

SCOTUS Decision May Limit Municipalities' Ability to Collect Impact Fees

In April, the Supreme Court held in *Sheetz v. County of El Dorado, California* that the Takings Clause of the United States Constitution applies to legislative land-use conditions, such as impact fees. This will result in additional litigation, stricter judicial scrutiny surrounding the constitutionality of legislative land-use conditions and a potential reevaluation of whether and how local governments assess impact fees.

Under the Fifth Amendment of the U.S. Constitution, the Takings Clause prohibits the taking of private property for public use without just compensation. The Supreme Court has held that this applies not just to physical takings through eminent domain, but also to the imposition of conditions to the issuance of permits, including, in some cases, the imposition of fees.

In a pair of cases decided in 1987 and 1994 – *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* – the Supreme Court created a test for assessing whether a permit condition – a stipulation which is issued with or incorporated by reference into a permit and which must be complied with – was an unconstitutional taking. In *Nollan*, the Court held that a requirement to grant a public access easement as a condition to a beachfront home renovation was an unconstitutional taking because the condition did not have an essential nexus to a legitimate state interest. Likewise, in *Dolan*, the Court overturned an Oregon city's requirement that a business dedicate a public greenway as a condition of granting a permit for a business expansion. In *Dolan*, the city's requirement had an essential nexus to a legitimate government interest, but the condition imposed was disproportionate to the impact of the proposed development.

Therefore, *Dolan* finalized the two-part test under the Takings Clause: (1) permit conditions must have an "essential nexus" to the government's land use interest – that is, a condition must be a legitimate means of achieving the government's stated purpose, rather than a mere tax or exaction – and (2) a condition must have "rough proportionality" to the development's impact on the public infrastructure – that is, it cannot grossly exceed the actual cost that a development will have on a community.

In *Sheetz*, a homeowner applied for a building permit to construct a manufactured house. In accordance with a legislatively adopted fee schedule, the plaintiff was required to pay more than \$20,000 in traffic-mitigation impact fees. The plaintiff paid the fees under protest and filed litigation against the county arguing that the legislatively adopted impact fees should be subject to the two-prong Takings Clause test established under *Nollan* and *Dolan*.

Prior to *Sheetz*, the Supreme Court had only applied the Takings Clause analysis to administrative permit conditions, not legislatively adopted permit conditions. An administrative permit condition is imposed against a particular project on a case-by-case basis as a condition to issuing a permit for the project. For example, a city might determine that a particular project would generate enough traffic to require a new turn lane and would assess a fee against the property to pay for the new turn lane as a condition to issuing the necessary permit. In contrast, a legislative permit condition is adopted by a legislative body (typically an ordinance adopted by a city council) and applies to types of development or developments in certain areas of a city, rather than to individual projects. For instance, to offset the expected traffic impacts of residential development, a city might pass an ordinance that requires all residential developments to pay a traffic mitigation impact fee of \$500 per unit as a condition to issuing permits for that type of development. Impact fees are a common type of legislatively adopted permit condition imposed by local governments on new projects to help offset the expected impacts of a project on public infrastructure.

Thus, the issue in *Sheetz* was whether a legislatively adopted permit condition was subject to the same Taking Clause guardrails – “essential nexus” and “rough proportionality” – as an administratively imposed permit condition. The Court held in a unanimous opinion that all permit conditions are subject to the Takings Clause regardless of whether imposed administratively or legislatively. However, the Court stopped short of determining *how* to apply the two-prong Takings Clause test to legislatively adopted permit conditions. This leaves many questions unanswered, including whether a legislatively adopted fee satisfies the “rough proportionality” prong of the Takings Clause test on average or must satisfy the test as applied to each individual project. The case was remanded to the California appellate court for application of the Takings Clause analysis. That analysis – while surely to be closely watched – will be binding only on California state courts, but it could inform common practices in other states or lead to litigation outside of California.

Despite the Supreme Court’s decision, the constitutionality of legislatively adopted permit conditions is still a live issue. Moving forward, governments should expect litigation over whether such conditions meet the two-prong of the Takings Clause test established under Supreme Court precedent. Courts across the country are likely to reach different decisions on these open questions, and it is unlikely there will be a consistent national standard for some time. Developers may feel emboldened to push back on impact fees as their projects move through the entitlement process, and they may experience some success in negotiating reduced fees if they can demonstrate that the legislatively adopted fees are not reasonably related to a legitimate government purpose or are disproportionate to the impacts of the proposed project. Developers and governments both should keep an eye on those decisions and Polsinelli client alerts to stay informed on the future of impact fees.