
(Credit: AP)

The U.S. Supreme Court has agreed to hear and decide an important "regulatory takings" case from California that has major implications for federal, state and local governments nationwide. The case is Sheetz v. County of El Dorado, Docket No. 22-1074.

Even before the justices granted review in the Sheetz case last Friday, the Court's 2023-24 Term was shaping up as one featuring sweeping constitutional challenges to government regulation generally and to environmental regulation in particular. For example, in Loper Bright Enterprises v. Raimondo, a case involving federal regulation of commercial ocean fishing practices, the fishing industry has asked the justices to repudiate their venerable 1984 decision in *Chevron v. Natural Resources Defense Council*, another environmental case that announced constitutionally-based principles of judicial deference to federal regulators' interpretation of ambiguous congressional statutes. And in Securities and Exchange Commission v. Jarkesy–a case directly involving federal authority to oversee securities markets–the parties bringing the litigation mount a broad constitutional attack on federal regulators' longstanding authority to seek and impose civil penalties through administrative enforcement proceedings; if successful, that challenge could well undermine federal environmental agencies' continued ability to pursue enforcement actions administratively, rather than exclusively through the courts. (Legal Planet colleague Dan Farber analyzes these two pending cases in more detail in an excellent, recent post.)

With the Supreme Court's recent grant of certiorari in Sheetz, the justices' current Term has emerged as the most consequential in recent memory regarding constitutional challenges to the scope of government's regulatory authority.

The Sheetz case arose out of El Dorado County's 2004 adoption of a new General Plan to

govern the county's land use planning and manage its future growth. A key provision of the General Plan requires that those proposing new development projects in the county–new housing subdivisions, commercial projects, etc.–reimburse the county for its costs for the publicly-funded road improvements needed to serve those private projects and mitigate the adverse traffic impacts that they create. The county implemented this policy by creating a "traffic impact mitigation" (TIM) fee program.

County resident George Sheetz sought and obtained county approval of a permit to construct a single-family home on his property. However, the county conditioned that approval upon Sheetz's payment of a TIM fee for adjacent highway and road improvements. Sheetz paid the fee under protest, claiming its imposition was unconstitutional. He subsequently sued the county in California state court to pursue his constitutional challenge.

Which brings us to a quick review of applicable regulatory takings law.

The U.S. Supreme Court first declared a century ago that government regulation of private property, if "excessive," can constitute a compensable "regulatory taking" of private property under the Takings Clause of the Fifth Amendment to the U.S. Constitution. But it was not until the late 1970's and 1980's that the Supreme Court first began articulating the details of regulatory takings law.

In 1987, the Court decided the seminal regulatory takings case *Nollan v. California Coastal Commission*. In *Nollan*, the Coastal Commission had conditioned its approval of a beachfront home construction project on the landowner's grant of an access easement allowing members of the public to cross a strip of the Nollans' dry sand property in order to access public parks on either side of the Nollan parcel. However, the Supreme Court struck down the easement as an unconstitutional condition in violation of the Takings Clause because, in the majority's view, the access condition lacked an "essential nexus" connecting it to a legitimate governmental interest.

Seven years later, in *Dolan v City of Tigard*, the Court returned to its newly-minted "unconstitutional conditions" doctrine. In *Dolan, a property owner* challenged a city's conditioning of a commercial land use permit on the property owner's dedication of a portion of his lot to the city for a publicly-funded storm drainage system and a public pedestrian/bicycle pathway. Again, the justices struck down the dedication condition as violative of the unconstitutional conditions doctrine they had first announced in *Nollan*. But in *Dolan* the Court expanded that doctrine by adding a second component to the constitutional standard: that the imposed condition must be "roughly proportional" to the

estimated impact of the proposed development on the public at large.

Finally, in the 2013 case of *Koontz v. St. Johns River Water Management District*, the Supreme Court held that its two-part "unconstitutional conditions" takings test was not limited to government exactions of interests in private *land*, but also extends to *monetary* exactions intended to further a comparable public purpose.

Critically, the land and fee exactions challenged successfully in the *Nollan*, *Dolan* and *Koontz* decisions all involved exactions imposed by land use regulators on an individual and discretionary basis–not as part of a general, broadly-applicable legislative mandate like the TIM fee program adopted and implemented by the El Dorado County Board of Supervisors.

In his regulatory takings lawsuit against the county, plaintiff Sheetz argued that the *Nollan/Dolan* unconstitutional conditions rule should apply to *legislatively*-prescribed monetary fees just as it does to conditions and fees imposed by government planners on an individualized basis. However, both the California trial court and, in a published opinion, the state Court of Appeal disagreed, relying on a consistent line of California Supreme Court decisions finding the *Nollan/Dolan* unconstitutional conditions doctrine inapplicable to legislatively-prescribed, generally applicable development fees like those assessed on plaintiff Sheetz.

While California appellate courts have consistently reached the same result on this point, lower state and federal courts in other jurisdictions have arrived at inconsistent conclusions on the issue. And to date the U.S. Supreme Court has not weighed in on the question–until now.

To this observer, the "California rule" on the scope of the "unconstitutional conditions" doctrine makes sense, primarily for one key reason: conditions and fee exactions imposed on a jurisdiction-wide basis by a city council, board of supervisors, state legislature or the U.S. Congress are simply impossible to adopt consistent with the rather precise *Nollan/Dolan* mandates of an "essential nexus" and "rough proportionality" between the legislatively-imposed condition and the burden of an individual property owner's project on the jurisdiction as a whole and the public at large.

That said, El Dorado County and its allies may have an uphill battle in the Supreme Court to preserve their lower court victory. As the old litigators' adage goes, the Supreme Court generally does not take up a case in order to affirm the lower court's ruling. And this Court has moved steadily to the right when it comes to environmental regulations challenged as

unconstitutional under the Takings Clause: the Court’s conservative majority has proven itself extremely protective of private property rights and increasingly hostile towards environmental and land use regulatory programs.

The Supreme Court will likely hear arguments in Sheetz v. County of El Dorado in early 2024, with a decision by the justices expected by the end of June.