



# TACIR

The Tennessee Advisory Commission  
on Intergovernmental Relations



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226 Anne Dallas Dudley Blvd., Suite 508  
Nashville, Tennessee 37243-0760  
Phone: (615) 741-3012  
Fax: (615) 532-2443  
[www.tn.gov/tacir](http://www.tn.gov/tacir)

## ***MEMORANDUM***

**TO:** Commission Members

**FROM:** Cliff Lippard *Cliff*  
Executive Director

**DATE:** 1 December 2021

**SUBJECT:** House Bill 366/Senate Bill 1604 (Right-of-Way Dedications) – Update

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Senate Bill 1604 by Senator Bailey and House Bill 366 by Representative Williams would prohibit a governmental entity from requiring a landowner to transfer ownership of any part of his or her property located along an existing public right-of-way to the entity as a condition of approving any application made to the entity to develop the property. The bill would authorize a governmental entity to require a right-of-way reservation as a condition of approving any proposed subdivision of a property, but if a governmental entity takes possession of a property covered by the reservation, then the owner will be entitled to just compensation. This bill also specifies that a real estate agent has no duty to inform any party to a real estate transaction concerning a right-of-way reservation. A draft report studying the legislation was requested by the Lieutenant Governor and House Speaker and will be presented at the January 2022 Commission meeting.

Before subdivision plats are approved, local governments, including their planning commissions, may require property owners to dedicate land or the authority to use a portion of their land through an easement for a right-of-way. It is common practice for local governments' planning commissions to adopt a dedication requirement as a part of their subdivision regulations and to require right-of-way dedication along existing roads that either are not wide enough to accommodate the new development or fail to meet the width requirements of the local major thoroughfare plan. In the right-of-way, roads, utilities, and other infrastructure necessitated by the development can be built, or improvements can be made to existing infrastructure.

The rationale for requiring a dedication is that when a property owner decides to subdivide a piece of property or change how that property is being used, that decision may bring about additional costs to the rest of the community. For example, more people in the area might lead to an increased demand on infrastructure. By dedicating property, the property owner is helping to pay for the costs of the infrastructure improvements attributable to the new development, and the total cost does not have to be borne by the community as a whole. Because of this rationale local governments typically don't pay landowners for dedications. Only one state, Massachusetts, has a statute that requires local governments to pay just compensation for dedications.

The US Supreme Court has upheld the requirement of dedications, subject to certain limitations. If a regulation or government action goes too far it can become a regulatory taking and violate the Takings Clause of the Fifth Amendment of the US Constitution (see *Pennsylvania Coal Co. v. Mahon* 260 US 393 (1922)). The Court established a two-prong test in two cases, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to determine whether a dedication is valid or is instead a regulatory taking. The first prong of the Nollan-Dolan test requires the government to show there is an "essential nexus" between the asserted legitimate state interest and the permit condition imposed by government. The second prong requires the government to demonstrate a "rough proportionality" between the dedication imposed and the effect of the development.

Other states have laws that help ensure local governments meet the requirements of the Nollan-Dolan test. Five states—Colorado, Utah, Minnesota, Arizona, and Texas—incorporate all or part of the language from the Nollan-Dolan test into their statutes. Four states—Washington, Texas, Louisiana, and Utah—require local governments to perform a written analysis of dedications. Four states—Idaho, Washington, Texas, and Utah—require either the state attorney general or the local government to adopt guidelines for proposed regulatory or administrative actions to help them determine whether they violate the Fifth Amendment.