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Can the Government Condition Development on Cash Payments?

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On October 26, 2011, I presented a lecture to Hawaii landowners, land lawyers, and government officials about an important case currently being considered for review by the U.S. Supreme Court about the government's power to require cash payments in return for development approvals.

In *West Linn Corporate Park v. City of West Linn*, an Oregon developer is challenging the fees the City required as violating the Supreme Court's exaction doctrine, which holds that government demands for land in exchange for development permissions must have a logical "nexus" to a problem the proposed development is expected to create, and must also be "roughly proportional" to the magnitude of the problem. Land use lawyers know this as the *Nollan/Dolan* rule, named for the two seminal Supreme Court cases that enunciated the doctrine, *Nollan v. California Coastal Commission* (1987) and *Dolan v. City of Tigard* (1992). While it is well-settled that these requirements apply when the government demands land in exchange for development permits, the lower courts have not settled on whether they also apply when cash or some other kind of exaction is required.

In the *West Linn* case, the Ninth Circuit Court of Appeals concluded that *Nollan* and *Dolan* do not apply when cash is demanded, only land. The court refused to apply any limits on the government's ability to impose these type of exactions, which may include "in lieu" fees, "affordable housing" or "workforce housing" requirements, and "fair share" fees. In short, in the Ninth Circuit (which includes Hawaii), there is no federal constitutional constraint on the government's ability to impose these type of conditions on discretionary permits to develop land.

There is a better-than-usual chance that the Supreme Court will agree to review the case, since the Ninth Circuit's decision squarely conflicts with decisions by the California and Texas Supreme Courts, both of which acknowledge the *Nollan/Dolan* rules apply to *all* exactions, not just demands for land. The Supreme Court will decide whether to review the Ninth Circuit at its November 10, 2011 conference.

Contact me at mmm@hawaiilawyer.com or at (808) 531-8031 for more information.

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