

GUEST COLUMN

Developers and city planners will be watching this case closely



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By Ritchie Vaughan

Petitioner George Sheetz claims that a \$23,420 traffic mitigation fee, required by El Dorado County in order to acquire a building permit for his “modest manufactured house,” violates the Fifth Amendment takings clause of the U.S. Constitution. The U.S. Supreme Court recently granted certiorari to review the proper test by which legislatively-adopted permit exactions will be reviewed.

Background on permit exactions

Permit exactions are requirements that local governments impose on development permits, for ex-

ample, to offset impacts to local public facilities, mitigate traffic, compensate for the loss of natural resources, provide public art in new developments, create affordable housing, and set charges for sewer and water connections. Permit exactions can be monetary, or they can be demands to dedicate land. And they can be applied on an ad hoc adjudicative basis during review of an individual application, or through generally applicable legislatively-enacted fees.

The Court has long acknowledged the dual reality that land-use permit applicants are “especially vulnerable” to potentially extortionate demands from the government that could frustrate an applicant’s Fifth Amendment right to just compensation, and that “many proposed

land uses threaten to impose costs on the public” that properly crafted exactions can offset. See *Koontz v. St. Johns River Water Mngmt. Dist.*, 570 U.S. 595 (2013).

To accommodate these competing interests, Supreme Court precedent allows the government to condition approvals on the dedication of land or payment of funds so long as there is an “essential nexus” and “rough proportionality” between the exaction and the costs the development would otherwise impose on the public. To guard against “out and out extortion” by the government against land use permit applicants, the so-called *Nollan/Dolan* test applies heightened scrutiny to permit exactions and imposes on the government the burden of justifying a proposed

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dedication. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

However, the California Supreme Court has limited the *Nollan/Dolan* heightened scrutiny test only to exactions that are imposed “ad hoc” to individual applications, and not to legislatively-imposed exactions that generally apply to a broad class of property owners. *Ehrlich v. City of Culver*, 12 Cal.4th 854 (1996). The California high court reasoned that the democratic political process sufficiently restrains legislatures from unconstitutional “extortion” of local landowners. *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643, 666-670 (2002). Legislatively imposed development impact fees that are not subject to the *Nollan/Dolan* test instead remain subject to more deferential means-end judicial review under the Mitigation Fee Act (Gov. Code §66000 *et seq.*). *Id.* at p. 671. The Mitigation Fee Act requires such fees to bear a “reasonable relationship” to the need for improvements to public facilities. *Ehrlich*, 12 Cal.4th at pp. 865, 867.

Facts of the case

In 2006, the County of El Dorado passed a legislatively-imposed traffic impact mitigation fee to finance local road improvements. The County published the fee chart in its ordinance. In 2016, Mr. Sheetz applied for a building permit to construct a 1,854 square-foot home. Both parties to the litigation agree that the County required the payment of \$23,420 in traffic impact fees for roadway improvements based on the nondiscretionary and broadly-applied fee formula established under the County’s traffic impact program. Sheetz paid this fee under protest and then sued the County for violating the takings clause.

Mr. Sheetz argues that the Fifth Amendment *Nollan/Dolan* test for land-use exactions applies to the County’s legislatively enacted traffic fees. As framed by the petitioner, if the government fails to “prove that an ‘essential nexus’ and ‘rough proportionality’ exist between the demanded property and the impacts of the owner’s project [...] it risks committing an uncompensated taking of private property in violation of the Fifth Amendment.”

In Mr. Sheetz’s suit against El Dorado County, both the trial and appellate courts held in favor of the County and rejected Mr. Sheetz’s constitutional claims. *Sheetz v. County of El Dorado*, 84 Cal.App.5th 394 (2022). According to those courts, California state law expressly declines to apply *Nollan/Dolan* to legislatively enacted, generally applicable fees (such as the traffic impact fees imposed on Mr. Sheetz’s application), and the fee paid by Sheetz was legal because it met the Mitigation Fee Act’s “reasonable relationship test.”

Mr. Sheetz petitioned for a writ of certiorari. He argued that courts around the nation are split on whether the *Nollan/Dolan* test applies to legislatively enacted fees or whether this heightened scrutiny applies only to discretionary permits negotiated on an individual, site-specific basis. For example, in a recent case about sidewalk easement requirements, the 6th Circuit held that *Nollan/Dolan* does apply to “legislatively compelled permit conditions.” *Knight v. Metropolitan Government of Nashville & Davidson County*, 67 F.4th 816 (2023).

In opposing certiorari, the County argued that *Nollan/Dolan* test does not apply to mandatory, generally-applicable fees passed by a legislature and that the framework established by the Mitigation Fee Act satisfies the constitutional purposes underlying the *Nollan/Dolan* test. The County supported its argument by pointing out that every case applying *Nollan/Dolan* has involved some element of local agency discretion. In *Knight*, for example, county staff had to individually determine the value of a sidewalk-based on a property’s street-frontage and had the discretion to waive sidewalk fees in some instances. (The *Knight* decision was published after the County filed its opposition, so the County did not analyze this case specifically.) According to the County, the Mitigation Fee Act’s “reasonable relationship” test protects landowners against extortionate permit exactions by local governments on the basis that California’s democratic process sufficiently protects landowner interests from unconstitutional exactions.

The petition was granted on Sept. 29, 2023.