



## When Property Owners Should Say 'Enough is Enough'

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**B**oth the federal and Florida constitutions protect citizens' rights to own and use real estate, free from government regulation which results in a "taking" of the property. If a government regulation prevents any economic use of a landowner's property that is readily identifiable as an unconstitutional taking for which a court may order compensation to the landowner.

A more subtle and lesser known form of constitutional "taking" occurs, however, when government regulators are willing to permit a landowner's desired use, but only upon certain conditions. In the parlance of constitutional law, conditions placed on development approval are called "exactions." Some are constitutional and some are not, depending on the circumstances.

Common examples of exactions include dedication (forced gifts) of land for roads, parks, schools, and nature preserves, or the payment of money to fund them. One of the most well known examples was detailed in the U.S. Supreme Court Case *Dolan v. City of Tigard*. In that case, the Dolans attempted to obtain approval from the city of Tigard, Oregon to replace their existing plumbing and electrical supply store with a new one. As a condition for approval, the city required the Dolans to dedicate about 10 percent of their land for open space and pedestrian and bicycle pathways. Consequently, the Dolans refused and sued the city.

Exactions may also require monetary obligations, known as "impact fees." Exactions in these various forms may be as high as tens of thousands of dollars and are often imposed in connection with platting and subdivision, site plan approval, variances, and building permits. Government agencies are not bashful about seeking them in all types of development contexts, whether residential, commercial, institutional, or industrial. The *Dolan* case and others have helped establish a series of guidelines to determine when exactions are proper and when they are excessively burdensome. Here are some helpful tips for landowners to consider:

First, the proposed exaction must be logically related to the impact of the landowner's proposed development. In other words, the government cannot use the occasion of a landowner's need for a land use approval to extract some unrelated gift. For example, it would be illegal for a government agency to require the gift of a public access easement across the yard of a beachfront home (to increase public access to the beach) as a condition to permitting remodeling of the home. Because remodeling the home would not in itself increase or decrease the level of public access to beaches, there is no logical relationship (or "nexus," in legalese) between the impact of the remodeling and public access to beaches. Requiring dedication of the access easement would therefore be an "illegal exaction." (These were the actual facts of another U.S. Supreme Court case, *Nollan v. California Coastal Commission*).

By contrast, it may be legal for the government to require dedication of land for road widening in connection with site plan approval of a new regional mall. Because such a commercial development would certainly generate increased traffic, there would be a logical relationship ("nexus") between the impact of the mall and the need for additional right-of-way.

Secondly, the quantity of the proposed exaction must be roughly proportional to the impact of the proposed development. Using the regional mall example above, it might be legal to exact enough right-of-way for the additional lanes needed to accommodate the increased traffic generated by the mall. However, an exaction of enough right-of-way or impact fees to construct a long overdue interstate highway interchange would likely flunk the roughly proportional test.

Finally, exactions that are pursued in an "ad hoc" fashion by government, as opposed to ones that follow a general formula, are to be closely scrutinized. Exactions sought from one property owner that are greater than those imposed on other similarly situated landowners are highly questionable. For example, it would be illegal to require one homeowner to

dedicate twice as much land in exchange for a sewer connection as than others in the same neighborhood were compelled to give up.

When considering exactions, some agencies take the "nothing ventured nothing gained" approach, seeking unrelated and/or excessive exactions hoping that uninformed landowners will play along, yet backing off when challenged. Such was the case with a former City of Miami code provision that required the automatic dedication of all designated future right of way abutting any property for which a construction permit was sought involving costs of \$25,000 or more. Many unsuspecting landowners dedicated their land (which the City would otherwise have paid for) simply because it was dictated by city code. Yet one savvy shopkeeper questioned the legality of the provision when all he was seeking to do was convert a Flagler Street dress shop into a shoe store. He knew that converting from one retail use to another would not have a discernable impact on downtown Miami traffic. When the shopkeeper threatened court action to declare the provision unconstitutional, the City not only backed off, but also issued his remodeling permit the same day.

Exactions issues are not always as obvious as in the Flagler Street case, and permitting agencies may not always readily back down. In those instances, it would be worthwhile for an affected landowner to retain a property rights attorney to review the matter. With the benefit of competent legal counsel, landowners facing exactions can proceed, knowing a fair deal from an unconstitutional one and when to say, "enough is enough."

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