



Supreme Court Holds that Legislative Impact Fee Programs Can Constitute a Taking

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Today, April 12, 2024, in *Sheetz v. County of El Dorado*, the U.S. Supreme Court unanimously overruled more than two decades of California precedent, holding that legislatively established development impact fee programs must have an essential nexus and a rough proportionality to the impacts from the proposed development project on which they are being applied. The full ramifications of this ruling are still yet to be decided, however, as the Supreme Court left open the possibility of applying the nexus/proportionality tests in a more deferential manner when the development impact fees are legislatively established and apply to a broad class of development.

By way of background, the U.S. Supreme Court has historically relied on a two-part test for evaluating the constitutionality of permit exactions. The first part, established in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 (*Nollan*), asks “whether [an] ‘essential nexus’ exists between the ‘legitimate state interest’ and the permit condition exacted by the city.” The second part, established in *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*), asks whether the condition is “roughly proportional” to the development’s impacts. Shortly after the U.S. Supreme Court established this two-part test, however, the California Supreme Court held in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 that while the *Nollan*/*Dolan* tests apply to adjudicative permit exactions, they do not apply to legislatively established development permit exactions, such as generally applicable impact fees or schedules. This distinction between adjudicative and legislative permit exactions was California law until today’s, April 12, 2024, U.S. Supreme Court decision.

In *Sheetz*, a property owner applied for a permit to construct a single manufactured home in El Dorado County. The County conditioned approval of the permit in part on the payment of nearly \$24,000 in traffic impact mitigation fees pursuant to a local ordinance that the County had adopted under its general plan. The amount of the fee under the County ordinance was based on the location of the property (i.e., the specific geographic “zone” within the County) and the project type (e.g., single family residential, multifamily

residential, general commercial, office). Sheetz challenged the fee's constitutionality, arguing that legislative monetary exactions, not just adjudicative monetary exactions, are subject to the "essential nexus" and "rough proportionality" tests. The California trial court and appellate court disagreed with Sheetz, holding that consistent with long-running California precedent, the *Nollan/Dolan* tests did not apply to the legislatively enacted traffic mitigation fees.

After the California Supreme Court denied Sheetz's request for review, he petitioned the U.S. Supreme Court. The U.S. Supreme Court granted the petition and heard argument this past January 2024. Based on oral argument, it was widely believed that the U.S. Supreme Court would rule in favor of Sheetz. That speculation turned out to be accurate. In today's April 12, 2024 decision, the U.S. Supreme Court has stated in no uncertain terms that the essential nexus and rough proportionality tests from *Nollan/Dolan* apply to legislatively imposed permit fees, even if established as a general program applying to a broad class of properties.

However, this will not be the end of the story, as the U.S. Supreme Court declined to address "the parties' other disputes over the validity of the traffic impact fee, including whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development." The Court explained that because the California Court of Appeal did not consider this issue, it would remand the matter back to the California courts so that they could consider this issue, along with a handful of others, in the first instance.

The decision will have widespread impacts across California and potentially other states. No longer can local cities, counties, or other government entities establish general fee programs while being shielded from the nexus/proportionality requirements. Government agencies will need to further assess their fee programs (traffic impact fees, school fees, park fees, affordable housing fees, etc.) to ensure such fees do not constitute a taking. It remains to be seen whether any such fee programs will need to be specifically assessed on a property-by-property basis, and what level of scrutiny such programs will be subject to.

In Justice Gorsuch's concurring opinion, he writes that there should be no difference whatsoever in assessing the validity of a general fee program against many property owners as compared to an individualized assessment for a particular proposed development. If that were the case, legislatively enacted general fee programs would likely be wholly abolished. Justice Kavanaugh's concurring opinion, however, seems to suggest the opposite – that the level of scrutiny for fee programs applied to a broad class of property owners has never been decided by the court, and the *Sheetz* decision does not prohibit the use of reasonable formulas or schedules. Thus, while the U.S. Supreme Court's decision provides clarity on the applicability of nexus and proportionality to general fee programs, how such fee programs can be applied moving forward will be the subject of future litigation in California.