

# Legislative Conditions on Land-Use Permits Are Subject to the Fifth Amendment's Takings Clause

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The Fifth Amendment's Takings Clause does not apply differently between permit conditions enacted by legislation and those administratively imposed on an individual basis. As a result, a development impact fee determined by a legislatively approved rate schedule is subject to the so-called *Nollan/Dolan* test's nexus and rough proportionality requirements.

In *Sheetz v. County of El Dorado, California*, a landowner applied for a County building permit to construct a small, prefabricated home on his property. As a condition of granting the permit, the County required the applicant to pay a \$23,420 impact fee to alleviate local traffic congestion. The impact fee was determined by a rate schedule approved by the County Board of Supervisors. The applicant paid the fee under protest to obtain the permit and then sued the County, claiming that the fee was an unlawful "exaction" of money under the Takings Clause. California courts disagreed, ruling that no taking occurred because the fee was based on the general plan's fee schedule adopted by legislative action of the Board of Supervisors, not through an administrative process.

The U.S. Supreme Court reversed, holding that the Takings Clause contains no exception for permit conditions imposed by legislation. In reaching this decision, the Court found that the text, history, and case law analyzing the Takings Clause makes no distinction between legislative and administrative conditions. Therefore, the County's legislative permit condition—the traffic impact fee—must satisfy the Court's two established legal tests for exactions to avoid being considered a taking under *Nollan/Dolan*. These two tests state that permit conditions must have an "essential nexus" to the government's land-use interest and that the permit conditions must have "rough proportionality" to the development's impact on the land-use interest. The Court concluded that "there is no basis for affording property rights less protection in the hands of legislators than administrators. The Takings Clause applies equally to both."

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Notably, the Court did not address whether a permit condition imposed on a class of properties - as it was in this case - must be tailored to the same extent as a condition targeting specific property. In a concurring opinion, three justices stated that the “decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property.”

In light of this case, public agencies should evaluate the nexus studies prepared in support of their development impact fees to confirm that they satisfy the requirements of *Nollan/Dolan*.

If you have any questions about how this case may affect your agency, please contact **Nicholas R. Ghirelli**, **Christian D. Petrangelo**, or your RWG attorney.