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EXACTIONS, DEDICATIONS AND IMPACT FEES

APPLICABILITY OF *NOLLAN-DOLAN* ROUGH PROPORTIONALITY REQUIREMENTS TO NON-POSSESSORY EXACTIONS AND EXACTIONS IMPOSED BY LEGISLATIVE ENACTMENT

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I. Analyzing economic deprivation claims: two separate scenarios

- A. A REGULATION EFFECTS A TAKING IF IT “DOES NOT SUBSTANTIALLY ADVANCE LEGITIMATE STATE INTERESTS...OR DENIES AN OWNER ECONOMICALLY VIABLE USE OF HIS LAND.” (*AGINS* PRONG 1 AND PRONG 2)

Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)
Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S., 470, 484-485 (1987)

B. ANALYZING ECONOMIC DEPRIVATION CLAIMS (“THE TOTAL TAKES”): *AGINS*, PRONG 2.

1. Where a regulation is alleged to have denied a landowner economically viable use of land, the court examines:
 - a. The **character** of the governmental action;
 - b. The **economic impact** of the regulation upon the claimant;
 - c. The extent to which the regulation has interfered with distance **investment-backed expectations**.

Penn. Central Trans. Co. v. New York City, 438 U.S. 104, 122 (1978)
Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2286, 2894 (1992).

2. The *Lucas* “Categorical Rule”: two categories of land use regulations require compensations without a “case-specific inquiry into the public interest advanced in support of the restraint.” *Lucas* 505 U.S. at ___, 112 S.Ct. at 2893.

__ Where a physical invasion of property is authorized

__ Where the regulation itself “denies all economically beneficial or productive use of land.” *Id.*

C. ANALYZING CLAIMS THAT A REGULATION FAILS TO ADVANCE A LEGITIMATE STATE INTEREST: *AGINS* PRONG 1.

1. The *Nollan-Dolan* Two Pronged Nexus Requirement

- a. First, an “essential nexus” must exist between the asserted legitimate state interest” and the permit condition imposed by government. *Nollan v. California Coastal Comm’n.*, 483 U.S. 825, at ___, 107 S.Ct. 3141, 3148 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 2317 (1994).
- b. Second, if the required nexus to a valid public purpose exists, the court must then analyze the “degree of connection” between the exaction and the “projected impact” of the proposed development. There must be “rough proportionality” between the two. *Dolan*, 512 U.S. at ___, 114 S.Ct. at 2317, 2319.

2. The burden of proof, at least in the second phase of the *Dolan* analysis, is on the government, not the property owner.

Dolan, 512 U.S. ___, 114 S.Ct. at 2319-2320, n. 8.

3. No “precise mathematical calculation” is required, but the regulator must make “some sort of **individualized determination**” that the **exaction “is related** both in nature and extent **to the impact** of the proposed development.” *Id.*

Government must make an effort “to quantify its findings” in support of the action. *Dolan*, 512 U.S. at ___ 114 S.Ct. at 2322.

4. The “**rough proportionality**” standard is analogous to the “**reasonable relationship**” test, and is intended to invoke a **higher level of court scrutiny than the minimal level of scrutiny that would occur under the “rational basis” test.** *Dolan*, 512 U.S. ___, 114 S.Ct. at 2319.
5. In diagrammatic form, the Nollan/Dolan two-pronged nexus test for regulatory exactions may be described as follows:

II. To what extent is the Nollan-Dolan proportionality standard applicable to non-possessory and legislatively imposed exactions?

A. Courts should be “particularly careful” where the conveyance or dedication of properties a condition of permit approval.

Nollan, 483 U.S. at ___, 107 S. Ct. At 3150; *Dolan* 512 U.S. ___, 114 S.Ct. 2316-2317

B. *Nollan* and *Dolan* each were concerned with “possessory” exactions, i.e., dedications to public use as a condition of approval.

1. *Nollan*: Landowners required to grant an easement for public access along the beach front of their property to facilitate pedestrian access to public beaches to the north and south as a condition of permit approval to enlarge their home.
2. *Dolan*: Landowner required to dedicate land for a public pedestrian/bicycle path and a regional flood control greenway as conditions of approval of her application to enlarge her plumbing and electric supply store and parking lot.

C. What are “non-possessory” exactions?

1. A non-possessory exaction may include a form of exaction or permit condition other than a required dedication, easement or conveyance of land, i.e. **a development fee or required off-site public improvement or amenity.**
2. **A comprehensive analysis by the Court of Appeals of Maryland (highest court) in *City of Annapolis v. Mareen Waterman*, 745 A.2d 1000 (Md 2000) is instructive on this point.** The court rejected a takings challenge arising from a subdivision approval, finding that the challenged “exactions” cited by the landowner (precluding use of one of several proposed lots for a dwelling, and requiring other areas to be common recreational areas for use by community residents) were not in fact exactions, triggering a *Nollan-Dolan* proportionality review, but were instead “regulations” to be analyzed under the economic deprivation/total take standards set forth in *Lucas*. The court found that the landowner was not precluded from excluding the general public from his property. **Citing numerous Supreme Court and federal court decisions, as well as decisions from over a dozen State courts, the Maryland court found that the term “exactions” encompasses both possessory and non-possessory impositions, including the following:**

Possessory Exactions

- lateral beach easements
- flood plain and public bicycle easement
- cable television easements
- dedication of land to the public for canals, parks, playgrounds, schools, streets, geothermal rights, drainage facilities and navigational servitudes

Non-Possessory Exaction

- mitigation fees
- in lieu of art fees
- impact fees
- fees in lieu of dedication of parks, playgrounds and schools

City of Annapolis v. Mareen Waterman 745 A.2d at 1020-1021, citing *inter alia*, *Powell, Powell on Real Property*, § 873(2)(d)(ii) at 79D-33 (MD Ed. 1998). “A subdivision exaction [including a subdivision dedication] is a type of subdivision *regulation* that requires developers to make public improvements or install public facilities (or finance them) at their own expense.” *Id.* at 1011. (Emphasis in original.)

D. **Source of the confusion: *City of Monterey v. Del Monte Dunes At Monterey Ltd., et. al*** 526 U.S. 687, 119 S.Ct. 1624 (1999)

1. The Supreme Court upheld a developer's Section 1983 takings claim and a jury award of \$1.45 million, resulting from the City's repeated denial of successively smaller approval requests over a period of several years. **The Court found that the *Dolan* rough proportionality standard is not applicable, in cases involving "denial" of a landowner's right to use its land, as distinguished from cases where the landowner's challenge relates to "excessive exactions" imposed in conjunction with permit approvals.** The Court stated:

Although in a general sense concerns for proportionality animate the Takings Clause . . . *we 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.*

* * *

The rule applied in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts. *It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.* *Id.* at 702-703, 119 S.Ct. at 1635 (Citations omitted.) (Emphasis added.)

— Some interpret these statements as meaning that the *Dolan* rough proportionality standard is not applicable to exaction cases other than those involving dedications, easements, or conveyances of land as a condition of permit approval. **This despite the fact that the Court shortly thereafter acknowledges its failure to thoroughly explain the applicability of *Agins*, Prong 1 "outside the context of required dedications or exactions,"** *Id.* at 704, 119 S.Ct. at 1636. (Emphasis added.)

— Others including this writer, regard the above statements as simply a reflection of historical fact; namely, that the Court has not applied rough proportionality analysis to challenges involving permit denials (the total takes), i.e. allegations of deprivation of economically viable use of property, as in *Lucas* and *Penn Central*. See *What Does It Take to Make a Take?*, *supra*, page 1

E. **Other Relevant Supreme Court Decisions**

1. *Ehrlich v. City of Culver City*, 512 U.S. 1231, 114 S.Ct. 2731 (1994)

This was a land use case involving imposition of development fees as a condition of reuse of a former private club. The Supreme Court granted certiorari, vacated the judgement of the California Court of Appeals, upholding the fees and remanded the case "for further consideration in light of *Dolan*."

2. *Eastern Enterprises v. Apfel* 524 U.S. 498, 118 S. Ct. 2131 (1998).

In this case, a plurality of the Court held that Congress took Eastern's property when it created a "disproportionate" scheme to allocate the costs of health benefits in the coal industry. *Id.* at 2153. (Note: Justice Kennedy decided this case on due process rather than takings grounds.)

3. *Andrus v. Allard*, 444 U.S. 51 (1979) Restrictions on sale of eagle feathers upheld. Supreme Court seems to suggest that real property – as opposed to personal property – may be afforded greater protection under the Constitution.

F. **Cases holding that *Dolan* rough proportionality is not applicable to non-possessory exactions.**

1. *Clajon Production Corp. v. Petera* 70 F.3d 1566 (10th Cir. 1995) *Nollan-Dolan* takings claims based on limits on hunting licenses rejected; *Nollan-Dolan* held to be limited to the context of a physical takings or their equivalent.
2. *New Port Largo, Inc. v. Monro County*, 95 F.3d 1084, 1088 (11th Cir. 1996)
3. *McCarthy v. City of Leewood* 894 P.2d 836 (Kan. 1995) (*Dolan* challenge to tag fee ordinance rejected; *Dolan* held not to apply to impact fees.)

G. **Cases applying *Nollan-Dolan* to non-possessory exactions.**

1. *Home Builders Assn. of Dayton and the Miami Valley v. Beavercreek*, 729 N.E.2d 349 (Ohio 2000) (Impact fee ordinance upheld as complying with *Nollan-Dolan* "dual rational nexus" test.)

2. *Ehrlich v. City of Culver City* 911 P.2d 429 (Ca. 1996) cert. denied 117 S.Ct. 299 (1996) (This case was heard on remand from the U.S. Supreme Court, as described above (Section II.E.1). The California Supreme Court held that *Dolan* was applicable to a challenge of permit conditions requiring payment of recreation fees and art fees.)
3. *Peterman v. Michigan Department of Natural Resources* 521 N.W.2d 499 (Mich. 1994) (No *Nollan-Dolan* “essential nexus” found between the Department’s construction of a boat launch and jetties to improve navigation and the resulting destruction of the plaintiff’s beach front property. Thus, the taking of plaintiff’s property served no public interest. The Court expressly rejects the contention that *Dolan* is limited to dedications imposed as a condition of permit approval.) (Split decision.)
4. *Christopher Lake Development Co. v. St. Louis County*, 35 F.3d 1269, 1275 (8th Cir. 1994) (Development approval conditioned upon applicant constructing an off-site drainage system to serve the entire watershed area violated *Dolan* proportionality standards.)
5. *Swanson v. Planning Board of the Township of Hopewell* 692 A.2d 966 (N.J. 1997) (Off-site sewer improvement charges imposed as a condition of rezoning rejected as lacking a rational nexus to the needs created by or benefits conferred upon the subdivision.) (Note: No citation to *Nollan* or *Dolan*.)
6. cf. *City of Annapolis v. Mareen Waterman*, 745 A.2d 1000 (Md. 2000), *supra*, Section II.C.2 (Court defines “exactions” as including a variety of fees, construction of public facilities, as well as dedications and easements.)

H. Cases holding that *Nollan-Dolan* are not applicable to legislatively-imposed exactions.

1. *Homebuilders Association v. City of Scottsdale* 930 P.2d 993 (Ariz. 1997) (*Dolan* rough proportionality does not apply to water service fee enacted by ordinance and uniformly applied to all properties.) (Split decision.)
2. *Parking Association of Georgia v. City of Atlanta* 450 S.E.2d 200 (Ga. 1994) cert denied 115 S.Ct. 2268 (1995) (Ordinance imposing parking lot standards, including landscaping requirements, upon parking lot owners held not to violate *Dolan*; no dedication of property was involved and the ordinance merely represented a legislative determination limiting the use of a portion of the landowners’ property.) (Split decision.)
3. *Southeast Cass Water Resource District v. Burlington Northern R. Co.* 527 N.W.2d 884 (ND 1995) (*Nollan-Dolan* based challenge to requirement that the railroad pay costs for alterations of bridges and culverts rejected. *Dolan* involved an adjudicative decision, requiring the land owner to deed portions of her property to the city in connection with a permit approval, whereas *Southeast Cass* involved a duty imposed upon the railroad through a legislative enactment.)

I. Cases holding that *Nollan-Dolan* apply to legislative enactments.

1. *Home Builders Assn. of Dayton and the Miami Valley v. Beavercreek*, 729 N.E.2d 349 (Ohio 2000) *supra* (Impact fee ordinance upheld as complying with *Nollan-Dolan* “dual rational nexus” test.)
2. *Northern Illinois Homebuilders v. County of DuPage* 649 N.E.2d 384 (Ill. 1995) (Transportation impact fee ordinance invalidated for failure to comply with *Dolan*.)
3. *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (NY 1994) (Statute requiring apartment building owners to renew certain leases with “non-private” hospital employees did not advance a legitimate state interest and effected an unconstitutional regulatory taking, citing *Nollan*.)
4. *Isla Verde International Holdings, Inc. V. City of Camus*, 990 P.2d 429 (Wash. Ct. App. 1999) (Open space set aside ordinance invalidated on basis of insufficient evidence that it complied with *Dolan* rough proportionality requirements regarding plaintiff’s development.)
5. *Robin Steel v. Cape Corp.* 677 A.2d 634 (Md App. 1996) (APFO held to satisfy *Dolan* reasonable relationship test, but open space zoning was overturned as a denial of economically viable use on a *Lucas* analysis.)

III. Where do we go from here?

- A. Despite the Supreme Court’s decision in *Ehrlich*, which appears to support an expansive application of *Dolan* to include development fees, and the Court’s holding in *Eastern Enterprises*, *supra*, Section II.E., some confusion exists as a result of the Court’s statements in *Del Monte Dunes*.
- B. **With Regard to Non-Possessory Exactions, this writer finds it significant that *Dolan* relied heavily upon a long and well-developed body of case law from State courts regarding subdivision exactions. Although applying different tests, is it noteworthy that these cases almost uniformly require some form of proportionality, regardless of the nature of the exaction.**
 1. As can be seen from Section II.G, a number of State high courts with extensive experience in land use jurisprudence expressly hold or clearly infer that *Nollan - Dolan* apply to non-possessory exactions. Two of these decisions were rendered after *Del Monte Dunes* and another (*Ehrlich*) was decided on remand from the Supreme Court, following which the Court denied certiorari. These State court decisions are entitled to great weight.

2. In view of the above, the following admonition by Maryland's highest court, given many years before *Nollan* or *Dolan*, still seems appropriate:

"There is little doubt that the developer can be required to deal with the problems he creates in his own subdivision but there is even less doubt that he can be saddled with the resolution of problems common to the area and for which he is no more responsible than other citizens."

Baltimore Planning Comm'n v. Victor Dev. Co., 275 A.2d 478, 482 (Md 1971) (reversing a planning commission denial of subdivision plan on the ground that construction of proposed apartments would increase the population and overcrowd school facilities.)

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* Portions of this outline are based on an article by the author entitled "What Does It Take to Make A Take? A Post-Dolan Look At The Evolution Of Regulatory Takings Jurisprudence In The Supreme Court," *The Urban Lawyer*, Winter 1995.

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