

Challenging and Reducing Governmental Exactions and Fees

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A. When Do Exactions Constitute An Illegal “Taking”

- a. Nollan v. California Coastal Commission, 483 U.S. 835, 107 S.Ct 3141 (1987).
 - i. California Coastal Commission conditions issuance of development permit on applicant’s grant of easement to allow public to cross their beachfront to go between two public beaches that were separated by the site, based on finding that new house would contribute to visual barrier of the ocean.
 - ii. “One of the principal purposes of the Takings Clause is ‘to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’” (citation omitted).
 - iii. Supreme Court agrees “that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.”
 - iv. “The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.”
 - v. There must be an “essential nexus” between the condition and the underlying land use restriction at issue.
 - vi. “In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not valid regulation of land use but an ‘out-and-out plan of extortion.’”

- b. Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct 2309 (1994).
- i. City Planning Commission requires applicant for commercial development to dedicate:
 1. property within 100-year floodplain as a public greenway for improvement of storm drainage system, based on findings that increase in impervious surfaces created “anticipated increased storm water flow” from site; and
 2. an additional 15-foot strip as a pedestrian/bicycle pathway, based on findings that future site users “could utilize the pathway.”
 - ii. Supreme Court cites “the well-settled doctrine of “unconstitutional conditions,” [under which] the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.”
 - iii. “In evaluating petitioner’s claim, we must first determine whether the ‘essential nexus’ exists between the ‘legitimate state interest’ and the permit condition exacted by the city.”
 - iv. “If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.”
 - v. Stated differently, “[t]he second part of our analysis requires us to determine whether the degree of the exactions demanded by the city’s permit conditions bears the *required relationship* to the projected impact of petitioner’s proposed development.” (emphasis added).
 - vi. “We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment.”
 - vii. “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.”
 - viii. Supreme Court holds that city failed to justify “why a public greenway, as opposed to a private one, was required in the interest of flood control”

- ix. The city also “has not met its burden of demonstrating that the additional number of vehicles and bicycle trips generated by petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement.”
- x. “No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.”

c. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 125 S.Ct 2074 (2005).

i. Discusses various categories of Takings:

1. Direct government appropriation or physical invasion of private property.

2. *Per se* Regulatory Takings:

a. Where government requires an owner to suffer a permanent physical invasion (e.g., requiring the installation of cable facilities on apartment buildings).

b. Where regulation deprives an owner of all economically beneficial use of property.

3. Other Regulatory Takings claims, which are subject to the balancing analysis set forth in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646 (1978).

4. Treats Nollan/Dolan distinctly.

ii. Court writes that Nollan and Dollan “involve a special application of the ‘doctrine of ‘unconstitutional conditions,’ which provides that ‘the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.’”

iii. Notes that “an inquiry [into a regulation’s underlying validity] is logically prior to and distinct from the question whether a

regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”

- iv. States that “if a government action is found to be impermissible – for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action.”

B. Applying *Nollan/Dolan* to Exactions/Fees Issues

- I. Cases indicating that *Nollan/Dolan* analysis only applies to mandatory dedication of land, and not to impact fees.

- a. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 2131 (1998).

- i. Plurality (four (O’Connor, Rehnquist, Scalia, Thomas) out of nine Justices) holds that Congressional Act that imposes retroactive liability on former coal mine operator effectuated an unconstitutional Taking.
- ii. Plurality holds that when legislative remedy singles out certain employers to bear a burden that is substantial in amount, based on the employers’ conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause.”
- iii. Justice Kennedy, concurring, holds that Takings Clause is inapplicable because no real property interest at stake.
 1. “The difficulties in determining whether there is a taking or a regulation even where a property right or interest is identified ought to counsel against extending regulatory takings doctrine to cases lacking this specificity.”
 2. “The plurality opinion would throw one of the most difficult and litigated areas of law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts. The existing category of cases involving specific property interests ought not to be obliterated by extending regulatory takings analysis to the amorphous class of cases embraced by the plurality’s opinion today.”
 3. Holds that Act violates the Due Process Clause.

- iv. Dissenting Justices (Breyer, Ginsburg, Souter, Stevens) agrees that the Takings Clause does not apply.
 1. “The ‘private property’ upon which the Clause traditionally has focused is a specific interest in physical or intellectual property.”
- b. Smith v. Town of Mendon, 4 N.Y.3d 1, 789 N.Y.S.2d 696 (2004).
 - i. Planning Board condition site approval on applicant’s filing a conservation easement restricting development on portions of their property that were classified as environmental protection overlay districts.
 - ii. Court holds that Nollan/Dolan analysis does not apply because “an exaction involves the conditioning of a land-use decision on the ‘dedication of property to public use,’ and “[t]here is no such dedication of ‘property’ here.”
 - iii. “In practice, the [Supreme] Court has identified exactions in only two real property cases, *Nollan* and *Dolan*, both of which involved the transfer of the most important ‘stick’ in the proverbial bundle of property rights, the right to exclude others.”
 - iv. Explains decision in Twin Lakes Development Corporation v. Town of Monroe (discussed below) by stating that in that case “we also characterized a fee imposed in lieu of the physical dedication of property to public use as an exaction.”
- c. Twin Lakes Development Corp. v. Town of Monroe, 1 N.Y.3d 98, 769 N.Y.S.2d 445 (2003), cert. denied, 541 U.S. 974 (2004).
 - i. Challenge to municipal requirements, that: (1) makes subdivision applicants pay fees in lieu of dedicating a portion of their property for recreational purposes, and (2) requires applicants to reimburse Town for consulting costs incurred in processing application.
 - ii. Court of Appeals finds that Town met “essential nexus requirement,” including because it made “explicit findings [at the time of enacting fee requirement] that the demand for recreational facilities exceeded existing resources” and that subdivisions “would exacerbate the problem.”

- iii. Holds that Plaintiff “identifie[d] no proof in the record” to justify finding that the per-lot recreational fees assessment set in the municipal legislation was not “roughly proportional.”
 - iv. Court of Appeals is “unpersuaded that Dolan precludes municipalities from establishing fixed fees to ensure that adequate recreational facilities can be provided.”
 - v. Court also rejects challenge to municipal provision regarding the payment of fees for processing application.
 - 1. Notes that “under the challenged provisions, the applicant is required only to reimburse the Town for fees actually expended.”
 - 2. Court also finds significant that:
 - II. Town pays the same rate for consulting services as it charges applicants;
 - III. Planning Board audits vouchers submitted by consultants and rejects excessive or unnecessary charges; and
 - IV. Applicants may inspect consultants invoices upon request.
- d. Clajon Production Corporation v. Petera, 70 F.3d 1566 (10th Cir. 1995).
- i. Challenge to hunting regulations, including provision that limited the number of licenses that would be issued to landowners of 160 or more acres.
 - ii. Court holds that Nollan/Dolan “are limited to the context of development exactions where there is a physical taking or its equivalent.”
 - iii. “*Nollan* and *Dolan* are best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one’s physical property) through a conditional permitting procedure.”
 - iv. “Given the important distinctions between general police power regulations and development exactions, and the

resemblance of development exactions to physical takings cases, we believe the ‘essential nexus’ and ‘rough proportionality’ tests are properly limited to the context of development exactions.”

II. Cases Indicating That *Nollan/Dolan* Can Apply to Fees.

- a. Erlich v. City of Culver City, 12 Cal. 4th 854, 911 P.2d 459 (Sup. Ct. Cal. 1996), cert. denied, 519 U.S. 929, 117 S.Ct. 299 (1996).
 - i. City conditions approval of condominium project to replace private sports complex upon payment of \$280,000.00 to be used “‘for partial replacement of the lost recreational activities.’”
 - ii. “When such [monetary] exactions are imposed -- as in this case -- neither generally or ministerially, but on an individual and discretionary basis, we conclude that the heightened standard of judicial scrutiny of *Nollan* and *Dolan* is triggered.”
 - iii. “The essential nexus test is, in short, a ‘means-ends’ equation, intended to limit the government’s bargaining mobility in imposing permit conditions on individual property owners -- whether they consist of possessory dedications or the exaction of cash payments -- that, because they appear to lack any evident connection to the public impact of the proposed use, *may* conceal an illegitimate demand -- may, in other words, amount to “‘out-and-out . . . extortion.’”
 - iv. “We view the requirement that the local government demonstrate *factually* sustainable proportionality between the effects of a proposed land use and a given exaction as one which furthers the assurances implicit in the *Nollan* test that the condition at issue is more than theoretically or even plausibly related to legitimate regulatory ends.”
 - v. “[T]he record before us in this case is devoid of any individualized findings to support the required ‘fit’ between the monetary exaction and the loss of a parcel zoned for commercial recreational use.”
 - vi. The amount of fee “must be tied more closely to the actual impact of the land use change the city granted the plaintiff.”
 - vii. Court suggests means of determining the “value or economic cost” of the Project’s impacts, including requiring applicant to defray anticipated costs of rezoning other property to allow recreational

use or, potentially, costs of attracting private recreational development.

- b. Town of Flower Mound v. Stafford Estates Ltd. Partnership, 47 Tex. Sup. Ct. J. 497, 135 S.W.3d 620 (Sup. Ct. 2004)
- i. Local law requires subdivision developers to improve abutting streets, even if improvements are not necessary because of project impacts. Developer seeks to recover costs of rebuilding road abutting subdivision.
 - ii. Court holds that fact that developer did not sue until after it had built road and obtained final approval did not bar claim.
 - iii. Rejects municipal argument that Nollan/Dolan only applied where real property dedication is at issue, and adopts Ehrlich analysis.
 - iv. “For the purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved.”
 - v. “[T]he burden [on a municipality to establish “rough proportionality] is essential to protect against the government’s unfairly leveraging its police power over land-use regulation to extract from landowners concessions and benefits to which it is not entitled.”
 - vi. Refuses to limit application of Nollan/Dolan to cases where an individual, “adjudicative” condition is imposed on particular developer as part of particular land use application, and allows it to be applied to case involving “legislative” exactions.
 - vii. “While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could ‘gang up’ on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.”

- c. City of Carrollton v. RIHR Incorporated, 308 S.W.3d 444 (Texas 2010) rehearing overruled, (Apr. 26, 2010), review denied, (Jul 30, 2010).
 - i. City conditions issuance of building permits for two residential lots shown on overall 55-lot subdivision plat on developer's repair of retaining wall affecting other parcels shown on plat.
 - ii. Court finds that exaction lacked the requisite "essential nexus."
 - iii. Court affirms award of damages determined by developer's "out-of-pocket expenses incurred during the exaction period."
 - 1. Recognizes, in effect, a temporary taking.
 - 2. Damages would include real estate taxes, and accrued interest on purchase money mortgage.
- d. McClung v. City of Sumner, 548 F.3d 1219 (2008), cert. denied, 129 S.Ct. 2765 (2008)
 - i. Challenge by developer to requirement that it install 24-inch storm pipe as part of permit approval and in exchange for waiver of fees.
 - ii. Court holds that challenge to Ordinance that required installation of storm improvements as part of new development not subject to Nollan/Dolan analysis.
 - iii. "Unlike the facts of *Dolan*, cases questioning land use regulations 'involve[] essentially legislative determinations classifying entire area of the city' and placing limitations on the use owners may make of their property."
 - iv. "In comparison to legislative land determinations, the *Nollan/Dolan* framework applies to adjudicative land-use exactions where the 'government demands that a landowner dedicate an easement allowing public access to her property as a condition to obtaining a development permit.'"
 - v. "Even if the upgrade could be viewed as a monetary exaction for the cost of upgrading the storm pipe . . . *Nollan/Dolan* still would not apply."
 - vi. "A monetary exaction differs from a land exaction – '[u]nlike real or personal property, money is fungible.'"

- e. City of Olympia v. Drebeck, 156 Wash.2d 289, 126 P.3d 802 (2006), cert. denied, 549 U.S. 988, 127 S.Ct. 436 (2006).
 - i. Challenge to transportation impact fee assessed in connection with office building project.
 - ii. Court interprets statutory requirement that impact fees:
 - (a) Shall only be imposed for system improvements that are reasonably related to the new development;
 - (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and
 - (c) Shall be used for system improvements that will reasonably benefit the new development.

Wash Rev. Code Ann. § 82.02.050.

- iii. Court holds that challenge to Ordinance that required installation of storm improvements as part of new development not subject to Nollan/Dolan analysis.
- f. Homebuilders Association of Dayton & the Miami Valley v. City of Beavercreek, 89 Ohio St.3d 121, 729 N.E.2d 349 (2000), reconsideration denied, 732 N.E.2d 1002 (2000).
 - i. Challenge to municipal ordinance imposing impact fees on developers to cover construction of new roadways.
 - ii. Court subjects ordinance to “dual rational nexus” analysis, which it says is based on Nollan/Dolan.
 - iii. Two-step analysis:
 - 1. “The city must first demonstrate that there is a reasonable relationship between the city’s interest in constructing new roadways and the increase in traffic generated by new development.”
 - 2. “If a reasonable relationship exists, it must then be demonstrated that there is a reasonable relationship between the impact fees imposed by [the City] and the benefits accruing to the developer from the construction of new roadways.”

- a. “[T]he second prong of the test requires [the City] to demonstrate a reasonable relationship between the fee imposed on a developer and the benefits accruing to the developer.”
- b. “This portion of the test addresses whether the developer and the city are paying their proportionate shares of the costs necessary to construct new roadways.”
- c. “To prove that a reasonable relationship exists, [the City] must demonstrate that the methodology used to determine the need for roadway improvements funded by the impact fee is based on generally accepted traffic engineering practices.”
- d. “When evaluating this prong, a court should consider the actual costs of constructing new roadways, the formula used to determine the fee, the fee paid by a particular developer, the city's contribution, road improvements made directly by developers, the length of time between the payment of the fee and new roadway construction projects, whether the roadway projects are site-specific to the new development, and any other criterion that bears on the reasonableness of the fee.

C. When Do Exactions/Fees Exceed Governmental Authority

- a. United States v. Sperry Corporation, 493 U.S. 52, 110 S.Ct. 387 (1989)
 - i. Challenge to statute imposing fee on awards from the Iran-United States Claims Tribunal. Statute states that it is to reimburse the government for expenses incurred in connection with the arbitration of claims.
 - ii. “This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services.”
 - iii. “All that we have required is that the user fee be a ‘fair approximation of the cost of benefits supplied.’” (citation omitted).
 - iv. Court holds fees imposed by the statute at issue “are not so clearly excessive as to belie their purported character as user fees.”

- v. Court rejects argument that the fees mandated by the statute constitute a taking, holding that “[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible.”
 - vi. “[A] reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services.”
- b. Jewish Reconstructionist Synagogue of the North Shore, Inc. v. Incorp. Vill. of Roslyn Harbor, 40 N.Y.2d 158, 386 N.Y.S.2d 198 (1976).
- i. Challenge to municipal ordinance that required applicants for zoning variances and special permits to pay the actual costs incurred by the board in reviewing the matter without any limitation.”
 - ii. “[W]hen the State’s jealously guarded police power is delegated to a local government or to its agencies, it must be accompanied by standards which guide and contain its use.”
 - iii. “As a consequence, when the power to enact fees is to be implied, the limitation that the fees charged must be reasonably necessary to the accomplishment of the statutory command must also be implied.”
 - iv. “The fees also ‘should be assessed or estimated on the basis of reliable factual studies or statistics.’”
 - v. “Without the safeguard of a requirement that fees bear a relation to average costs, a board would be free to incur, in the individual case, not only necessary costs but also any which it, in its untrammelled discretion, might think desirable or convenient, no matter how oppressive or discouraging they might in fact be for applicants.”
 - vi. “At stake are the terms upon which citizens may have access to a governmental function and their right to have those terms, whether or not they are in the form of fixed fees, fixed by standards which lend assurance that they are not ‘unreasonable, discriminatory nor oppressive.’”
 - vii. “Manifestly, ready accessibility of judicial and other mandated governmental functions is too important for that accessibility and its appearance of accessibility.”

- c. St. Onge v. Donovan, 71 N.Y.2d 507, 527 N.Y.S.2d 721 (1988).
- i. “A zoning board may, where appropriate, impose ‘reasonable conditions and restrictions as are directly related to and incidental to the proposed use of the property’, and aimed at minimizing the adverse impact to an area that might result from the grant of a variance or special permit.”
 - ii. “[C]onditions are proper [where] they relate directly to the use of the land in question, and are corrective measures designed to protect neighboring properties against the possible adverse effects of the use.”
 - iii. “[Z]oning boards may not impose conditions which are unrelated to the purposes of zoning.”
 - iv. “[C]onditions are invalid [where] they do not seek to ameliorate the effects of the land use at issue, and are thus unrelated to the legitimate purposes of zoning.”
- d. Economy Enterprises, Inc. v Township Committee of Manalapan Township, 104 N.J. Super 373, 250 A.2d 139 (N.J. Super Ct. App. Div. 1969)
- i. Invalidates ordinance under which “the governing body divorces itself from any function in relation to the process of so-called reimbursement except to the extent that it acts as a dry trustee of the moneys paid into a special account by the developer and funnels such funds out directly to the engineer who did the inspection in relation to the particular development.”
 - ii. “Under the foregoing arrangement the developer is completely at the mercy of the engineer. The latter is under no restraint save his conscience as to how much to charge the developer. The governing body has no economic incentive to curtail the charges since they do not come out of the municipal treasury. The developer may be loath to take issue with the charges as he may have future problems with the engineer and may not wish to court the possibility of antagonizing him by objecting to the amount of his charge.”
- e. Cimato Brothers, Inc. v. Town of Pendleton, 270 A.D.2d 879, 705 N.Y.S.2d 468 (4th Dept. 2000), leave to appeal denied, 95 N.Y.2d 757, 713 N.Y.S.2d 1 (2000).
- i. Upholding subdivision developer’s challenge to a town ordinance, which fixed inspection fees at ten percent (10%), even though the

Town Board had estimated that eight percent (8%) would be sufficient to cover inspection costs.

- ii. Court persuaded by facts fee structure ordinance was enacted “[w]ithout the benefit of a statistical study,” such that the eight percent (8%) figure was simply an estimate, and that the Town Board “added 2% to ensure that the amount generated by the fee was sufficient to cover its costs.”
- iii. “Evidence that refunds have been given to each contractor since enactment of the ordinance further support the conclusion that there is no reasonable basis for fixing the fee at 10% of the estimated cost.”
- iv. Court further finds that “the ordinance does not limit the nature or extent of services that the Town Engineer might perform in every instance nor does it set forth any guidelines regarding the charges for such services.”
- v. “Instead, the Town Board has the impermissible unfettered discretion to direct the Town Engineer to perform whatever services it deems appropriate and then to approve the payment of whatever charges are submitted to it by the Town Engineer.”

D. When Are Exactions/Fees An Illegal Tax?

- a. Torsoe Bros. Construction Corp. v. Bd. of Trustees of Incorp. Vill. of Monroe, 49 A.D.2d 461, 375 N.Y.S.2d 612 (2d Dept. 1975).
 - i. Petitioner challenges imposition of \$30,000 fee to tap into municipal water system.
 - ii. Court holds that municipality cannot use tap-in fees to defray cost of maintaining and improving water system.
 - iii. “It is well settled that where a license or permit fee is imposed under the power to regulate, the amount charged cannot be greater than a sum reasonably necessary to cover the costs of issuance, inspection and enforcement.”
 - iv. “To the extent that fees charged are exacted for revenue purposes or to offset the cost of general governmental functions they are invalid as an unauthorized tax.”

- b. N.Y. Telephone Co. v. City of Amsterdam, 200 A.D.2d 315, 613 N.Y.S.2d 993 (3rd Dept. 1994)
- i. Challenge to ordinance that required applicants for street excavation permits to pay \$13 per square foot of excavation occurring within the paved portion of the right-of-way, sidewalk or greenbelt portion of the right-of-way.
 - ii. Although [the municipality] has characterized the charge as a fee, “[t]he label which is attached to an assessment is not dispositive of its true nature.” (citation omitted)
 - iii. “Simply stated, taxes are burdens of a pecuniary nature imposed for the purpose of defraying the costs of government services generally, while fees have been characterized as the ‘visitation of the costs of special services upon the one who derives a *benefit* from them.’” (citations omitted).
 - iv. Court finds that ordinance is an improper revenue generating measure, including because “the record reveals that the ‘fee’ sought to be imposed by defendant is being exacted for revenue purposes and, further, that the \$13 per square foot charge clearly is disproportionate to the costs associated with issuing the excavation permit and subsequent inspections and enforcement.”
 - v. Court finds it significant that the moneys garnered under the ordinance are deposited in the municipality’s general fund, and that municipal Common Council meeting minutes indicate that the ordinance is a revenue-raising measure.
 - vi. “As to the overall reasonableness of the charge, plaintiffs established that the costs associated with a routine excavation are dramatically less than the charges that would be imposed under defendant's ordinance.”
- c. Lodge of the Ozarks, Inc. v City of Branson, 796 S.W.2d 646 (Mo. Ct. App. 1990).
- i. Challenge, inter alia, to \$29,750 Building Permit fee for lodge.
 - ii. Discusses cases from other jurisdictions, noting that these cases “hold generally that the amount of the fee may not exceed the cost of issuing the permit and of inspecting and regulating the permitted activity and that a city does not have a power to impose a tax under the guise of a license or permit.”

- iii. Court finds that “the permit fee is most substantial,” but credits “testimony from various city employees, all called as witnesses by the lodge, that there would be ‘ongoing inspections at no charge to the lodge,’ in order to ‘inspect and enforce the codes.’”
 - iv. “Since the permit fee was imposed not only for inspection but also enforcement of the building codes, and since the lodge introduced no evidence of the extent to which the latter purpose would be served, nor the cost involved therewith, this court holds that the lodge has failed to sustain its burden of showing unreasonableness of the building permit fee.”
- d. St. Clair County Home Builders Association v. City of Pell City, 2010 WL 3518657 (Ala. Sept. 10, 2010), rehearing denied, (Ala. Nov. 12, 2010).
- i. Challenge by home builders association to ordinance intended to finance water and sewer system projects, imposing “impact fees” for sewer connection and “capital recovery” fees for water connections.
 - ii. Court notes that under ordinance:
 - 1. the moneys collected are deposited into separate accounts specifically earmarked for water and sewer system improvement projects, and;
 - 2. it was uncontested that anticipated revenues “will not exceed the projected costs of the improvements needed to add the capacity necessary for growth and that the revenues will actually be much less than the projected costs of adding that capacity.
 - iii. “[A] fee imposed by a municipality is considered a service fee when the municipality charges a fee that is related to defraying the costs of a specific service and the moneys collected from the imposition of that fee are earmarked for that specific service and are not used as general revenue for the municipality.”
 - iv. “In this case, it is undisputed that the ordinance limits the use of the impact fees and the capital-recovery fees collected to capital improvements to its water and sewer systems; the fees are not considered general revenue to be used for any purpose.”
 - v. Accordingly, the Court finds that “the impact fees and the capital-recovery fees are properly characterized as service fees rather than taxes.”

- vi. “The City's imposition of service fees through its adoption of the ordinance is a valid exercise of the City's powers, whether derived from the express statutory language granting it the authority to construct, operate, and maintain water and sewer systems or under the City's police power allowing it to control sanitary matters within its municipal limits by operating a sewer system.”
 - vii. “Undoubtedly implied within the City's power to construct, operate, and maintain its water and sewer systems is the power to charge the users of those systems fees to defray the cost of providing such services.”
 - viii. Court further finds that “Dolan does not apply to generally applicable legislative enactments, such as the ordinance.”
 - ix. Court further rejects argument that fees were arbitrary and unreasonable because they were improperly calculated.
 - x. Notes that “Alabama law does not require that fees precisely comport with the benefits provided to property owners.”
 - xi. Ordinance need only pass “substantial indirect benefit” test, which “does not require a showing that each person against whom the service fees are assessed receives a proportional direct benefit.”
 - xii. “Instead, all that need be shown is that each person against whom the service fees are assessed received at least a substantial indirect benefit.”
 - xiii. “It cannot seriously be contested that there is not at least a substantial indirect benefit from being connected to the City's water and/or sewer system.”
- e. Daniels v. Borough of Point Pleasant, 23 N.J. 357, 129 A.2d 265 (Sup. Ct. N.J. 1957)
- i. Court invalidates a provision that increased fees to more than 700% of the actual cost associated with inspecting construction of buildings.
 - ii. “Inherent in the power to regulate and control is the power to charge license fees primarily designed to defray the costs of such control. They must not, of course, exceed the bounds of reason considered in connection with the service and the cost of the service granted.”

- iii. “Admittedly, the purpose of the ordinance was to raise revenue to defray the increased cost of school and other government services. The philosophy of this ordinance is that the tax rate of the borough should remain the same and the new people coming into the municipality should bear the burden of the increased costs of their presence. This is so totally contrary to tax philosophy as to require it to be stricken down.”

E. Getting Excess Fees Returned/Deferring Fees and Performance Bonds

- a. Town of Shawangunk v. Goldwil Properties Corp., 61 A.D.2d 693, 403 N.Y.S.2d 784 (3rd Dept. 1978)
 - i. Surety seeks to limit exposure on \$242,000 performance bond, posted to secure subdivision improvements, to portion of subdivision which was actually developed.
 - ii. Citing State statute authorizing performance bonds to secure subdivision improvements, Court holds that it “seems to restrict expenditures to an amount “commensurate with the extent of building development that has taken place in the subdivision.”
 - iii. “In our view, these words of limitation were purposely inserted in the statute as a means to assure that subdivision residents would be supplied with necessary services without insisting on the completion of an entire project as a matter of course in every case.”
 - iv. “[T]he language would call for the payment of the face amount of the bond to the Town so that it could complete improvements reasonably justified by that part of the subdivision which had been developed followed by a refund of any amount not needed to complete that portion of the work.”
 - v. Holding that where only a portion of a subdivision was built, the performance bond could be used by the municipality to install improvements for that portion only, with the remainder to be refunded to the developer since there would be no need for improvements on the undeveloped portion of the approved plat.

- b. Matter of Wildlife Assoc. v. Town Board of Southampton, 141 A.D.2d 651, 529 N.Y.S.2d 548 (2d Dept. 1988).
 - i. Applicant who was charged \$57,000 engineering review in connection with subdivision application seeks refund after learning that only \$8,700 was spent on its application.
 - ii. Court affirms applicant's demand for audit.
- c. River Vale Planning Board v. E & R Office Interiors, Inc., 241 N.J. Super. 391, 575 A.2d 55 (Superior Ct. N.J. 1990)
 - i. Municipality seeks to enforce terms of approval and development agreement, notwithstanding that project had been abandoned.
 - ii. Court affirms lower Court determination that "the installation of the improvements contemplated by the Developer's Agreement as a condition of site plan approval was subject to an implied or constructive condition that those improvements were required only if the developer proceeded with the project contemplated by the application and approval."
 - iii. Affirms order that bond be released.
- d. Clare v. Town of Hudson, 160 N.H. 378, 999 A.2d 348 (2010).
 - i. Applicant seeks refund of \$81,705.00 performance bond posted to fund improvements to specific traffic intersection, arguing that the funds were not used for its intended purpose.
 - ii. State regulation requires that impact fees be segregated from municipality's general fund and be used solely for the capital improvements for which they were collected.
 - iii. Court finds that only \$75,437.05 "was actually attributable to the work for which the impact fee was collected."
- e. Westchester Fire Insurance Co. v. City of Brooksville, 731 F.Supp.2d 1298 (M.D. Fla. July 30, 2010)
 - i. Municipality attempts to recover \$5.3 million from surety ostensibly to install infrastructure for an abandoned, single-family housing development.
 - ii. Court holds that "the [performance] bonds and the ordinance [requiring bonding to ensure construction of improvements for

subdivision] construed together impose a condition that construction of the development proceed before the City may collect.”

- iii. Court notes that “the City ordinance requires the bonds to ensure that no resident purchases a home without access to the City's utility services.”
- iv. “Because no home has been built that requires the City's utility service and because no home will be built for at least several years, the implied condition fails.
- v. Court further finds that “[b]ecause no home exists in Phase Two that requires the City’s utility services, requiring the City to install improvements on undeveloped land (and requiring [the surety] to reimburse the City’s cost to install the improvements) imposes an unreasonable forfeiture against [the surety] and promotes an unreasonable windfall for the City.”