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CLIENT ALERT

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U.S. Supreme Court Decision Impacts California Developers

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On April 12, 2024, the U.S. Supreme Court issued an important decision that may have major impacts on developers in California, although the degree of impact will depend on how lower courts interpret that decision. In *Sheetz v. County of El Dorado*, the Court ruled that a traffic impact fee imposed by the County of El Dorado based on a fee schedule in the County's General Plan was a violation of the Takings Clause in the U.S. Constitution.

Since the enactment of major tax reform measures in California in the 1970s, including Proposition 13 (1978),[1] local jurisdictions have relied heavily on development impact fees to fund necessary infrastructure and key government services (e.g. roads, schools, police services, maintenance projects, etc.). Local governments' adoption of impact fees must conform to constitutional (described further below) and statutory (e.g. the Mitigation Fee Act[2]) requirements. Among other requirements, the local government must adopt findings establishing a reasonable relationship between the proposed fee's use, the type of development project, the need for the public facility, and the amount of the fee and the cost attributable to the development. (*See* Gov. Code, § 66001.) These fees typically are imposed as a condition of development approval and often add tens- if not hundreds-of-thousands of dollars in costs to a project. Especially with respect to housing, these fees add additional layers of costs, which result in increasingly unaffordable newly built housing units. In some cases, impact fees are not scaled down, even as developers propose smaller, and by design, what should be more affordable homes.

The U.S. Supreme Court has held that conditions imposed by government on building permits, including impact fees, are subject to a two-part test, reaffirming their decisions in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, and *Dolan v. City of Tigard* (1994) 512 U.S. 374. First, the permit condition must have an "essential nexus" to the government's land-use interest. Second, the permit condition must have a "rough proportionality" to the development's impact on the land-use interest. Following California Supreme Court precedent, the trial court and Court of Appeal held that this two-part test did not apply to legislatively-imposed conditions such as impact fees that are commonly set by counties or municipalities in fee schedules, as El Dorado did. Those courts upheld the County's imposition of a $23,420 traffic impact fee for a building permit for construction of a residence on backcountry property that was not based on the specific impacts of that particular project.

The Supreme Court took up the appeal to resolve a split in state courts as to whether this test applies to legislatively-imposed permit fees or only ad-hoc, individualized administrative decisions. The Court held (unanimously) that the Takings Clause and the two-part test applies equally to both and that fees that had been set without analysis under that test were unconstitutional regardless of which arm of government imposed them. The Court pointedly did not address the specificity with which permit conditions or fees imposed on a class of developments must be tailored to that specific development, and a concurring opinion by Justice Kavanaugh, joined by Justices Kagan and Jackson, emphasized that the Court's decision did not prohibit imposing such fees through reasonable formulas or fee schedules.

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[1] Prior to voter approval of Prop. 13, which dramatically reduced the amount of revenue local governments collected from property taxes, local governments relied heavily on these taxes to fund infrastructure improvements, maintenance, and public services.

[2] California Government Code section 66000 *et seq.*

The Court remanded the case back for further proceedings, as issues such as whether the fees established by the General Plan schedule satisfied the two-part takings test were not decided by the lower courts. This will be a critical determination on remand. While developers and applicants often question local jurisdictions' basis for imposing large impact fees, fee schedules nonetheless are useful for planning purposes as they are known and can be accommodated in development cost projections. Throwing schedule-based fees out entirely likely results in an untenable world of unknown impact fees and waiting for planning departments to calculate them on a more-granular basis. Hopefully, a middle ground can be worked out allowing for fees based on schedules, just ensuring that those schedules are more tailored to the development's impacts to pass muster under the U.S. Supreme Court's Takings analysis.

Possible Legislative Changes in California on the Horizon

In its ongoing efforts to lessen housing costs and to increase the supply of housing, the California Legislature is considering several bills for this upcoming legislative cycle that would modify how local governments impose and collect impact fees. These bills include:

- SB 937 (Wiener) – for certain residential projects, would require payment of some impact fees at the time of issuance of certificate of occupancy;
- SB 1210 (Skinner) – for residential development projects, require certain utilities to post on their websites their fee schedules and timeframes for completing typical service connections;
- AB 1820 (Schiavo) – would allow a housing development applicant to request a fee estimate and/or a fee schedule applicable to the project, depending on the local agency. The bill would additionally require the public agency to provide an itemized list and total sum of all fees and exactions within 20 days of final project approval;
- AB 2144 (Grayson) – would impose on local governments certain reporting requirements, including by providing impact fee nexus studies, on their local websites;

We will continually track these and other major California land use and environmental bills proposed during this legislative session. As always, the text of these bills could change as they work their way through the legislative process.

Conclusion

In the interim, we have an interesting turn of events, as most California municipalities and counties set their impact fees as El Dorado County did. Thus, if other jurisdictions' future development impact fees are challenged in court, they likely will be overturned unless those jurisdictions analyze their validity under the two-part takings test. It will be vital to track how cities and counties respond until further details emerge from the *Sheetz* litigation.

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