Government Need Not Satisfy Nexus and Proportionality Tests if Dedication Requirement Does Not Otherwise Constitute a Taking

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Landowners routinely have to give up something in return for a government agency's granting a discretionary permit. Developers are quite familiar with these requirements, as they are consistently compelled to dedicate property or provide money in exchange for a development approval. However, there are limits, as the government agency cannot typically demand conditions that are not proportional or related to the impacts that would be created by the proposed project. These limits are referred to as the "nexus" and "rough proportionality" standards set forth in the well-known United States Supreme Court cases of *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374. But do these nexus and proportionality standards always apply to dedication requirements?

According to a recent California Court of Appeal decision, *Powell v. County of Humboldt* (January 16, 2014), the answer is no. In analyzing the County's conditioning of a building permit on a property owner dedicating an overflight easement, the Court in *Powell* held that before one even reaches analyzing the nexus and proportionality standards, the condition being imposed must otherwise constitute a taking of property. If the exaction would not rise to the level of a taking if the government "took" it outside the dedication context, then the *Nollan/Dolan* tests are inapplicable.

Background

The Powells owned a residential property located one mile from an airport. Due to airport proximity, the property was situated within an "Airport Compatibility Zone" which required property owners to dedicate an overflight easement as a condition of the issuance of any building permit. When the Powells applied for a

building permit for a covered porch and carport, the County conditioned its approval on the Powells' executing the overflight easement. The Powells refused to execute the easement and filed a lawsuit, claiming the dedication requirement constituted an unlawful taking since it was not related to the impact of the Powells' project, thereby violating the nexus dedication standard set forth in *Nollan*.

The trial court granted the County's motion for summary judgment, holding that the overflight easement did not qualify as a taking. The court held that since the easement did not constitute a taking, it was not subject to scrutiny under *Nollan*. The Powells appealed.

The Court of Appeal

The Court of Appeal thoroughly examined California and federal takings jurisprudence and concluded that the nexus and proportionality standards set forth in *Nollan* and *Dolan* apply only to dedication requirements that, outside the exactions context, would otherwise constitute a taking. In other words, before engaging in the *Nollan/Dolan* scrutiny for a permit approval condition, the court must first determine whether the condition would rise to the level of a compensable taking if applied to the landowner outside the permitting process. If the condition does not involve a "taking," *Nollan* and *Dolan* do not apply.

The Court then examined the County's overflight easement to determine whether it constituted a taking of the Powells' property. The Court concluded that the easement did not completely deprive the Powells of all the beneficial use of their property or otherwise interfere with their investment-backed expectations. Thus, the Court was left with analyzing whether the overflight easement constituted a physical taking of their property.

Under California law, a property's ownership rights are subject to limitations when it comes to the use of airspace. (See Civ. Code, § 659.) Specifically, aircrafts are permitted to fly at altitudes of at least 1,000 feet over congested areas or at least 500 feet in sparsely populated areas. (14 C.F.R. § 91.119(b), (c); Pub. Util. Code, § 21403, subd. (a).) In other words, an owner's private property interest extends up only to 500 or 1,000 feet, depending on the property's location. If flights occur above this block of air, no physical intrusion or taking occurs since no private property interest is being touched. Even flights within private airspace below 500 or 1,000 feet may not constitute a taking unless they cause a measurable reduction in the property's market value due to a substantial interference with the use and enjoyment of the property that is unique to the particular owner.

Based on this standard, the Court concluded that the County's overflight easement did not constitute a taking of property since there was no evidence it would (i) permit flights within the Powells' private airspace, (ii) substantially interfere with their use and enjoyment of the property, or (iii) cause a measurable reduction in their property's value. As a result, the Powells were not entitled to compensation, and the County could impose the overflight easement as a condition of the Powells' securing a building permit -- regardless of the overflight easement's relationship to the Powells' porch and carport.

Conclusion

Under *Powell*, the *Nollan* "nexus" standard does not apply unless the government requires a person as a condition for receiving a discretionary government benefit to give up the constitutional right to just compensation for a taking of their property, or compels the person to pay a monetary fee equivalent to such a taking. The same logic should also apply to exclude *Dolan* scrutiny in similar situations. Government agencies are free to impose conditions or dedication requirements if they do not constitute a taking of a property interest.