



Eminent Domain

The traditional notion of a “taking” is an eminent domain action arising under the Fifth Amendment; the government expropriates private property for public use, and in exchange it pays just compensation to the property’s owner. In most instances, the fight in these cases is over the value of the property taken and pre-condemnation activity. If the parties to an exercise of the eminent domain power cannot reach consensus on the compensation owed to the property owner, the government will initiate an action to condemn the property so the dispute can be resolved at trial.

LAND USE EXACTIONS:

The Interplay Between Public Infrastructure Improvements and Private Development

BY DOUG R. THORNLEY, ESQ.

It’s no secret that Nevada’s infrastructure is struggling to keep pace with a growing population, lured to the state by the promise of economic development. The unique characteristics of local government revenue in the Silver State, coupled with rising construction costs, has led to reliance on private development to finance certain public infrastructure projects and revitalize aging equipment that provides a wider public benefit through exactions imposed on discretionary approvals.

This condition sometimes results in public infrastructure cobbled together throughout the course of several projects instead of by comprehensive design, producing congested roads, unanticipated stormwater conveyance and strained public services. When the government imposes conditions on development proposals in the hope of correcting these deficiencies, frustrated land owners and developers complain, “that’s a taking!” But is it? Well, that depends.

Many times litigation concerning valuation in direct condemnation cases revolves around technical questions like the so-called “relevant parcel inquiry.” The U.S. Supreme Court wrestled with the issue in *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017), where a single property owner held two adjacent parcels that were individually too small to develop. Wisconsin law required merger of the sites into a single parcel, causing the land owner to complain that the loss of one of the separately-described parcels was a regulatory taking. The court held otherwise, applying a multi-factor test considering the “treatment of the land under state and local law; the physical characteristics of the land; and the prospective value of the regulated land.” The Nevada Supreme Court took on the converse in *City of N. Las Vegas v. Dist. Ct. (5th & Brooks, LLC)*, Docket No. 68263. There, the court considered the question of how many parcels existed for the purpose of a direct condemnation action when the landowner had agreed to divide a parcel through a purchase and sale agreement, but had not yet completed the legal requirements to effectuate the split. The court concluded that because the parcel was undivided at the time, the city commenced the eminent domain action that only one parcel existed for the purpose of valuing the property.

Inverse Condemnation

Inverse condemnation claims, on the other hand, are brought by property owners against the government when

the government takes property without following the prescribed process.¹ This usually happens in one of three situations. First, when the government, or a third-party authorized by the government, physically occupies privately-held real property without paying for it. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Second, in cases where the value or usefulness of private property is eliminated or seriously diminished by a regulatory action. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Or third, when a local government obligates a land owner or developer to construct certain capital improvements or to dedicate land as a condition of approval for new construction, and the exaction lacks an essential nexus with the government interest advanced by the condition or “rough proportionality” to the impact intended to be mitigated.

Impact of Public Infrastructure on Private Property

The intentional flooding of private property by the government is a taking. See *Arkansas Game and Fish Comm’n v. United States*, 568 U.S. 23, 33-34 (2012). But what about the aggregate effect of approving development over time that ultimately results in the inundation of a downstream property? According to the Nevada Supreme Court, the answer is much more nuanced.

In *Fritz v. Washoe County*, 376 P.3d 794 (Nev. 2016), the court considered the question: what constitutes “substantial involvement” by the government in activities resulting in a taking of property? The Fritzes complained that Washoe County’s approval of two projects on the Mt. Rose Highway, related acceptance of dedicated streets and accepted runoff management strategies caused the Fritz’s property to flood when it rains. *Id.* at 795. The friction in this case is that the upstream runoff in question is generated on private property by private parties, not the government. *Id.* at 796-97. But when the government works in concert with a private party, it may be held responsible for damage to property if it was substantially involved in the development of the condition that caused the injury. *Id.* The court explained that there is a

range of government actions that might constitute substantial involvement, from “mere planning,” which does not, all the way to the actual construction of physical improvements, which clearly does. *Id.* at 797-98.

The difficulty for public agencies is that *Fritz* is a vehicle by which liability may be incurred, despite their best efforts to appropriately consider and manage development’s impact on the operation of public infrastructure. To better insulate themselves from a *Fritz*-ian takings claim, local governments might be inclined to impose more robust conditions of approval than would otherwise be necessary. That could be a mistake.

Exactions Imposed on Private Development

Exactions are based on the same general police power that underlies all planning and zoning authority: the protection of public health, safety and welfare. Through that lens, the authority of a local government to deny a development application translates to the ability to exact concessions from an applicant in exchange for approval of the proposal. These conditions must be reasonable and have a substantial relationship to the reason for which the government could lawfully deny the application. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 837 (1987). Exactions must also be proportional to the amount of impact the proposed development would have on the problem sought to be controlled by the obligation or restriction. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (2005). That’s true even when the exaction is a monetary demand imposed on an ad hoc, adjudicative basis.² *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 612 (2013). Exactions that do not satisfy these two requirements violate the Fifth Amendment.

For example, a new project on the Mt. Rose Highway in Washoe County could not be required to cure the dispute at issue in *Fritz*, because those drainage difficulties are due primarily to the runoff generated by other developments; however, our hypothetical development would still be obligated to employ mitigation measures sufficient to control its own stormwater runoff. *Fritz* forces the government to be more cognizant of

the interplay between developments, but creates a high-wire act by exposing the government to liability to third parties for the design and administration of the exactions and conditions imposed on a particular project.

Be a Problem-Solver

A city planner once snarled at me, “do you want to be right, or do you want to be done?” Your answer to that question will, of course, depend on the peculiar realities of a given situation. It’s tougher, for example, to amortize the cost of a wastewater treatment facility than the cost of one fire truck throughout a single project, and you should not abide out-and-out leveraging and abuse of the authority to impose exactions. But in most cases, one project will not have to bear the entire burden of a public improvement or capital contribution from which it derives only some of the benefit. Deciphering the practical challenges faced by regulatory agencies in approving new development and understanding the constitutional limits of their authority is valuable when assessing and negotiating the scope of imposed exactions. Creative solutions to difficult problems are what you’re selling, and recognizing that the interests of developers and local governments aren’t entirely disparate is an important step toward getting your client’s project off of the ground and generating a return on investment. **NL**

1. Prove six elements, win your case: (1) a taking (2) of a real or personal interest in private property (3) for public use (4) without just compensation being paid (5) that is proximately caused by a governmental entity (6) that has not instituted formal proceedings. See *Fritz v. Washoe County*, 376 P.3d 794, 796 (Nev. 2016).
2. Unresolved, however, is the question of whether the *Nollan/Dolan* test should be used to evaluate the constitutionality of generally applicable monetary exactions that are imposed legislatively instead of administratively. See *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 136 S.Ct. 928, 928 (2016) (Thomas, J., concurring in denial of cert.).



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