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## Exacting Tests: Determining When a Taking is Unconstitutional

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**Abstract:** In the past, courts generally deferred to legislatures when determining whether a law constitutes a regulatory taking. However, not all regulations are treated equal, and different tests apply to different types of regulations. Types of land use actions with a lower threshold of constitutionality include exactions, and regulations that apply fixed fee schedules to private landowners. This article combs both federal and New York law to come to the clear determination that universal standards exist for each type of regulation.

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New York Courts are developing a comprehensive set of tests to determine when a regulation, to quote Mr. Justice Holmes, goes “too far” and constitutes a taking in violation of the just compensation requirement of the fifth amendment. Historically, courts have deferred to the judgments of regulators, presumed the constitutionality of land use controls and environmental regulations, and imposed a heavy burden of proof on those who contend that a particular regulation is a taking. These judicial standards apply to generally applicable regulations, such as zoning or wetland regulations, which regulate all similarly situated parcels in the community. Precisely what standards should be applied to regulations that single out a few property owners or that impose exactions as conditions on development approvals has lacked definition.

### Exactions and Takings Jurisprudence

An exaction is a condition imposed on the issuance of a development approval that requires the developer to dedicate land to the public, to allow the public access to his private land, or to pay a fee in lieu of such requirements. In these cases, under U.S. Supreme Court decisions the regulator must show that there is an *essential nexus* between the condition imposed and the public purpose that is to be achieved by the condition. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The Court added a “rough proportionality” requirement to reviewing exactions in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The City of Tigard required a site plan developer to dedicate a portion of

her property lying within a 100-year floodplain for the improvement of a storm drainage system along a nearby creek and an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The conditions required the owner to convey an easement to the city allowing it and the public access to her land. The landowner objected, claiming that these requirements were not calculated to mitigate the impact of the proposed development and, therefore, constituted an uncompensated taking.

Citing *Nollan*, the Court stated that when dedication conditions are imposed on a land use permit, they must bear an “essential nexus” to a legitimate public objective. In view of clear findings regarding the seriousness of the flooding and traffic problems in the city and along the creek, such a nexus was found. The Court went on to establish, for the first time, a test that is to be used to determine “the required degree of connection between the [dedication conditions] and the projected impact of the proposed development.” *Dolan*, 512 U.S. at 377. For this purpose, the Court wrote “we think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of *individualized determination* that the required dedication is related both in nature and extent to the impact of the proposed development.” *Id.* at 391 (emphasis added).

In *Dolan*, the Court found that the City had not shown why a dedicated public greenway, rather than a private one, was required in the interest of flood control. In regard to the pedestrian/bicycle path dedication, the Court held that the city’s finding that the path “could offset some of the traffic demand” was too general. *Id.* at 389. The City did not “meet its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement.” *Id.* at 395. The Court required the City to “make some effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset some of the traffic demand generated.” *Id.* at 395-96. The imposition of the burden of proof on the regulator, the stricter scrutiny used, and the failure to presume the validity of the City’s determinations are uniquely applicable to cases where exactions are challenged.

The Supreme Court framed the “rough proportionality” test by adapting a “reasonable relationship” test used in several state court decisions referencing *Jordan v. Menomonee Falls*, 28 Wis. 2d 608 (1965), *Collis v. Bloomington*, 310 Minn. 5 (1976), *College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 807 (Tex. 1984), and *Call v. West Jordan*, 606 P.2d 217, 220 (Utah 1979). *Id.* at 390. In all three of these cases property owners challenged the constitutionality of municipal ordinances that required subdividers to dedicate land for recreational purposes or pay a fee in lieu of such dedication. The state courts required a showing of a reasonable relationship between the planned subdivision and the impact fee or land dedication condition imposed. In *Jordan*, the fee in lieu of dedication was

\$200 per lot for all subdivisions because it had determined that land valued at \$200 per household added to the community was needed to provide the added park and school lands. *Jordan*, 28 Wis. 2d at 614-15. In the U.S. Supreme Court's parlance, this standard became known as the rough proportionality requirement.

### **Per-Lot or Per-Household Fixed Fee Schedules**

Recently, the Court of Appeals clarified the applicability of the "rough proportionality" test to fixed fee schedules that apply to all subdivisions approved in the community. In *Twin Lakes Development Corp. v. Town of Monroe*, 2003 N.Y. LEXIS 3949 (November 20, 2003), the Court of Appeals held that the town's fixed recreational fee schedule is not a taking of property without just compensation. Pursuant to Town Law § 277(4) a Town, after making a finding that there is an unmet need in the Town for recreational facilities, may require a subdivider to provide recreational facilities on site or, if there is no appropriate location for such facilities on the site, require the subdivider to make a contribution to the locality's recreational trust fund. This section was enacted by the State legislature in recognition that, as development proceeds, land is eventually lost that is needed for park and recreational services to citizens. Using this authority, the Town of Monroe requires all developers to pay \$1,500 per-lot for a proposed subdivision of five or more lots. Monroe Town Code § 26B-2(A)(7).

In *Twin Lakes*, the Court of Appeals consulted *Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), to confirm that such fees are exactions. *Twin Lakes Development Corp.*, 2003 N.Y. LEXIS 3949 at \*7 and \*8 n1. In *Monterey*, the Court declined to extend the strict scrutiny analysis to cases in which the plaintiff challenges a denial of a development permit. In dicta, however, the Court stated that "land-use decisions conditioning approval of development on the dedication of property to public use" and, by extension, fees in lieu of such dedication, are exactions. See *Monterey*, 526 U.S. at 703.

The petitioner, Twin Lakes Development Corp., an applicant for a subdivision permit, was required to pay \$33,000 in order to obtain the necessary approvals to proceed with its 22 residential lots. Twin Lakes paid the fee in protest and argued that the Town's fixed recreation fee, applied routinely to all subdivisions, did not reflect the type of individualized determination that must be made and thus violated the U.S. Supreme Court's requirement that exactions be reasonably proportional to the impacts that they mitigate. *Twin Lakes Development Corp.*, 2003 N.Y. LEXIS 3949 at \*6.

The Court of Appeals in *Twin Lakes* addressed the reasonableness of the fee amount and found that the plaintiff failed to demonstrate that the Town's fixed fee was a taking. The court found that that the essential nexus existed because the Town "made explicit findings that the demand for recreational facilities exceeded

existing resources and that continued subdivision development, paired with the 'upward-spiraling land costs,' would exacerbate the problem." *Id.* at \*9.

Given this showing, the court found that Twin Lakes failed to prove that the \$1,500 fee was not roughly proportional to the impact its development would have on the recreational needs of the Town. The Town found with respect to plaintiff's application that there was a need for recreational opportunities in the town and the subdivision would increase this need, but the site was not suitable for the development of a park. "These findings satisfy the requirements of Town Law § 277(4)(c) and reflect the individualized consideration of the project's impact contemplated by *Dolan*." *Id.* at \*10. The Court of Appeals thus found that *Dolan's* rough proportionality test does not preclude the establishment of fixed fees.

### **Rezoning Cases**

In *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 94 N.Y.2d 96 (1999), the plaintiff argued that the rezoning of its large parcel from residential to recreational use was a taking because it violated the essential nexus test of *Nollan*. As a result of the rezoning, plaintiff's plan to construct a number of homes was denied by the Town. The town had conducted years of studies and had documented its need to preserve open space, create recreational opportunities, and provide for flood control. The plaintiff, nonetheless, argued that, under the *Nollan* test, "there is an insufficiently 'close causal nexus' between the rezoning measures and the legitimate public interests defendants sought to achieve." *Id.* at 105. Although the plaintiff conceded that the Supreme Court, in *Monterey v. Del Monte Dunes*, limited the *Dolan* "rough proportionality" test to exaction cases, the plaintiff maintained that the court must consider the "essential nexus" test since the Supreme Court did not expressly limit that text to exactions. In essence, the plaintiffs implied that singling out their large acreage along with one other golf course for special treatment was the type of regulation to which the stricter judicial rules should apply.

The Court of Appeals disagreed and held that the Supreme Court, in limiting the "rough proportionality" test to exaction cases "necessarily rejected the applicability of the 'essential nexus' inquiry to general zoning regulations as well." *Id.* at 107. In affirming the decision of the Appellate Division, the court held that the test from *Agins v. City of Tiburon*, 447 U.S. 255 (1980) remained the proper test for a regulatory taking: a regulatory taking occurs when the ordinance does not substantially advance a legitimate state interest or when it deprives the owner of the economically viable use of his land.