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2-16-2005

## Court Reviews: The Takings Doctrine and Exactions

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### Recommended Citation

John R. Nolon & Jessica A. Bacher, Court Reviews: The Takings Doctrine and Exactions, N.Y. L.J., Feb. 16, 2005, at 5, <http://digitalcommons.pace.edu/lawfaculty/686/>.

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## The Takings Doctrine and Exactions

Written for Publication in the New York Law Journal  
February 16, 2005

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**Abstract:** Exactions occur when applications to develop parcels of land require governmental permission, and that permission is conditioned upon dedicating part of the land to public use. Exactions have long been challenged as regulatory takings, and both federal and state courts look at these types of regulations with a heightened level of scrutiny due to the nature of exactions to remove a crucial element from the bundle of property rights associated with ownership of real property: the right to exclude. This column discusses a recent example of exactions jurisprudence applied in New York and goes on to compare that decision in that case to a long history of Supreme Court takings jurisprudence.

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In *Smith v. Town of Mendon*, the Court of Appeals held that a conservation restriction imposed as a condition to site plan approval is not an exaction and is not subject to heightened judicial scrutiny when challenged as a regulatory taking. 2004 N.Y. LEXIS 3854 (December 21, 2004). The Mendon Planning Board conditioned its approval of the Smiths' single family home proposal on the filing of conservation restriction covering portions of the parcel located within the Town's environmental protection overlay districts. The Town previously had established four overlay districts that cover sensitive lands that contain steep slopes or border on major creeks, wooded areas, or floodplains. The overlay district provisions prohibit development and other land disturbing activities unless the landowner can show that a proposed activity will not adversely affect the protected resources.

The actual construction of the Smiths' home would not adversely affect the environment as long as no development occurred in the overlay districts. Nonetheless, the Planning Board found that the conservation restriction was needed to "put subsequent buyers on notice that the property contains restraints which may limit development within these environmentally sensitive areas" and

would “provide the most meaningful and responsible means of protecting the [property in the overlay districts].” *Smith*, 2004 N.Y. LEXIS 3854 at \*3.

The conservation restriction mirrors the effect of the overlay district regulations by prohibiting construction on sensitive lands. It adds to those regulations by allowing town inspectors to enter the property, upon 30 days notice, to inspect conditions in the constrained areas. The restriction also encumbers the property in perpetuity, which would survive the Town’s elimination or relaxation of the overlay district rules. Further, the conservation restriction provides the Town with legal ability to bring an injunction to enforce the restriction, adding to its zoning powers to issue citations and seek civil and criminal penalties.

The Smiths commenced an action asserting that the conservation restriction amounted to an unconstitutional taking. At issue was whether the restriction constitutes an exaction and thus requires a heightened standard of review. The Court of Appeals supported the Town’s argument that such a zoning condition is not an exaction and therefore is not subject to heightened scrutiny. In the *Mendon* decision, the Court of Appeals provides the bar with an instructive restatement of U.S. Supreme Court takings jurisprudence.

#### *Total Takings*

“The first and perhaps most critical factor in the [Supreme] Court’s taking analyses [is] whether the regulation deprived landowners of ‘all economically viable use’ of their property.” *Smith* at \*8 (citing *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720 (1999)). Courts apply a heightened degree of scrutiny when reviewing a regulation that allows an owner no viable use of his property. Such regulations may be said to constitute a “total taking” and to implicate the constitutional guarantee that property will not be confiscated for public use without just compensation. The United States Supreme Court has said that in the “extraordinary circumstance when no productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life.” *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1017 (1992). In such cases, there is a “heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.” *Id.* at 1018. Unless the regulator can show that the use prohibited by the regulation would not be allowed under nuisance law or “background principles of property law,” or is inherent in the title to the land, a regulation that prohibits all beneficial use will be considered a regulatory taking. *Id.* at 1029.

#### *Penn Central/Agins Standard*

“If the contested regulation falls short of eliminating all economically viable uses of the encumbered property, the Court looks to several factors to determine

whether a taking occurred, including ‘the regulation’s economic effect on the landowner, the extent to which the regulation interferes with the reasonable investment-backed expectations, and the character of the government action.’” *Smith* at \*8 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978)). When the character of the government action is that of a traditional zoning restriction, the standard articulated in *Agins v. City of Tiburon* applies. 447 U.S. 255 (1980). In that case, the Court held that the “application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.” *Smith* at \*8.

### *Exactions*

The Smiths argued that a conservation restriction is an exaction and that the Town’s action should not be reviewed under the less stringent *Penn Central/Agins* test. Exaction cases trigger stricter judicial scrutiny because the right to exclude – a fundamental property right – is implicated. An exaction is a condition imposed on the issuance of a development approval that requires the developer to dedicate land to the public, to allow the public access to his private land, or to pay a fee in lieu of such requirements. Relatively few land use laws or decisions force the owner to convey an easement or portion of the title to the public to allow public access. Where they do, the regulator must show that there is an essential nexus between the condition imposed and the public purpose that is to be achieved by the condition. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Courts also require individualized impact studies showing that public benefits obtained by the condition imposed on the property are “roughly proportional” to the adverse impacts of the development on the community. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Applicability of this heightened degree of judicial scrutiny is limited to these conveyance cases. In *Bonnie Briar Syndicate, Inc. v. Mamaroneck*, the Court of Appeals explicitly restricted the use of the “essential nexus” test and the “rough proportionality” test to situations where landowners are required to convey easements or title allowing public access or fees in lieu of such requirements. 94 N.Y.2d 96 (1999). *Bonnie Briar*, like the *Mendon* case, involved traditional zoning restrictions that limited the use of the property and that fell short of total takings.

In *Dolan*, the City of Tigard required a site plan developer to dedicate a portion of her property lying within a 100-year floodplain for the improvement of a storm drainage system along a nearby creek and an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway. The conditions required the owner to convey an easement to the city allowing it and the public access to her land. The landowner objected, claiming that these requirements were not calculated to mitigate the impact of the proposed development and, therefore, constituted an uncompensated taking.

Citing *Nollan*, the Court stated that when dedication conditions are imposed on a land use permit, they must bear an “essential nexus” to a legitimate public objective. In view of clear findings regarding the seriousness of the flooding and traffic problems in the city and along the creek, such a nexus was found. The Court went on to establish, for the first time, a test that is to be used to determine “the required degree of connection between the [dedication conditions] and the projected impact of the proposed development.” *Dolan*, 512 U.S. at 377. For this purpose, the Court wrote, “we think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No 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.” *Id.* at 391 (emphasis added).

In *Dolan*, the Court found that the City had not shown why a dedicated public greenway, rather than a private one, was required in the interest of flood control. In regard to the pedestrian/bicycle path dedication, the Court held that the city’s finding that the path “could offset some of the traffic demand” was too general. *Id.* at 389. The City did not “meet its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement.” *Id.* at 395. The Court required the City to “make some effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset some of the traffic demand generated.” *Id.* at 395-96. The imposition of the burden of proof on the regulator, the stricter scrutiny used, and the failure to presume the validity of the City’s determinations are uniquely applicable to cases where exactions are challenged.

Recently, the Court of Appeals clarified the applicability of the “rough proportionality” test to fixed fee schedules that apply to all subdivisions approved in a community. In *Twin Lakes Development Corp. v. Town of Monroe*, 769 N.Y.S.2d 445 (2003), the Court of Appeals held that the town’s fixed recreational fee schedule is not an exaction subject to higher judicial scrutiny. In *Twin Lakes*, the Court of Appeals consulted *Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), to determine whether such fees are exactions. *Twin Lakes Development Corp.*, 769 N.Y.S.2d 445, 449. In *Monterey*, the Court declined to extend the strict scrutiny analysis to cases in which the plaintiff challenges a denial of a development permit. In dicta, the Court stated that “land-use decisions conditioning approval of development on the dedication of property to public use” and, by extension, fees in lieu of such dedication, are exactions. See *Monterey*, 526 U.S. at 703.

In *Smith*, the Court of Appeals found that under the doctrinal framework of the Supreme Court, the conservation restriction was not an exaction subject to the *Nollan/Dolan* tests. The court declined “to extend the concept of exaction where there is no dedication of property to public use and the restriction merely

places conditions on development.” *Smith* at \*13. The court reviewed the case using the *Penn Central/Agins* test and found that the conservation restriction did not constitute a taking. “The application of a general zoning law to particular property effects a taking if the law does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.” *Agins*, 447 U.S. 255 at 260. The restriction did not deny the Smiths all economically viable use of their property. It is unclear whether the restriction would have any effect on the market value of the property because under the preexisting overlay districts the “encumbered parts of the property had almost no development value before the Town announced the restriction.” *Smith* at \*17.

In conclusion, the Court of Appeals held that “the conservation restriction substantially advances a legitimate government purpose – environmental preservation.” *Id.* at \*17-\*18. “Ensuring perpetual protection for open space – along with the resources and habitats they shelter – from the vicissitudes of workaday land-use battles is hardly an inconsequential governmental interest.” *Id.* at \*19. The imposition of a conservation restriction is a “well established land use tool’ that is ‘consistent with the State’s longstanding commitment to protecting ... critical natural resources.” *Id.*