An Update on Exactions

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Exactions (aka development conditions)

• Dedications: require that developer *convey land* to the city to address project effects
  – For parks, other public facilities, etc.

• Impact fees: require that developer *pay money* to address project effects
  – For traffic impact, community facilities, water quality, etc.
Why exactions?

- Reduced state and fed funding
- Prop 13 reduces local govt revenues
- Increased sense that “development should pay for itself”
Basic legal authority: Police power

Government authority to regulate private activity to promote public’s

• health
• safety
• welfare
Who has police power?

• States
  – So, Calif authorizes certain exactions

• In California, broad delegation to cities and counties
  – Basically, as broad as the state
  – So, state authorization not required for many kinds of exactions
Basic legal limitations on police power

- Reasonably related to public welfare
- Can’t conflict with “higher level” of law
  (e.g., local exercise of police power can’t conflict with state or federal law)
Basic legal limitation as applied to exactions

• Is it enough that the exaction will promote the public’s health, safety, and welfare?

• No -- requires a relationship between project impacts and conditions imposed on the project
Nollan v. California Coastal Commission

- U.S. Supreme Court (1987)
- Project: Build bigger house
- Impact: Blocked view of ocean
- Exaction: Public access along beach
- Court says: No “essential nexus” between project impacts and exaction
**Dolan v. City of Tigard**  
U.S. Supreme Court (1994)

- Project: Expanded store, paved parking
- Impact #1: Increased traffic (435 trips/day)
- Exaction #1: Dedicate bike path
- Court says: Must show that bike path dedication is “roughly proportional” to increased traffic
Dolan (cont’d)

- Impact #2: Increased run-off from site
- Exaction #2: Dedicate portion of site in floodplain
- Court says: Must show that floodplain dedication is roughly proportional to increased run-off
“Heightened Scrutiny”

- Essential nexus plus rough proportionality
- Requires “individualized determination”
- Requires some quantification
- Burden of proof on government
When does heightened scrutiny apply?

• Ad hoc conditions requiring dedication of land (*Nollan* and *Dolan*)
• What about fees?
Ehrlich v. Culver City
Calif Supreme Court (1996)

• Project: Townhomes on site of private tennis club
• Impact: Lost rec facilities
• Exaction: Pay a “recreation mitigation fee”
• Court says: This fee is subject to heightened scrutiny because “ad hoc”
What about legislative fees?

• Legislatively-imposed fees -- subject to a more relaxed standard:
  – Requires “reasonable relationship" between the fee and “the deleterious public impact of the development”
  – Burden of proof on challenger
Put another way, regarding legislative fees

• “[T]he arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster.”

• *San Remo Hotel v. San Francisco* (Calif Supreme Court, 2002)
End of story?

Maybe not

• U.S. Supreme Court (2013)
• Most of proposed development within Riparian Habitat Protection Zone
• Dist. proposed:
  – More limited development footprint
  – Fee for offsite mitigation to offset adverse impact on RHPZ
Issue

- Is this ad hoc fee subject to “heightened scrutiny?”
- Some states (e.g., Calif) say “yes”
- Some states say “no”
Holding in *Koontz*

- Monetary exactions must satisfy *Nollan/Dolan* nexus and rough proportionality requirements (i.e., tougher standard for government)

- Doesn’t seem to distinguish between “legislative” and “ad hoc” fees
Where does that leave Calif?

• *Koontz* majority didn’t address *Ehrlich* “legislative v ad hoc” distinction

• Dissent: “Perhaps the Court means … to curb the intrusion into local affairs” and will adopt *Ehrlich* approach
What’s next?

- CBIA v. City of San Jose
- Inclusionary housing ordinance
- Ct. of Appeal upheld
- But Calif Supreme Court agreed to hear, so Ct. of Appeal decision vacated
- Opportunity to talk about how Koontz affects Ehrlich
Meanwhile …

- **Sterling Park, L.P. v. City of Palo Alto**
- Calif Supreme Court (October 2013)
- Held that Palo Alto inclusionary housing requirements are exactions, not limitations on land use
- (Important because effects applicable statute of limitations)
Mitigation Fee Act

• aka “AB 1600”
• Requirements to justify impact fees
• What standard applies?
• It depends?
Govt Code sec. 66005(c)

It is the intent of the Legislature in adding this section to codify existing constitutional and decisional law with respect to the imposition of development fees and monetary exactions on developments by local agencies. This section is declaratory of existing law and shall not be construed or interpreted as creating new law or as modifying or changing existing law.
AB 1359 (2013) amends Quimby Act

• “Quimby Act”: state law authorizing park land dedication requirements and in lieu fees in subdivisions

• Quimby used to say dedicated land or fees could only be used to develop or rehab parks to serve the “paying” subdivision
AB 1359 says

• Quimby Act fees can also be used to develop or rehab park or recreational facilities in a neighborhood other than the “paying” neighborhood, if:
• “Other” neighborhood has fewer than 3 acres of park area per 1,000 population
• “Paying” neighborhood already has parks that meet or exceed prevailing city ratio, but at least 3 acres per 1,000 population
• Public hearing before using the fees
• Finding that it’s reasonably foreseeable that future inhabitants of the “paying” subdivision will use the proposed park in the “other” neighborhood
• Fees to be used within a specified radius consistent with general plan or specific plan
• “Specified radius” includes a planning area, zone of influence, or other geographic region designated by the city
Also,

• AB 1359 authorizes joint or shared use agreements to facilitate access to park or recreational facilities for residents in specified areas
Resources on Exactions


• Jacobson’s summaries of takings and exactions cases (tom.jacobson@sonoma.edu)