

# MUNICIPAL EXACTIONS AND DEVELOPMENT CONDITIONS: DISTINGUISHING A “VALID REGULATION OF LAND” FROM AN “OUT-AND-OUT PLAN OF EXTORTION”

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The area of the law governing exactions and development conditions is a fascinating one that continues to evolve as courts seek to balance the need for local governments to obtain infrastructure with constitutional restraints limiting the reach of local government regulation. A solid understanding of exactions and development conditions is critical to anyone involved with land development in Nevada. This is especially true for owners and developers, as they struggle to survive on thinner margins and adapt to the new post-recession reality of the development economy. This article will provide a basic overview of the major U.S. Supreme Court and Nevada cases related to exactions and development conditions, and provide a few practical tips for both government and private-sector lawyers to keep in mind when determining whether an exaction is a valid regulation of land, or, as Justice Scalia once said, “an out-and-out plan of extortion.”

## *What is an Exaction or Development Condition?*

In the development context, an exaction is something the local zoning authority requires a property owner to give to the community, in order to obtain approval to develop land. The “something” can be almost anything: land; a portion of the value of the land; money (a mitigation fee); or other property. There are three basic types of exactions:

1. **Dedication Exaction:** a physical appropriation of an owner’s property (fee title, easement, etc.), via a condition on a development application, requiring the surrender or dedication of a portion of the owner’s property.
2. **Regulatory Exaction:** a non-possessory land use or other governmental regulation of the property that impacts the value of the land. These exactions are imposed legislatively, via an ordinance or code requirement, and usually apply to a class of property owners.
3. **Ad hoc or Grey Exaction:** a condition imposed on a property owner on an ad hoc basis, in response to the unique challenges posed by a particular development or use. These exactions are not generally supported by a specific legislative requirement in an ordinance or code, but instead result from custom and practice.

## *Nexus and Rough Proportionality*

The Fifth Amendment of the United States Constitution provides in part that:

“No person shall be ... deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.”

The Taking Clause is generally applicable in the eminent domain context, and requires just compensation. However, the due process clause generally applies in the context of land development, and allows local governments to exact property, or something of value from the property owner, without having to provide compensation, provided two tests are met:

1. “nexus” and
2. “rough proportionality”

Nexus means the exaction must have a rational connection (nexus) to the burden the government seeks to avoid. The nexus requirement derives from *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987). In that case, the Nollans owned a small bungalow in Ventura, California, between two public beaches. The Nollans applied for the permits necessary to replace the bungalow with a modern, three-bedroom house. The California Coastal Commission conditioned the

permits on a requirement that the Nollans dedicate an easement for public use across the beach portion of their property. The reason offered for the condition was that the new house would interfere with visual access to the beach from the street and create a “psychological barrier” to beach access.

On review, the Supreme Court noted that an easement allowing the people, already present on the public beaches, to walk across the beach portion of the Nollans’ property, would not reduce viewing obstacles from the street created by the new house. As a result the court concluded that there was no nexus between the condition and the public burden allegedly generated by the Nollans’ new house. Thus, according to Justice Scalia, since there was no nexus the condition was, “not a valid regulation of land, but an out-and-out plan of extortion.”

Rough proportionality means that the amount of the exaction must roughly correspond to the burden placed on the government, resulting from the proposed development. Following up on *Nollan*, this test was the holding of *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309 (1994). The Dolans operated a small plumbing and electrical supply store with a gravel parking lot. A creek traversed the property and a portion of the property was within a flood plain. The Dolans applied for permits to increase the size of the store and pave the parking lot. The city conditioned the permit upon dedication of a portion of the property for a storm-drain system and a pedestrian/bicycle path. The Dolans challenged the exaction, noting that the city had not identified any special quantifiable burdens created by their applications that justified the exactions.

The U.S. Supreme Court determined that the dedication requirement was not roughly proportional to the burden placed on the city resulting from the development. There was no evidence that the bike path would offset traffic demands generated by the building addition. Importantly, the court noted that “[n]o precise mathematical calculation is required, but the city must make some sort of individual determination that the required [exaction] is related both in nature [nexus] and extent [proportionality] to the impact of the proposed development.”

### ***What About Nevada Law?***

Like the U.S. Constitution, the Nevada Constitution also contains a takings clause and a due process clause. As a result, it was generally assumed that satisfying the *Nollan/Dolan* analysis sufficed to satisfy Nevada’s constitutional requirements. However, that assumption may be in doubt, as a result of *McCarran*

*International Airport v. Sisolak*, 122 Nev. 645, 137 P.3d 1110 (2006). In that case, Sisolak owned property near the airport. Before and after Sisolak purchased the property, Clark County imposed height restrictions in the area. The property was also burdened by an avigation easement, granted by Sisolak’s predecessor in interest. Sisolak challenged the height restrictions as a taking and the district court agreed, awarding Sisolak \$6.5 million.

On appeal, the Nevada Supreme Court held that the Nevada Constitution “...contemplates expansive property rights in the context of taking claims...” even broader than the Fifth Amendment. Notably, the court stated that a regulatory taking occurs when a public agency seeking to acquire property for a public use... fails to follow the procedures set forth in NRS Chapter 37 [the statutory scheme governing eminent domain actions].” Read strictly, this could mean that every time a public agency seeks to obtain property (even in the context of the land development process) it must do so via eminent domain proceedings. In other words, dedication exactions are unconstitutional in Nevada. In a dissenting opinion, Justice Becker stated, “I dissent from the broad statement that our eminent domain provision was intended to give landowners greater protection than that given under the Fifth Amendment of the United States Constitution. This contradicts over a century of precedent.”

One explanation for the breadth of the Nevada Supreme Court’s language in *Sisolak* may simply be timing. Fewer than 13 months earlier, the United States Supreme Court issued its opinion in *Kelo v. City of New*

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*London*, 545 U.S. 469, 125 S. Ct. 2655 (2005), in which it ruled that taking property from one private owner to give it to another private owner for redevelopment constitutes “public use.” That decision provoked unusually widespread public outrage and triggered taking reform campaigns throughout the country. This included adoption of the People’s Initiative to Stop the Taking of Our Land (PISTOL) amendments to Nevada’s constitution.

## *Evaluating the Risks*

### **Exactions most at risk:**

- Those that appear to be made by a local government, after it has determined that it wants a piece of land, and then uses the development approval process as a means to get it.
- Those that appear to be an attempt to force a property owner to bear a public burden which, in fairness, should be borne by the public as a whole.
- Those that appear to be an attempt by government to use its monopoly power over the land development process in order to obtain, from a property owner, interests unrelated to the proposed development.
- Ad hoc exactions, which are often made as a manner of custom and practice without the benefit of a proportionality analysis.

### **Exactions least at risk:**

- Those that are imposed in an honest effort to offset the impacts of development, and are supported by documentation and data demonstrating nexus and rough proportionality.
- The more the exaction appears designed to remedy a public burden created by the proposed development, the more likely the exaction will be upheld.
- Regulatory exactions will generally be upheld as long as the regulation does not deny the property owner economically beneficial use of the property and the regulation advances a legitimate government interest. ■



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