

Recent Developments in Exactions and Impact Fees

W. Andrew Gowder, Jr.*
Bryan W. Wenter**

I. Introduction

THE LAWS GOVERNING EXACTIONS¹ and development impact fees continue to evolve as the nation's courts seek to balance the need for local governments to finance the infrastructure required by new development with the constitutional and statutory constraints limiting the reach of local governmental regulation. Some of the most frequently litigated issues in this area are whether the rules established in *Nollan v. California Coastal Commission*² and *Dolan v. City of Tigard*³ apply to legislative or adjudicative exactions, whether *Nollan*'s⁴ and *Dolan*'s⁵ heightened scrutiny applies to impact fees or in-lieu fees,⁶ and whether an exaction is properly tied to capital expenditures for the infrastructure needed to serve a particular development. This year's report on the latest developments

*Shareholder, Pratt-Thomas Walker, P.A., Charleston, South Carolina. J.D., *cum laude*, Wake Forest University School of Law; B.A., *summa cum laude*, Wofford College. Mr. Gowder is the Committee Coordinator of the American Bar Association's Section of State and Local Government Law. He focuses his practice on land use, state and local government, business litigation, business entity formation and governance.

**Assistant City Attorney, City of Walnut Creek, California. J.D., University of North Carolina School of Law; M.R.P., University of North Carolina at Chapel Hill; B.A., *magna cum laude*, University of Oregon. Mr. Wenter is the chair of the Land Use Planning & Zoning Committee of the American Bar Association's Section of State and Local Government Law. He focuses his practice on land use and local government law.

1. Exactions are conditions imposed on developers, for the privilege of developing land, to aid local government in providing public facilities. Exactions come in several forms, including conveyances of land or an interest in land, and development impact fees. Exactions are typically imposed to provide land or funding for facilities such as water and sewer lines, road construction, new schools, and parks. The power to impose exactions is part of local government's police power. If that power is exercised properly, an exaction that serves the same legitimate police power as a refusal to issue a permit will not constitute a taking.

2. 483 U.S. 825 (1987).

3. 512 U.S. 374 (1994).

4. See *infra* notes 10, 12-13 and accompanying text.

5. See *infra* notes 11, 14-18 and accompanying text.

6. An in-lieu fee is a fee paid as an alternative to satisfying some other obligation, such as providing affordable housing units.

in exactions and impact fees addresses several of these commonly litigated issues, including whether legislatively imposed fees are exactions or whether certain actions are exactions under the *Nollan* and *Dolan* tests and what “rough proportionality” really means. The report also addresses procedural issues that arise in litigation such as whether an unconstitutional exaction is void ab initio or merely voidable and when the statute of limitations begins to run on challenges to exactions.

II. Overview of the *Nollan* and *Dolan* Rules

Government agencies frequently require landowners and developers to dedicate land or pay impact fees as conditions of development permit approval. The rationale for such exactions is that new development should be required to pay its own way by providing the public facilities needed to serve a particular project. Although these types of conditions of development approval are widely used nationwide, landowners and developers continue to challenge exactions and fees they consider excessive or improper.

Under the Takings Clause of the Fifth Amendment, which provides that private property cannot be taken for public use without just compensation,⁷ compelling a property owner to relinquish a portion of his or her land to public use constitutes a taking.⁸ An exaction will also be a taking, under the framework the United States Supreme Court established in *Nollan* and *Dolan*, both of which involved Fifth Amendment takings challenges to adjudicative land use exactions in which the “government demand[ed] that a landowner dedicate an easement allowing public access to his property as a condition of obtaining a development permit,”⁹ if it does not “substantially advance the same government[al] interest that would [be] a valid ground for denial of a land use permit”¹⁰ or if it is not also roughly proportional “both in nature and extent to the impact of the proposed development.”¹¹

In *Nollan*, the California’s Coastal Commission (Commission) allowed landowners to replace a small beachfront bungalow but required

7. U.S. CONST. amend. V. The Fifth Amendment is incorporated into and made applicable to the states by the Fourteenth Amendment. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897). State constitutions also require the payment of just compensation when property is taken for public use. *See, e.g.* CAL. CONST., art. I, § 19.

8. *Nollan*, 483 U.S. at 831, 834.

9. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005).

10. *Id.* at 547.

11. *Dolan*, 512 U.S. at 391.

that they grant a public easement across their property on the beach because the new, larger house would interfere with visual access and create a psychological barrier to using the beach.¹² The Court held that the condition was unconstitutional on the grounds that it did not bear a logical connection (i.e., “essential nexus”) to the harm that the commission sought to address because requiring an easement to provide access to people already on the beach did nothing to promote visual access to the beach or overcome psychological barriers to its use.¹³

In *Dolan*, a city allowed a landowner to expand her plumbing and electrical supply store but, because her property was in a flood plain, required her to dedicate a portion of the relevant property as a “greenway” for drainage.¹⁴ The city also required her to dedicate a pedestrian and bicycle pathway to mitigate projected traffic increases.¹⁵ The Court agreed that there was a nexus between the requested land dedications for additional drainage and a pathway to reduce vehicle traffic.¹⁶ The Court ruled the exaction unconstitutional, however, because the city failed to show that the conditions were “roughly proportional” to the negative impacts caused by the development.¹⁷ The Court explained that “[n]o 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.”¹⁸

III. Recent Cases

A. Legislatively Imposed Exactions

In *McClung v. City of Sumner*,¹⁹ an important case of first impression, the Ninth Circuit appellate court addressed whether a legislative, generally applicable development condition, as opposed to an adjudicative land use exaction, should be reviewed under the ad hoc standards of *Penn Central Transportation Co. v. New York City*,²⁰ or the more demanding nexus and rough proportionality standards of *Nollan* and *Dolan*.

12. *Nollan*, 483 U.S. at 828, 838.

13. *Id.* at 839-40.

14. *Dolan*, 512 U.S. at 379.

15. *Id.* at 379-81.

16. *Id.* at 387-88.

17. *Id.* at 394-95.

18. *Id.* at 391.

19. 545 F.3d 803 (9th Cir. 2008), *modified*, 548 F.3d 1219 (9th Cir. 2008).

20. 438 U.S. 104 (1978). In *Penn Central*, the New York City Landmarks Preservation Commission refused to approve plans to construct an office building over Grand

Following severe flooding in the early 1990s, the city of Sumner adopted an ordinance that requires most new developments to include storm drain pipes with a minimum diameter of twelve inches, along with plans for the city to replace certain pipes with up to twenty-four inch diameter pipe.²¹ The landowners of four adjoining residential properties later applied to develop one of their parcels into a Subway® sandwich shop, and learned that a portion of the storm drain pipe serving that property did not satisfy the city's ordinance or its plans to upgrade to twenty-four inch pipe.²² The city engineer sent a letter offering to waive certain fees in exchange for the landowners installing a twenty-four inch instead of a twelve inch pipe.²³

Although the landowners revised their plans, installed a twenty-four inch pipe without objection, and received the benefit of certain fees being waived, they filed suit asserting that the city's requirement that they upgrade the storm drain was a taking in violation of the Fifth Amendment.²⁴

The court first considered the landowners' challenge to the city's requirement that new developments install at least twelve inch diameter sewer pipes, and noted that the case did not involve either an individual adjudicative decision or a requirement that the landowners relinquish real property rights.²⁵ The court reasoned that the city's ordinance "was the source of the twelve inch storm pipe requirement, not an adjudicative determination applicable solely to the McClungs."²⁶ The court

Central Terminal due to its "landmark" status under the Landmarks Preservation Law. *Id.* at 116-17. The Supreme Court recognized that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* at 124 (citation omitted). The Court then acknowledged that it was "unable to develop any 'set formula'" for evaluating these types of claims, but identified relevant factors to guide the analysis, such as the "economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action." *Id.* (citation omitted).

21. *McClung*, 548 F.3d at 1222.

22. *Id.*

23. *Id.* at 1222-23.

24. *Id.* at 1223. The landowners filed initially in Washington state court asserting violations of Washington law, and several years of litigation ensued. *Id.* The landowners later amended their complaint to allege that the city's storm drain upgrade requirement was a taking in violation of the Fifth Amendment, after being allowed to do so by the Washington appeals court, and the city responded by removing the case to federal court. *Id.* (citing *Tapps Brewing, Inc. v. McClung*, 125 Wash. App. 1024 (2005)).

25. *Id.* at 1225.

26. *McClung*, 548 F.3d at 1227.

held that this generally applicable land use regulation was within the city's police power and that it was subject to review under *Penn Central* because it involved a takings claim based on a condition imposed on all new developments.²⁷ The court ruled that *Nollan* and *Dolan* do not apply to generally applicable development conditions that do not require a landowner to relinquish rights in real property.²⁸ The court also observed that because the ordinance at issue was adopted to mitigate the adverse effects of new development, it was not deciding whether *Penn Central* or *Nollan* and *Dolan* would apply to a legislatively imposed exaction "designed to advance a wholly unrelated interest."²⁹

The court then considered the landowners' takings claim based on the request that they install a twenty-four inch pipe in exchange for a waiver of certain fees.³⁰ The court rejected this claim, holding that under Washington state law the landowners had voluntarily entered into an implied contract with the city, and that they had accordingly agreed to install the larger pipe.³¹ Because the landowners were not compelled to install the larger pipe, but voluntarily contracted with the city to do so, the court concluded that there was no taking and that *Nollan* and *Dolan* did not apply.³²

In the case of *Wolf Ranch, L.L.C., v. City of Colorado Springs*³³ the Colorado Court of Appeals reviewed a Colorado statute that codified, in effect, the holdings of *Nollan* and *Dolan*.

Wolf Ranch, L.L.C., which owns some 1900 acres of land in Colorado Springs, is in the Cottonwood drainage basin, which is one of thirty major drainage basins within the city of Colorado Springs. In 2005, Wolf Ranch requested to be exempted from the Cottonwood Creek drainage fee which was then \$9,315 per acre. In June 2006, the City Drainage Board denied Wolf Ranch's request. Following an appeal to the City Council, which likewise denied the request, Wolf Ranch filed a petition for relief with the district court asking the court determine that the city had failed to meet its burden of proof under Colorado Revised Statute § 29-20-204(2)(c) (2008) that the imposition of drainage fees on Wolf Ranch was roughly proportional to the impact of the proposed use of

27. *Id.*

28. *Id.* at 1227-28.

29. *Id.* at 1225, n.3.

30. *Id.* at 1228-29.

31. *McClung*, 548 F.3d at 1229.

32. *Id.* at 1230.

33. 2008 WL 4878388 (Colo. App. 2008).

Wolf Ranch. As a result, Wolf Ranch requested an order that it should be exempt from payment of any drainage fees to the city and should be developed as a closed basin. The court of appeals stated the issue before them was whether the city's imposition of drainage fees or, precisely, its refusal to exempt Wolf Ranch from those fees, impaired Wolf Ranch's property rights in violation of the Act.³⁴

The court then reviewed the background and purpose of the Act, which was to codify the constitutionally-based standards of *Nollan* and *Dolan*, and then reviewed the language of the Act as follows:

In imposing conditions upon the granting of land-use approvals, no local government shall require an owner of private property to dedicate real property to the public, or pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis, unless there is an essential nexus between the dedication or payment and a legitimate local government interest, and the dedication or payment is roughly proportional both in nature and extent to the impact of the proposed use or development of such property. This section shall not apply to any legislatively formulated assessment, fee, or charge that is imposed on a broad class of property owners by a local government.³⁵

The court then observed that not every condition on land use triggered the Act, instead the Act is triggered by two types of conditions: (1) to dedicate real property to the public; or (2) to take money or provide services to a public entity in an "amount that is determined on an individual and discretionary basis."³⁶ The court found that the city, by denying the exemption request and conditioning any development on payment of drainage fees, did not impose the type of monetary condition covered by the Act, but rather simply required Wolf Ranch to pay the same legislatively determined fee imposed on an equal per-acre basis on all developers in the Cottonwood Creek basin. As a result, the court held that the Act was not triggered because requiring Wolf Ranch to pay drainage fees did not impose a monetary condition in an amount determined on an individual and discretionary basis.³⁷

B. *Facial Challenges*

In several recent cases, courts have held that the tests established in the *Nollan* and *Dolan* decisions govern individualized, or as applied, legal challenges, while recognizing that those tests have not been applied to

34. COLO. REV. STAT. § 29-20-201 - § 29-20-205 (2008).

35. *Wolf Ranch, L.L.C.*, 2008 WL 4878388, at *3 (Colo. App. 2008) (interpreting COLO. REV. STAT. § 29-20-203(1) (2008)).

36. *Id.* at *3 (quoting § 29-20-203(1) (2008)).

37. *Id.* at *6.

generally applicable land use regulations.³⁸ Despite the weight of that seemingly established precedent, the plaintiffs in *Action Apartment Association v. City of Santa Monica*³⁹ argued that the scope of the *Nollan* and *Dolan* rules should be expanded to include facial challenges to generally applicable land use regulations.⁴⁰

Action Apartment Association involved the city of Santa Monica's adoption of an ordinance that modified the options for meeting the city's existing affordable housing requirements.⁴¹ The modification eliminated an earlier option that allowed developers to construct affordable housing units off-site and instead required such units to be constructed on-site.⁴² The association challenged the ordinance under several theories, the most noteworthy of which was that the ordinance violated the takings clauses of the federal and state constitutions because there was no nexus between the construction of new or replacement market-rate housing and the need to provide affordable housing.⁴³

Relying on language in the United States Supreme Court's *Lingle v. Chevron U.S.A. Inc.*⁴⁴ decision, the Action Apartment Association asserted that the *Nollan* and *Dolan* nexus and rough proportionality tests apply both to applied judicial review of adjudicative decisions involving an individual developer's request for project approval and to facial challenges⁴⁵

38. See, e.g. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (emphasizing that the United States Supreme Court's holding that the "substantially advances" test is not a valid takings test did not require the Court to disturb any of its prior takings jurisprudence); *San Remo Hotel L.P. v. City and County of S.F.*, 41 P.3d 87, 102-03 (2002) (distinguishing between a fee condition applied to a single property that is subject to *Nollan* and *Dolan* heightened scrutiny and a generally applicable development fee that is subject instead to the "reasonable relationship" test's relaxed form of heightened scrutiny). See also *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (noting that the Court has not extended *Dolan*'s rough-proportionality beyond the special context of land use decisions conditioning approval of development on the dedication of property for public use).

39. 82 Cal. Rptr. 3d 722 (2008).

40. *Id.* at 724.

41. *Id.*

42. *Id.* at 461.

43. *Id.*

44. 544 U.S. 528 (2005).

45. A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. To void a statute as a whole on the grounds that it is facially unconstitutional, a plaintiff cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute but instead must show that the statute's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions. *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069 (1995). Rather, in the context of a facial takings claim, a party

to land use regulations.⁴⁶ The issue before the Supreme Court in *Lingle* was whether the “substantially advances a state interest” test in *Agins v. Tiburon*,⁴⁷ remained a viable test for determining whether a given regulation effected a taking. In determining that the “substantially advances” test had no part in takings analysis because it derived from due process rather than takings precedents, the Court reasoned that the rules established in *Nollan* and *Dolan* were distinct from the “substantially advances” test and stated expressly that “our decision should not be read to disturb these precedents.”⁴⁸

The *Action Apartment Association* court rejected the plaintiff’s claim, concluding that “*Lingle* does not abrogate the rule that the *Nollan/Dolan* nexus and rough proportionality test [sic] applies only in the context of judicial review of individual adjudicative land use decisions.”⁴⁹ The court noted that the basis for applying *Nollan* and *Dolan* is “the discretionary deployment of the police power” in “the imposition of land-use conditions in individual cases,” and *Lingle* did not change that principle.⁵⁰ The decision affirms existing limitations to the *Nollan* and *Dolan* rules under which landowners harmed by generally applicable legislative decisions will not find relief via takings law.

C. Interpreting Dolan

In an interesting decision, the Utah Supreme Court, in *B.A.M. Development, L.L.C. v. Salt Lake County*,⁵¹ considered whether the state’s lower courts properly applied *Dolan*’s “rough proportionality” analysis.⁵² The case addressed Salt Lake County’s imposition of a condition of approval that required the developer of a residential subdivision to widen the road outside of the subdivision from seventeen feet half-width to

attacking a statute must demonstrate that its mere enactment constitutes a taking and deprives the owner all viable use of the property at issue. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 318 (2002). The United States Supreme Court has defined a facial takings claim as an “uphill battle” and “difficult” to demonstrate. *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 297 (1981).

46. *Action Apartment Ass’n*, 166 Cal. App. 4th at 460.

47. 447 U.S. 255 (1980). In *Agins*, a case involving a facial takings challenge to certain municipal zoning ordinances, the Court declared that application of a general zoning law to particular property effects a taking if the ordinance (1) does not substantially advance legitimate state interests or (2) denies an owner economically viable use of his land. *Id.* at 260.

48. *Lingle*, 544 U.S. at 548.

49. *Action Apartment Ass’n*, 166 Cal. App. 4th at 471.

50. *Id.* at 470.

51. 196 P.3d 601 (Utah 2008).

52. *Id.* at 602.

forty feet half-width.⁵³ In response to changes in its master plan, the county then notified the developer that it would be required to increase the street to fifty-three feet half-width.⁵⁴ The developer objected, arguing that the additional thirteen-foot requirement was an unconstitutional exaction.⁵⁵

Before addressing the question in dispute, the Utah Supreme Court analyzed the term “rough proportionality” and concluded that it “has engendered vast confusion about just what the municipalities and courts are expected to evaluate when extracting action or value from a land owner trying to improve real property.”⁵⁶ Accordingly, the Utah court rejected the term “rough proportionality” in favor of what it considered the “more workable description of rough equivalence, on the assumption that it represents what the *Dolan* Court actually meant.”⁵⁷

In addition to articulating a new term that attempts to provide clarity to the *Dolan* rule, the Utah Supreme Court also provided a standard that seeks to approximate its requirements. The court explained that “[t]he proportion of 1 to 1.01 is roughly equivalent, while the proportion of 1 to 3 is not.”⁵⁸ The court also stated that, measured in dollars, if the cost of the exaction and the cost of the impacts are “about the same,” then they are “roughly equivalent.”⁵⁹

The court went on to articulate the mechanics of a proper *Dolan* analysis. A trial court must first determine whether the exaction and impact are related.⁶⁰ The court is then required to determine whether the exaction and impact are related in extent, which requires an analysis of the costs of the impact and the costs of the exaction.⁶¹ After determining the cost to each party, the court must determine whether they are roughly equivalent.⁶² The court remanded the case back to the trial court to conduct the required analysis.⁶³

A decision out of Florida, *St. Johns River Water Management District v. Koontz*, analyzed whether the requirement by the Water

53. *Id.* at 602.

54. *Id.*

55. *Id.* The court did not explain why the developer argued that the additional exaction, from forty feet to fifty-three feet half-width, amounted to a taking, while the original exaction, from seventeen to forty feet half-width, did not.

56. *B.A.M. Dev., L.L.C.*, 196 P.3d at 603.

57. *Id.*

58. *Id.*

59. *Id.* at 604.

60. *Id.* at 603-04.

61. *B.A.M. Dev., L.L.C.*, 196 P.3d at 604.

62. *Id.*

63. *Id.*

Management District (District) to satisfy certain off-site mitigation conditions as a condition of permit approval was an improper exaction under the test of *Nollan* and *Dolan*.⁶⁴ In this case, the developer proposed to develop 3.7 acres near Highway Fifty. In order to develop this property, he sought management and storage of a surface waters permit to dredge three and one quarter acres of wetlands. The commission agreed to recommend approval if the developer would deed the remaining portion of this property into a conservation area, and provide off-site mitigation by replacing culverts four and one-half miles southeast of the property or plug certain drainage canals on other property some seven miles away. Alternatively, the commission demanded the developer reduce his development to one acre and turn the remaining fourteen acres into a deed-restricted conservation area. The developer agreed to deed his excess property into conservation but refused the commission's demands for offsite mitigation or reduction of his development from three and seven-tenths acres to one acre. As a result, the commission denied his permit applications.⁶⁵ The trial court applied the *Nollan* and *Dolan* tests with respect to the discretionary decision to issue permits and concluded "that the District had effected a taking of Mr. Koontz's property and awarded damages."⁶⁶ The court "determined that the off-site mitigation imposed by the District had no essential nexus to the development restrictions already in place on the Koontz property and was not roughly proportional to the relief requested by" the developer.⁶⁷ The District attacked the decision not by challenging the court's reasoning under the *Nollan* and *Dolan* analysis, but rather by arguing that the denial should not have been reviewed by the court at all. Under the Florida statute, the circuit court may only review cases in which a constitutional taking is proven. The District argued that no such exaction occurred in this case because nothing was exacted from the developer (since he had refused to agree to the District's condition).

The court, in reviewing this argument, restated it as whether "an exaction claim is cognizable when, as here, the land owner refused to agree to an improper request from the government resulting in the denial of the permit."⁶⁸ The court concluded that the question had already been

64. 5 So. 3d 8 (Fla. Dist. Ct. App. 2009).

65. *Id.* at 2.

66. *Id.*

67. *Id.*

68. *Id.*

answered in *Dolan* itself, which also involved a challenge to rejected conditions.⁶⁹

The District also argued that an action did not lie here because the condition imposed did not involve a physical dedication of land but instead a requirement that the developer spend money to improve the land belonging to the District. The court again pointed to another United States Supreme Court case *Ehrlich v. City of Culver City*,⁷⁰ and concluded that the Supreme Court may have settled this issue in favor of extending *Nollan* and *Dolan* to non-possessory exactions when it remanded the case to the state court. The decision was followed by a lengthy dissent and a concurring opinion examining the two issues raised by the District.

In a sign that the issue is not yet decided in this case, on March 20, 2009, the court issued an opinion granting a motion to certify the question to the Florida Supreme Court as one of great public importance:

Where a landowner concedes that permit denial did not deprive him of all or substantially all economically viable use of the property, does Article X Section 6(a) of the Florida Constitution recognize an exaction taking under the holdings of *Nollan* and *Dolan* where, instead of a compelled dedication of real property to public use, the exaction is a condition for permit approval that the Circuit Court finds unreasonable?⁷¹

D. *In-lieu Fees*

In two recent decisions, California appellate courts addressed challenges to in-lieu fees. Before discussing those cases, it is useful to understand that *Nollan* and *Dolan* dealt only with development permit conditions requiring the dedication of land or an interest in land, and the United States Supreme Court has not extended the rules established in those decisions to other contexts. Under California's *Ehrlich v. City of Culver City*⁷² decision, the rules also apply to ad hoc in-lieu mitigation fees.⁷³ In contrast, legislatively imposed mitigation fees applicable to a

69. *St. Johns River Water Mgmt. Dist.*, 5 So. 3d 8, 3 (Fla. Dist. Ct. App. 2009).

70. 512 U.S.1231 (1994).

71. *St. Johns River Water Mgmt. Dist.*, 5 So. 3d at 12.

72. 12 Cal. 4th 854 (1996) (holding that "the requirement to provide [either] art or a cash equivalent thereof is as more akin to traditional land-use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions such as color schemes, building materials and architectural amenities. Such . . . conditions have long been held to be valid exercises of the city's traditional police power and do not amount to a taking merely because they might incidentally . . . impose a cost in connection with the property"), *cert. denied*, 519 U.S. 929 (1996).

73. The California legislature has also created a statutory nexus and rough proportionality requirement known as the Mitigation Fee Act (also commonly referred to as

class of persons rather than an individual project applicant are subject to a more relaxed form of heightened scrutiny. As the California Supreme Court held in *San Remo Hotel v. City and County of San Francisco*,⁷⁴ “such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development.”⁷⁵ The court acknowledged that the required relationship is not as exacting as that required by *Nollan, Dolan*, and *Ehrlich*, but noted that “the arbitrary and extortionate use” of mitigation fees will be unconstitutional, even if they are imposed legislatively.⁷⁶

1. IN-LIEU MITIGATION FEES

In *Ocean Harbor House Homeowners Association v. California Coastal Commission*,⁷⁷ a homeowners association applied to the California Coastal Commission for a coastal development permit to build a 585-foot seawall to protect its existing condominium complex from erosion that threatened the structural integrity of the property.⁷⁸ The commission granted the permit conditioned upon the association’s payment of a \$2 million fee to mitigate the loss of an acre of beach and its recreational value by purchasing replacement beach property elsewhere.⁷⁹ The association sued claiming that “the fee was an unconstitutional taking because there was no nexus or rough proportionality between the fee and the impact of the seawall.”⁸⁰ The association’s claim was premised on the argument that the only on-site impacts of the proposed

“AB 1600”) that provides a litany of requirements local governments must follow to establish or impose development fees charged to defray the costs of public facilities related to a development project. CAL. GOV’T CODE §§ 66000-66000.5 (2009). The Act was amended following the *Ehrlich* decision to broaden the definition of “fee” to include fees imposed on a specific project on an ad hoc basis and fees imposed on a broad class of projects by generally applicable legislation.

74. 27 Cal. 4th 643 (2002). In *San Remo*, the court considered the validity of a San Francisco ordinance addressing and limiting the conversion of residential hotel rooms to tourist hotel rooms. The ordinance was enacted in response to a perceived need to preserve the availability of residential hotel rooms for the city’s low-income residents who, otherwise, would have no viable housing choices. Permission to make such conversions was conditioned upon either a one-to-one replacement of the residential units converted or, among other alternatives, payment of a replacement in-lieu fee. Rejecting the plaintiff’s argument that a form of stricter scrutiny applied to its review of the replacement in-lieu fee, the *San Remo* court said that “legislatively imposed development mitigation fees . . . must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development.”

75. *Id.* at 671.

76. *Id.*

77. 163 Cal. App. 4th 215 (2008).

78. *Id.* at 219.

79. *Id.*

80. *Id.* at 226.

seawall were a loss of beach and continuous later access and a decrease in sand supply, and that basing the fee on the recreational value of the acre of beach was unconstitutional.⁸¹

Noting that the loss of beach and its recreational use were unavoidable impacts that could not be directly mitigated, a California appellate court determined that there was an essential nexus between the projected impact of the seawall and the in-lieu mitigation fee to acquire replacement beach property.⁸² The court rejected the association's claim that *Nollan* prohibits a fee that is not tailored to the direct, on-site impacts of a given project.⁸³ The court also ruled that the in lieu mitigation fee satisfied *Dolan*'s rough proportionality test because the commission actually did more than it was constitutionally required to do by making a "precise mathematical calculation show an exacting correspondence between the fee and the loss of recreational value," and showed that the fee was "directly proportional" to the loss of such value.⁸⁴

2. IN-LIEU AFFORDABLE HOUSING FEES

*Building Industry Association of Central California v. City of Patterson*⁸⁵ involved a challenge to a city's affordable housing in-lieu fee that turned on the contractual language contained in a development agreement related to the construction of two residential subdivisions. At the time the development agreement was approved, the city "allowed developers to pay a fee of \$734 per house in lieu of building affordable housing."⁸⁶ Several years later, "the city increased the fee to \$20,946 per house," based in part on a different method of calculating its fees, and sought to apply the increased fee to the developer's projects.⁸⁷ The developer sued, challenging the increased fee on various grounds.⁸⁸

The development agreement provided several means by which the developer could satisfy its affordable housing obligations, including building affordable units or paying the in-lieu fee.⁸⁹ The agreement stated that the amount of the affordable housing in-lieu fee was "as-yet undetermined" and that the new amount would not be less than

81. *Id.* at 232-33, 237.

82. *Ocean Harbor House Homeowners Ass'n*, 163 Cal. App. 4th at 232.

83. *Id.* at 232-33.

84. *Id.* at 237.

85. 171 Cal. App. 4th 886 (2009).

86. *Id.* at 888.

87. *Id.*

88. *Id.* at 889.

89. *Id.* at 890.

\$734 per unit.⁹⁰ The agreement also provided that “[d]eveloper acknowledges that the City is currently preparing an updated analysis of its Affordable Housing fee and hereby agrees to be bound by the revised fee schedule . . . providing the same is *reasonably justified*.”⁹¹

The court rejected the developer’s claim that the development agreement prohibited the city from changing its method of calculating affordable housing fees since the developer had agreed to be bound by the revised fee so long as it was reasonably justified.⁹² The question was what the term “reasonably justified” means. The developer argued that the term incorporated existing law, while the city asserted that the term waived any otherwise applicable law.⁹³ Relying on ordinary rules of contract interpretation, the court agreed with the developer, holding that “an objectively reasonable person would expect the term ‘reasonably justified’ to mean that any increase in the affordable housing in-lieu fee would conform to existing law” because “it is too great a leap to infer that the term ‘reasonably justified’ demonstrates an intention to waive applicable legal requirements.”⁹⁴

The court rejected the developer’s argument that the increased in-lieu fees were subject to the more strict *Nollan* and *Dolan* rules because the in-lieu fees were “formulaic, legislatively mandated fees” and not “discretionary ad hoc” fees.⁹⁵ Instead, the court concluded that the *San Remo* test, which requires a “reasonable relationship” between both the intended use and amount of the fee to the impacts of the development, was incorporated into the development agreement and applied the test to the city’s increased in-lieu affordable housing fee.⁹⁶

Applying that test, the court held that the fee increase was not justified because there was no “reasonable relationship” between the city’s affordable housing need and the developer’s project.⁹⁷ The study the city conducted failed to justify the increased in-lieu fee because it did not calculate the fee based on the development of the subdivisions and the city’s need for affordable housing.⁹⁸ The city’s study showed, instead, that the fee was calculated based on the number of affordable

90. *Bldg. Indus. Ass’n of Cent. California*, 171 Cal. App. 4th at 890.

91. *Id.* at 890, 894-95 (emphasis in original).

92. *Id.* at 895-96.

93. *Id.* at 895.

94. *Id.* at 896.

95. *Bldg. Indus. Ass’n of Cent. California*, 171 Cal. App. 4th at 897-98.

96. *Id.* at 898.

97. *Id.* at 898-99.

98. *Id.* at 899.

housing units allocated to the city through the Regional Housing Needs Assessment,⁹⁹ which had nothing to do with the need for affordable housing associated with new market rate development.¹⁰⁰

E. Procedure: Statute of Limitations

An opinion from the appellate courts of Florida examined the questions of the legal effect of an exaction that might run afoul of the *Nollan* and *Dolan* tests, and of the date from which an exaction must be challenged after it is made. In *New Testament Baptist Church Inc. of Miami v. State of Florida*,¹⁰¹ the New Testament Baptist Church (Church) appealed a final judgment in a condemnation suit brought by the Florida Department of Transportation.¹⁰² The issue on appeal was whether the trial court erred in granting summary judgment on the Church's counterclaim for inverse condemnation on the basis that the Church's claim is barred by the statute of limitations.¹⁰³

The Church claimed "that a plat dedication required by the county fourteen years earlier was unconstitutional and, therefore, void."¹⁰⁴ The Church claimed it still owned certain previously dedicated and platted land because the dedication was an unconstitutional condition of plat approval, and, therefore, void under *Nollan* and *Dolan*.¹⁰⁵

The court pointed out that it is not disputed that a four-year statute of limitations applies to inverse condemnation cases.¹⁰⁶ The Church, however, maintained "that the 'forced exaction' in the 1992 plat was void from inception as an unconstitutional condition of plat approval because" it lacked an "'essential nexus' between the pre-condition to development approval and a legitimate state interest," and "there was no 'rough proportionality' between the forced exaction and the projected impact of the proposed . . . development."¹⁰⁷ The court concluded "that the conveyance was not void ab initio, as argued by the Church, but [was] merely voidable."¹⁰⁸ The difference between void and voidable

99. A Regional Housing Needs Assessment (RHNA) quantifies the need for housing within each jurisdiction during specified planning periods and is mandated by California housing law as part of the periodic process of updating local housing elements of each city's general plan. CAL. GOV'T CODE § 65584 *et seq.*

100. *Bldg. Indus. Ass'n of Cent. California*, 171 Cal. App. 4th at 899.

101. 993 So. 2d 112 (Fla. Dist. Ct. App. 2008).

102. *Id.* at 113.

103. *Id.*

104. *Id.*

105. *Id.*

106. *New Testament Baptist Church Inc.*, 993 So. 2d at 114.

107. *Id.* at 114.

108. *Id.* at 116.

contracts is whether they have been against public policy. Contracts that have been an individual's, such as those arising from fraud, misrepresentation or mistake, are voidable. Only contracts that are against "public policy or harm the public are void ab initio."¹⁰⁹

In this case, the court found that the earlier plat dedication was not void ab initio, but merely voidable where it affected only the Church and did not harm the general public. Further, the court found that the Church ratified the conveyance by not objecting to it or taking any action to challenge it, notwithstanding the existence of administrative and judicial remedies. Further, "the Church accepted the benefits of the dedication by proceeding to develop its property."¹¹⁰ In conclusion, the court found "where the rights of third parties" were not affected, "a stale claim is limited by the statute."¹¹¹ Consequently, those wishing to challenge an exaction as unconstitutional must consider the applicable statute of limitations as having been triggered from the time the exaction was made.

109. *Id.*

110. *Id.* at 117.

111. *New Testament Baptist Church Inc.*, 993 So. 2d at 117.