Silver Peak – El Dorado County CA

It seems absurd to blog about legal doctrine nowadays, but I, like many, am preparing for Spring term classes, and Takings represents one way that the Supremes might try to destroy American government. So it is always good to keep it in mind.

Most of us know the issues concerning exactions – when a government requires concessions in exchange for a permit. *Nollan v California Coastal Commission* and *Dolan v City of Tigard* established the black-letter, bar exam framework: such exactions must have an "essential nexus" between the harm the granting the permit would cause and the exaction required, and such exaction must be "roughly proportional" to that harm. A more recent case, *Koontz v. St John's River Water Management Distric*t, is something of a mess, mainly because it was written by troglodyte Sam Alito, but at 100,000 feet it held that monetary exactions also get *Nollan/Dolan* scrutiny.

Now comes the Supremes' latest dog's breakfast, *Sheetz v El Dorado County* (Rick covered this when it first appeared; I am writing here about some of the broader issues). The Sheetz' wanted to build a prefab house on their property. The Court had previously passed an ordinance setting forth a traffic mitigation fee schedule, and required payment of that fee in exchange for the permit. The Sheetz' objected that the exaction was unconstitutional, and cited *Nollan* and *Dolan,* but the California Court of Appeal said those cases were irrelevant because the exaction at

issue was enacted by a legislative body: it was not an ad hoc, negotiated exaction such has been at issue in previous Supreme Court Takings cases.

The Supremes unsurprisingly reversed, holding that there is no "legislative exception" to *Nollan* and *Dolan.* Unsurprisingly this misstates the issue entirely: the entire point of *Nollan* scrutiny was to avoid an "out-and-out plan of extortion," in Justice Scalia's words, and Chief Justice Rehnquist in *Dolan* made it very clear that part of this heightened scrutiny requires an "individualized determination" on rough proportionality. By its very nature, then, a legislative exaction *cannot* fall under *Nollan* and *Dolan.* This is the gravamen of a forthcoming article by Lee Anne Fennell and Timothy M. Mulvaney (although obviously they do a lot more than that, and you should read it).

And one might have expected that someone on the Court would have said this. No one did: *Sheetz* is, amazingly, a unanimous opinion. Justices Sotomayor and Jackson concur in the result, but not do dissent.

And there a huge problem in the entire framework: what does it mean to use "rough proportionality" in a *legislative* exaction? Suppose a local government says that for every housing unit permitted, the applicant must put, say, $1 into the school construction fund. The nexus is straightforward: as a general matter more housing means more kids, and more kids means that they must be educated. (This is why, as in Vulgaria, local governments *hate children*: they are expensive and contribute virtually nothing to the public fisc.).

So how do we figure "rough proportionality"? Would it be, "in general, if you take all residential units, then 1,000 residential units will mean X number of kids to educate, and so that will lead to Y dollars per unit"? That makes sense to me, but that doesn't seem like heightened scrutiny. That really is the whole problem with the very common-sensical rough proportionality.

And that is especially because *Dolan* itself requires an "individualized" determination, so if we take that seriously, wouldn't that mean that you just *cannot have* legislatively determined exactions? Apparently not. They just need to comply with *Nollan* and *Dolan* – but the Court doesn't say how.

Justice Kavanaugh, who from time to time has actually been somewhat sane on environmental questions, actually helps out here a little, noting:

> I write separately to underscore that the Court has not previously decided—and today explicitly declines to decide—whether "a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development." Importantly, therefore, today's decision does not address or prohibit the common government practice of imposing permit conditions, such as impact fees, on new developments through reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property. Moreover, as is apparent from the fact that today's decision expressly leaves the question open, no prior decision of this Court has addressed or prohibited that longstanding government practice. Both Nollan and Dolan considered permit conditions tailored to specific parcels of property. Those decisions had no occasion to address permit conditions, such as impact fees, that are imposed on permit applicants based on reasonable formulas or schedules that assess the impact of classes of development.

So this leaves open the idea that if a legislative body imposes impact fees by "classes of development," that could be okay. Or maybe not. But again, what does that mean? What is a "class" of property? Suppose again that we have the payment into a school construction fund by residential unit. Sounds like a "class of development" to me. But then someone builds a senior housing development. No kids there. Is the "class" a housing development, or is it a *senior* housing development?

And of course we get the classic legal weasel world: "reasonable" formulas or schedules. What is reasonable? With this Court, we don't want to know.

And there is already one vote for blowing the whole thing up: Justice Gorsuch rejects the entire notion of a "class of developments," which suggests that would ban legislative fees altogether.

Think about what *that* could mean. In Koontz, Justice Kagan in dissent raised the spectre of courts using heightened scrutiny to strike down *taxes*, because the distinction between "fees" and "taxes" is anything but clear. Justice Alito in typically disingenuous style said, "well, of course we won't do that," but when pressed about the distinction, he basically went the full Justice Potter Stewart in Jacobellis v Ohio regarding obscenity: he knows it when he sees it.

Of course if you can't have legislative fees, and you can't tell fees from taxes, then….you know….

No need to panic, at least not yet. It's a cottage industry among some observers to say that the sky is falling whenever the Court issues a Takings decision. If basically all the Court is saying to legislatures is "have a reasonable connection between the harm and the exaction and make it roughly proportional," there might not be anything to worry about. Even Thomas and Alito didn't join Gorsuch's concurrence.

Back in 2001, Ann co-wrote an article finding that local jurisdictions, after doing their *Nollan* and *Dolan* analyses, found that they were actually *under*charging, and raised the fees.

But right now, there is nothing to stop Trump judges from using this doctrine to start striking down fees, because after all, the Court has *not* said whether "classes of developments" is okay, and what it would even look like. And that is my real worry. The very vagueness of *Sheetz* is basically an invitation for right-wing judges on, say, the 5th and 8th Circuits to start striking down fees all over the place. And if we have learned anything about the Roberts Court, it is that it will pretty regularly bend over backwards to turn the Constitution into the bastard child of Jim Crow and Ayn Rand.