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What the Sheetz: Where California Development Impact Fees Stand Following Recent Supreme Court Decision

Article By:

Whitney Hodges

Undoubtedly, development impact fees (DIFs)[1] can make or break the pro forma of any development project. Until this month, developers hoping to challenge the assessment of project-related DIFs were often limited in the causes of action that could be brought. For instance, in California, a DIF may be challenged under the Mitigation Fee Act (Govt. Code §§ 66000 *et seq*.), and only DIFs that were "imposed neither generally nor ministerially, but on an individual and discretionary basis" could invoke the Takings Clause embedded in the Fifth Amendment of the United States Constitution.[2] This limitation on developers' ability to utilize the Takings Clause meant that courts would not apply the "*Nollan/Dolan* test" to DIFs generally applicable to a broad class of property owners pursuant to legislative action.[3]

On April 12, 2023, this limitation was lifted when the United States Supreme Court released its much anticipated decision in *Sheetz v. County of El Dorado* (2024) 601 U.S. _____. In *Sheetz*, the Supreme Court unanimously ruled that the Takings Clause of the Fifth Amendment does not distinguish between legislative and administrative land use permit conditions. Instead, the prohibition on imposing unconstitutional conditions applies equally to legislatures and agencies. The decision settles a long-standing division among state and federal courts about whether a "legislative" exemption exists when assessing whether a regulatory action violates the Taking Clause.

While this decision is not surprising, given that during oral argument the parties "radically agreed" with this position, the *Sheetz* decision unequivocally opens the door for property owners and developers alike to challenge exactions as unconstitutional takings regardless of whether the fee is the product of legislation or regulation. This, in turn, could reduce some of the fees which contribute to the exorbitant cost of construction in California[4] and thus, combat the housing crisis.

Local and state governments have already expressed concern this expansion of what constitutes a regulatory takings limits, and could even eliminate, an agency's authority to enact programmatic land use regulations and charge fees to groups of similarly situated property owners. Indeed, *Sheetz* could impose a significant administrative burden on state and local governments by requiring case-by-case scrutiny prior to the imposition of project conditions.[5] It also jeopardizes the ability of jurisdictions to finance infrastructure and facilities impacted by widescale development.

Background

In 2016, George Sheetz applied for a building permit to construct a manufactured residence on his property in El Dorado County, California. In exchange for approval of the permit, the County imposed a $23,420 DIF to fund improvements to the County's road systems. This fee amount was calculated based on a County-approved rate schedule that factored in the type of development and its locations, and was not based on traffic impacts specifically associated with Sheetz's particular project. As justification for this assessment, the County cited its Traffic Impact Mitigation Fee Program.[6] This program, enacted as part of the County General Plan, is intended to assist in financing the construction of new roads and the widening of existing roads in attempt to address increasing demand for public infrastructure.

Mr. Sheetz paid the fee under protest and obtained the permit. He then sued the County in state court, alleging, among other things, the fee was an unlawful "exaction" of money in violation of the Takings Clause of the Fifth Amendment. Specifically, Mr. Sheetz argued that precedent established by *Nollan v. California Coastal Commission* (1987)483 U. S. 825 and *Dolan v. City of Tigard* (1994)512 U. S. 374 (referred to as the *Nollan/Dolan* test)[7] requires that if a government compels someone to give up property or money in exchange for a land use permit, it must show that such a condition has an "essential nexus" and is "roughly proportional" to the effects of the proposed use authorized by the permit.

Prior to oral argument before the Supreme Court, the County argued that the nexus and proportionality test established by *Nollan* and *Dolan* is limited to conditions imposed administratively, and not conditions imposed legislatively. Specifically, the County argued that legislation that creates a fee schedule or formula that applies equally to categories of similar properties without seeking any dedicatory interest in land may not be subject to the *Nollan*/*Dolan* test.

The California trial court upheld the fee, holding, in part, that because the statute authorized the fee, it was immune from application of the *Nollan*/*Dolan* test. The appellate court affirmed this decision, relaying the "legislative exemption,"[8] and the California Supreme Court denied subsequent review.

Supreme Court Weighs In

The California Court of Appeal echoed precedent when it held that the *Nollan*/*Dolan* test does not apply to "legislatively authorized" fee programs that are "generally applicable" to all new developments within the jurisdiction. Per the Court of the Appeal, the County's Traffic Impact Mitigation Fee Program fell into this bucket, noting that the DIF imposed on Mr. Sheetz was not an ad hoc fee imposed on an "individual and discretionary" basis. Only fees imposed through administrative action on a case-by-case basis could be subject to constitutional review. Under this reasoning, the court found that when a local government imposed a DIF "on a broad class of property owners through legislative action" (like the County's traffic DIF), such a fee is only subject to the reasonable relationship test under the Mitigation Fee Act.

The United States Supreme Court rejected this position and expressly held that fees imposed on a broad class of property owners by legislation must also satisfy the *Nollan*/*Dolan* test, just like administratively imposed, ad-hoc conditions. The unanimous opinion, authored by Justice Amy Coney Barrett, found "[n]othing in constitutional text, history or precedent supports exempting legislatures from ordinary takings rules." The Supreme Court further found "there is no basis for affording property rights less protection in the hands of legislators than administrators. The Takings Clause applies equally to both – which means that it prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits." The *Sheetz* decision also specifies that the *Nollan*/*Dolan* test applies regardless of whether the legislative permitting condition requires the

applicant to dedicate property or pay a DIF.

The Supreme Court remanded the case back to the California appellate court to be resolved in accordance with this holding.

In their concurrence, Justices Sonia Sotomayor and Ketanji Brown Jackson clarified that their agreement with the opinion was predicated on the decision's limited nature and not addressing "whether the permit condition would be a compensable taking if imposed outside the permitting context."

Justice Neil Gorsuch also supplied a concurrence, stating that regardless of whether the DIF applies to a "class of properties" rather than "a particular development," an "individualized determination" is needed to determine whether the DIF amounts to an unconstitutional regulatory taking.

In the third concurrence, Justice Brett Kavanaugh, joined by Justices Elena Kagan and Jackson, disagreed with Justice Gorsuch. Instead, this opinion suggests that less specificity would pass muster, as the decision does not prohibit local governments from adopting impact fees "through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property." This concurrence also concedes there may be wisdom in supporting the "common government practice of imposing permit conditions, such as impact fees, on new development through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property."

Implications

The unanimous opinion was limited. Taken with the three concurring opinions, the Justices do not appear to agree on what this means for developers in the future, or whether legislative DIFs must be tailored with the same degree of specificity as administrative or ad-hoc DIFs imposed.

Given the lack of specificity of the *Sheetz* decision, governmental agencies will need to reexamine and reformat the DIFs programs without concrete guiding principles. In the short term, *Sheetz* could impact a plethora of DIFs, including inclusionary housing, linkage fees, and other in-lieu-of fees, depending on how they were adopted and implemented.

Additionally, the *Sheetz* decision will likely trigger a tidal wave of litigation by developers and property owners looking to reduce the DIFs assessed against new development. In this likely unsightly amount of litigation, the question of the degree of specificity necessary to satisfy the "rough proportionality" requirement for DIFs will likely be a key issue.

FOOTNOTES

[1] A DIF is often a condition imposed on a property owner/developer by a governmental agency that requires the payment of money before the agency approves a permit application. DIFs are typically intended to mitigate the impacts of projects on public infrastructure and utilities.

[2] The Fifth Amendment of the U.S. Constitution, applicable to the states through the Fourteenth Amendment, prohibits the government's taking of private property without payment of just compensation.

[3] See *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643,

666-670; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 859-860, 866-867, 876, 869, 881.

[4] A 2018 study found DIFs for new single-family homes in California range from $21,000 to $157,000 per unit, accounting for 6% to 8% of the price of a typical home. (Sarah Mawhorter, David Garcia, & Hayley Raetz, *It All Adds Up: The Cost of Housing Development Fees In Seven California Cities,* Terner Center for Housing Innovation (UC Berkley), March 2018, available here: https://ternercenter.berkeley.edu/blog/it-all-adds-up-the-cost-of-housing-development-fees-in-seven-california-cities/.) DIFs are particularly high in California where property taxes are capped by Proposition 13 and DIFs are used to balance government agency budgets.

[5] The Biden administration filed an amicus brief on behalf of the County in the dispute and provided testimony during oral arguments that the Supreme Court had never previously considered user-based fees that fund public benefits to be a taking barred by the Fifth Amendment. Eighteen State Attorney Generals and the District of Columbia cautioned that overturning the "legislative exemption" and requiring governments to assess DIFs on a project-by-project basis would complicate land use planning and result in permit delays.

[6] The program, established to finance the construction and widening of roads, authorizes the County to impose fees on builders of new developments. The fees are assessed according to a rate schedule that took into account the type of development and location in the County.

[7] In *Nollan*, the Supreme Court determined that an exaction of a property interest had to have an "essential nexus" to the proposed project. In *Dolan*, the Supreme Court then recognized that the exaction of property must be "roughly proportional" to the impact of the proposed project. In *Koontz v. St. Johns River Water Mgmt Dist.* (2013) 570 U.S. 595 (2013), the Supreme Court clarified that compensable takings for land use permits can include money and not just real property.

[8] The appellate court also held that the traffic DIF did not violate the Mitigation Fee Act because the County could demonstrate that a "reasonable relationship" existed between the DIF and the burden posed by Sheetz's project.

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