preempt state law, legislative history can be considered to identify congressional intent).

209. 1995 OK 134, ¶ 28, 909 P.2d at 52.

210. *Id.* ¶¶ 32, 43, 909 P.2d at 52, 55-56.

ambiguous.[211] "Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."[212] On this analysis, a lower court could look to legislative history to resolve an ambiguous point (for example, in this context, the meaning of rational basis scrutiny), but could not use intent to supplant plain meaning (for example, in this context, the functional nexus analysis). Ambiguity, though, can arise either from specific words and phrases or from the internal inconsistency of the statute.[213]

In Oklahoma, however, little record of legislative history is maintained by the state legislature. Indeed, "[T]he Oklahoma system of recording legislative history does not include debates, explanatory committee reports, or other documentation which might shed light upon the reasons or considerations motivating the action or inaction on the part of the legislature."[214] The extent of legislative history maintained is solely the various iterations of each bill that are presented before its codification.[215] Official substantive legislative intent is not regularly kept.[216]

However, official bill files, maintained by the legislature, contain each presentation of a bill from introduction to codification.[217] This has been the practice of each house of the legislature since 1989.[218] Intent of the legislature, to the extent it can be discerned, must be gleaned from the various iterations of each bill maintained. Thus, there is scant available legislative history through which to view vague propositions within the statute, and certainly no such history to which a reviewing court would be

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211. *In re Martin's Estate*, ¶ 15, 80 P.2d at 563. The court stated, "If we are to examine into the history of the legislation and contemporaneous circumstances, we are compelled to admit that the act is ambiguous." *Id.*

212. *Id.* (quoting McCain v. State Election Bd., 1930 OK 323, ¶ 0, 289 P. 759, 760) (internal quotation marks omitted).

213. State *ex rel.* Rucker v. Tapp, 1963 OK 37, ¶ 6, 380 P.2d 260, 263 ("Ambiguity of statutes may arise otherwise than from fault of expression. An ambiguity justifying the interpretation of a statute, is not simply that arising from the meaning of particular words, but includes such as may arise in respect to the general scope and meaning of a statute when all its provisions are examined. The courts regard an ambiguity to exist where the legislature has enacted two or more provisions or statutes which appear to be inconsistent." (internal quotation marks omitted)).

214. State *ex rel.* Cartwright v. Ga.-Pac. Corp., 1982 OK 148, ¶ 32, 663 P.2d 718, 723.

215. *Resources Regarding Oklahoma's Legislative Measures*, OKLA. DEP'T OF LIBR., http://www.odl.state.ok.us/lawinfo/billinfo.htm (last visited July 2, 2013).

216. *Id.*

217. *Id.*

218. *Id.*

comfortable citing. Because any interpretation of legislative intent must be inferred from the additions to and subtractions from the iterations of the statute, it seems a court would be more comfortable drawing its inferences from the statute itself.

The willingness of Oklahoma courts to evaluate substantive legislative history and the unwillingness of the state legislature to maintain such history is a frustrating inter-branch conflict; and, none of the explanations for this conflict amount to cogent rationale. First, perhaps contrary to intuition, all legislative records are *confidential* unless specified otherwise.[219] In accordance with Oklahoma statute, "The records and files of the Legislature, not otherwise provided by law to be open to public inspection, shall be confidential and privileged and may be released for public consumption only upon approval by the presiding officer of each house respectively."[220] Second, the legislature specifically excluded itself from inclusion in the definition of a public body in the Oklahoma Open Records Act.[221] In short, the statute provides that "[a]ll records of public bodies and public officials shall be open to any person for inspection, copying, or mechanical reproduction during regular business hours."[222] Public body, however, "does not mean judges, justices, the Council on Judicial Complaints, *the Legislature, or legislators*."[223]

The sequestration of legislative history in Oklahoma is not an accident of omission; it is a calculated and reaffirmed aim of the legislature that is reiterated in multiple statutes.[224] For whatever reasons, the legislature has continued its policy of confidentiality despite the aid that legislative history would offer the judiciary and the public at large. Commentators have noted that this confidentiality is a recurring electoral theme, but little movement has been made beyond politicking.[225] The Supreme Court of Oklahoma has

219. 73 OKLA. STAT. § 73(B) (2011).

220. *Id.*

221. 51 OKLA. STAT. § 24A.3(2) (2011).

222. *Id.* § 24A.5.

223. *Id.* § 24A.3(2) (emphasis added).

224. *See id.* (defining "public body" as excluding the legislature); *id.* § 24A.5 (allowing inspection of "public body" records enabling additional foreclosure); 73 OKLA. STAT. § 73(B) ("The records and files of the Legislature . . . shall be confidential and privileged and may be released for public consumption only upon approval by the presiding officer of each house respectively.").

225. *See* John Estus, *Oklahoma Lawmaker Exemption Keeps Public in the Dark on Records*, OKLAHOMAN (Mar. 17, 2010, 8:33 AM), http://newsok.com/oklahoma-lawmaker-exemption-keeps-public-in-the-dark-on-records/article/3447088; Wayne Greene, *Open Government in Oklahoma a Work in Progress*, TULSA WORLD (updated Mar. 13, 2011, 6:44

repeated its willingness to evaluate substantive legislative history when it is available (for example, when evaluating federal law);[226] therefore, the blame for the history of the legislature remaining sealed lies entirely with the legislature itself.

Certainly a full body of criticism of the use of legislative history exists. The most prominent of these refrains is the textualist view that input outside the corners of the document is superfluous and not instructive.[227] These critics maintain that single intent is impossible to discern from the large body of the legislature.[228] Critics of legislative intent also highlight that legislation is the product of intense debate and compromise that does not solely seek to further the core aim of the statute; many unrelated aims are tied into the final product.[229] As well, textualists assert the danger in the possibility of manipulation of legislative history, especially on the part of the losing side of the vote.[230] These critics also caution that legislative history has not undergone the rigors of the legislative process and is therefore at best unreliable and at worst an unconstitutional supplanting of the process of law-making established by the terms of the constitution.[231] Finally, many also maintain that turning to legislative intent is an unconstitutional delegation of power to the smaller committee from which the legislative history is derived, as the majority of instructive legislative history is derived from smaller committees and their reports.[232]

Regardless of the merit of these arguments, the Supreme Court of Oklahoma has reiterated its willingness to evaluate legislative history to interpret ambiguous statutes.[233] Though some states have taken a more

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AM), http://www.tulsaworld.com/article.aspx/Open_government_in_Oklahoma_a_work_in_progress/20110313_16_a15_transp982281. *But see* Barbara Hoberock, *Bill Would Put Legislature Under Oklahoma Open Meeting, Records Laws*, TULSA WORLD (updated Jan. 19, 2012, 4:27 AM), http://www.tulsaworld.com/article.aspx/Bill_would_put_Legislature_under_Oklahoma_open_meeting/20120119_16_a8_cutlin710342.

226. *See, e.g.*, *In re* Estate of Little Bear, 1995 OK 134, 909 P.2d 42; *In re* Martin's Estate, 1938 OK 322, 80 P.2d 561.

227. Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758 (2010).

228. *Id.* at 1762.

229. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 7 (2001).

230. Gluck, *supra* note 227, at 1762-63.

231. Manning, *supra* note 228, at 98-99.

232. *Id.*

233. *See, e.g.*, *In re* Estate of Little Bear, 1995 OK 134, 909 P.2d 42; *In re* Martin's Estate, 1938 OK 322, 80 P.2d 561.

textualist view of legislative history, Oklahoma is not among this company.[234] It is strange that Oklahoma courts are so willing to evaluate legislative history, despite its absence in the records of the state legislature. Yet, this is the reality. In fact, if anything, Oklahoma courts appear to be trending liberally in their usage of legislative history.[235]

For what it is worth, the phases of the bill provided by the Oklahoma legislature can give *some* insight regarding the statute. Evaluation of the various iterations of the bill shows that the "reasonably and roughly proportional to the nature and extent of the impact of development" provision was added after initial presentation, as was the "rational-basis scrutiny" standard.[236] The "functional nexus" standard remained constant throughout each variation of the bill presented.[237]

The addition of the "reasonably and roughly proportional" standard lends credence to the proposition that the legislature intended to adopt the "rough proportionality" standard of *Dolan*, as the addition reiterates the requirements set forth in the beginning of the subsection without the additional modifiers. What the inclusion after the introduction of the bill means regarding "rational basis scrutiny" is difficult to determine, but is likely reflective of concern for the stringent nature of the statute.[238] However, the provision is of little practical value. The endurance of the "functional nexus" standard shows deliberateness by the bill's author and a concurrence within the committees and the legislature as a whole. These examples illustrate the degree of inference required when evaluating the legislative history maintained and the paucity of useful directions that may be taken from it. The need for maintaining substantive legislative history in the Oklahoma legislature is obvious.

### *VII. Examples of Other Issues*

Interestingly, as a concluding example of the potential problems beyond those discussed in this Comment, the manner in which a development fee is defined may frustrate the purpose of the statute. Redundancy caused by the

234. Gluck, *supra* note 227, at 1758-59 (discussing the endurance of textualism in some states).

235. Darla Jackson, *Legislative History: A Guide for the State of Oklahoma*, 30 LEGAL REFERENCE SERVICES Q. 119, 120 (2011). *See generally* Sur. Bail Bondsmen of Okla., Inc. v. Ins. Comm'r, 2010 OK 73, ¶ 26, 243 P.3d 1177, 1185.

236. History of a Bill: SB708, *supra* note 17.

237. *Id.*

238. Some state senators were concerned about the degree of control the bill removed from municipalities. *See supra* note 20 and accompanying text.

statutory definition and the statute itself also raises questions regarding the scope of the statute. Both the way a development fee is defined in nature and the way that it is defined in imposition create issues regarding the rest of the statute.

*A. Development Fee: A Strict Definition*

The definition of development fees is "any payment of money imposed, in whole or in part, as a condition of approval of any building permit, plat approval, or zoning change, to the extent the fee is to pay for public infrastructure systems that are attributable to new development or to expand or modify existing development."[239] It is arguable that a fee assessed on development not tied to infrastructure improvement is permissible and outside the reach of the statute because of the portion of the definition that clarifies a development fee exists "to the extent the fee is to pay for public infrastructure systems that are attributable to new development or to expand or modify existing development."[240] This observation, however, must be clarified by the statutory definition of "public infrastructure systems."

The statute enumerates eight categories of improvements falling within the definition of "public infrastructure systems."[241] However, the definition does not limit "public infrastructure systems" to the eight categories given.[242] Under the statute, "any real property improvement, fixture, or accession" can be included within the definition of "public infrastructure system."[243] Thus, the seemingly limited definition of a development fee actually applies to purpose with a physical element.

*B. Internal Redundancy*

Section 895 provides in subsection (B) that development fees may only be charged for capital improvements.[244] If evaluated in a vacuum, it appears the subsection mandates that fees only be assessed for the purpose of capital improvements. However, by statutory definition, a development fee is only a fee imposed for that very purpose.[245] Thus, this redundancy introduces confusion and presents two alternatives: either the statute is simply redundant, or the statute is intended to be preclusive in the purpose in which

239. 62 OKLA. STAT. § 895(A)(1) (2011).
240. *Id.*
241. *Id.* § 895(A)(3).
242. *See id.*
243. *Id.*
244. *Id.* § 895(B).
245. *Id.* § 895(A)(1).

any fee tied to development may be assessed. The development community would likely argue for the latter characterization as the statute seeks to broadly limit the scope of fees assessed on new development.

*C. Permitting and Zoning: An End-around?*

As well, by definition, development fees are only such fees that are assessed "as a condition of approval of any building permit, plat approval, or zoning change."[246] This definitional observation brings to mind an important question. If a development fee is assessed through a method outside of the enumerated means in the definition, can a municipality avoid the provisions of the statute? Because the definition does not contain the same "including but not limited to" language found in other portions of the statute, it appears that logically the answer must be "yes."[247]

An important determination is whether municipalities in Oklahoma have such power to assess the fee through, perhaps, a "connection" or "incorporation" fee; many municipalities assess fees in this matter already. Though subsection (N) addresses connection fees, it does so only when connection fees exceed the costs attributable to the new development. Certainly, this is a quick fix by the legislature if this is the case. However, with shifting demographics, such a change might be a political fight in the next decade.

As well, simple timing may be enough to remove a development fee from the ambit of the statute. That is, even the phrasing of the imposition of a development fee would remove the development fee from the governance of the statute. If, for example, a developer became legally responsible for the amount of a fee at the commencement of construction, rather than payment being a prerequisite condition, a development fee scheme might altogether avoid the restrictions of the statute. Though a court might view this as a bald attempt to avoid the impositions of the statute, it cannot be disregarded that the "including but not limited to" language is noticeably absent in this portion of the statute, where it logically would be present. These additional concerns highlight the judicial mess this statute could create should development fees become a contested issue in the future.

## *VIII. Conclusion*

The codification of section 895 displayed foresight by the suburban development community and its representatives in the Oklahoma

246. *Id.*
247. *Compare id*, *with id.* § 895(B)(4).

legislature. As Oklahoma City becomes more bipolar with the growth of the inner-city, disagreements regarding fair distribution of infrastructure costs are certain to arise. To use the argot of the ex-urbanites, it seems the growing urban population in the city has been cut off at the pass. However, through the languishing nature of the bill's passage, the statute as codified is both imprecise in achieving its aim and possibly vulnerable to back-door exceptions.

Though Oklahoma courts have not had the occasion to decide whether to extend *Nollan*/*Dolan* Takings Clause jurisprudence, it appears that section 895 answers that question in the affirmative; the language of the statute draws parallels to the Supreme Court's Takings Clause jurisprudence involving real estate exactions. This provides both a reviewing court and a municipality implementing a development fee scheme a degree of certainty beyond the language of the statute itself.

Without question the most perplexing inclusion in the statute is the mandate that a reviewing court employ rational basis review when evaluating a challenged development fee system. As stated before, this provision is of no substantial value. The plain and ordinary meaning of "rational basis" must be abandoned for the sake of the statute as a whole. Therefore rational basis must be only a baseline in judicial review, rendering the subsection superfluous.

The unfortunate aspect of the statute, however, is not its conclusions—it is the handwringing required to settle upon them. The legislature ignored available, clearly defined phraseology, and this has possibly led to an outcome outside of the legislature's original intent. The history of judicial grappling with development fees begs for a level of clarity absent from the statute. A simple survey of nearby jurisdictions would have made clear the need for clarity and exactitude in this area of the law. However, the legislature chose both to use well-established language in a manner antithetical to the statute, and to adopt language used typically in an entirely separate context. Clarity, it seems, be damned.

Substantive legislative history would have also been instructive in this matter; and, the Supreme Court of Oklahoma has an unquestioned history of utilizing substantive legislative history when it is available (for example, in the context of federal statutory interpretation). However, as substantive legislative intent is not documented because of a willful withholding by the state legislature, it is impossible to affirmatively determine intent, certainly so in a manner that would affect an interpretation by a reviewing court. Though criticisms exist of the utilization of legislative intent, Oklahoma courts largely have ignored them, even liberalizing their approach to its use

in recent cases. Oddly, this is in spite of the lack of state legislative history. Of the scant "history" that is available to the public, there is none that the court would utilize as the basis of its decision.

Finally, the definitions create uncertainty regarding the scope of the statute. A court would have to pit legislative intent against logical conclusions if evaluating a development fee scheme that implicated such definitional problems. Also possibly significant are the potential loopholes in the manner of assessment of a development fee. The same is true concerning the time which fees are assessed. Depending upon the need for revenue, these scenarios may not be farfetched speculation.

At its best, section 895 serves to ensure equitable allocation of costs to new development; however, at its worst, the statute is an attempt to maintain unfairly low assessments on new development. Oklahoma City is at the low end of the spectrum of imposed development fees. What is certain, however, is that this statute is an example of the damage that can be done to a bill if it is moved through more committees than necessary. The statute is, in a word, clunky. It is an inartful example of impulse and perhaps panic ignoring form and function. It may turn out that section 895 is an onerous, bureaucratic, and completely avoidable bit of legislation.

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