

## **SCOTUS Asked to Clarify the Scope of Constitutional Challenges to Land Use Permit Conditions**

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In *Sheetz v. County of El Dorado, California*, when George Sheetz sought a building permit to construct a single-family residence, the County of El Dorado agreed to issue the permit with one important condition: he had to pay a \$23,420 traffic impact mitigation fee. The County had authorized the traffic impact mitigation fees as part of a general road improvement program intended to offset the impact of new development on the surrounding road infrastructure. Mr. Sheetz challenged the impact fee as unconstitutional in California state court and ultimately lost, with the California Supreme Court declining to consider his appeal. Mr. Sheetz is now asking the United States Supreme Court to hear his case.

The constitutionality of imposing conditions on land use permits has a long history before the Supreme Court, with three important cases establishing the existing legal framework. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court held that the government can only demand the relinquishment of a property interest as a condition to obtaining a land use permit if there is a clear connection between the demand and the purpose of the regulation – what is commonly referred to as the “nexus” requirement. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court stated that even if the nexus requirement was satisfied, the government’s condition must be “roughly proportional” to the projected impact of the proposed development, that is to say, the nature of the condition cannot be grossly disproportionate to the proposed benefit of imposing it.

Following *Nollan* and *Dolan*, lower courts carved out exceptions to the “nexus” and “rough proportionality” tests. For example, some courts held that only real property exactions, where the government requires that a property owner give up an interest in land, were subject to *Nollan/Dolan* review, and that monetary exactions – impact fees, for example – were not. In *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) the Court held that *Nollan* and *Dolan* also applied to monetary exactions and demands for fees “in lieu of” a real property exaction must also satisfy the “nexus” and “rough proportionality” tests.

Other lower-court created exceptions to *Nollan* and *Dolan* still exist. Some jurisdictions, such as California, hold that monetary exactions created by legislation rather than being imposed on an individual, *ad hoc* basis are completely exempt from the nexus and roughly proportionality tests. Other jurisdictions do not recognize this distinction. In his petition to the Court, Mr. Sheetz is asking to the Court to hold that legislatively created monetary exactions are subject to *Nollan* and *Dolan* and resolve the split among the jurisdictions on the issue.

Mr. Sheetz argues that the rationale behind exempting legislatively created conditions is beside the point. The justification for the “legislative exemption” is, essentially, that legislators who enact severe or disproportionate exactions are subject to the democratic process (i.e., not being re-elected or rescinding laws in the face of public backlash) which serves as an important check on unpopular governmental action, whereas fees imposed by unelected governmental employees on an *ad hoc* basis are not open to democratic challenge and, therefore, should be subject to a constitutional claim.

According to Mr. Sheetz, a taking is a taking, regardless of the governmental authority doing it. He is in good company, too, with Justices Thomas and O’Connor dissenting in a 1995 case: “The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.” Mr. Sheetz also argues that legislative exactions are not inherently more protective of property interests than *ad hoc* ones, offering the example that when given the choice in raising revenue by either (i) raising taxes on all constituents; or (ii) imposing significant monetary fees on a select group of individuals, property developers for instance, legislators keen on reelection will naturally be inclined to pursue the latter option.

If the Court decides to hear the case, its decision will significantly impact local governments and development, by either green-lighting monetary exactions that are exempt from *Nollan/Dolan* review, eliminating or curtailing them by making them subject to the constitutional takings analysis; or, of course, some kind of alternate holding that attempts to balance the competing interests at hand. To be clear, all development has an impact on the surrounding environment, whether it is a single family home or a large industrial complex. The reality of municipal budgeting is that local governments have limited methods to offset those impacts and keep up with the demand on infrastructure and government services occasioned by development. In Mr. Sheetz’s case, the fee concerned road improvements, but local governments also struggle to account for the increased demand on stormwater management and flood prevention systems, sanitary sewer capacity, and public transportation, among other things – all of which affect communities in significant ways. But the government’s efforts to offset development impacts must at all times comply with property owners’ constitutional rights.

Unsurprisingly, Mr. Sheetz’s petition has garnered significant attention at the Court, even before the defendant County of El Dorado has replied. A number of *amicus* briefs have been filed with the Court since Mr. Sheetz’s petition was filed. The County’s time to respond has been extended until July 5, 2023.