Rough Proportionality: Where to Draw the Line?

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Robert F. Brown
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Ste. 800
Richardson, Texas 75081
(214) 747-6130
www.bhlaw.net
email: rbrown@bhlaw.net

James B. Griffin
Brown & Ortiz, P. C.
112 E. Pecan, Ste. 1360
San Antonio, Texas 78205
(210) 299-3704
www.brownortizpc.com
email: james@brownortiz.com

I.

INTRODUCTION

In recent years, perhaps no area of municipal planning and practice has become the subject of more confusion and debate than zoning and land use practice. While federal and state courts attempt to unravel the often perplexing decisions of the United States Supreme Court in regulatory takings and land use cases, mayors, city council members, city managers, planners, city attorneys and building officials are left scrambling for footing on an ever shifting playing field that appears to become softer and more unsure with each Supreme Court opinion.

One need only read a local newspaper and, more than likely, you will probably see an article about a zoning or land use dispute. Disputes about zoning classifications, variances and permits are commonplace. More frequently, in addition to these traditional situations, we now see new controversies that stem from increased municipal efforts to protect the environment, preserve our historic landmarks and cultural heritage, and enrich the quality of life in our neighborhoods. Overlying all of these issues is a greater emphasis on identifying and controlling urban sprawl and its ill-effects.

While each of these issues are worthy of significant and in depth discussion, this paper makes no effort to do so, primarily because the task would be somewhat daunting and the results extremely voluminous. Rather, this paper seeks to provide an overview of the concept of rough proportionality in Texas, with emphasis on the Texas Supreme Court case of *Town of Flower Mound, Texas v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 (Tex. 2004), and further, to offer suggestions on how Texas cities and potential developers may address the issue of exactions in the land development process.

II.

THE BREADTH OF TAKINGS CASES

Article I, Section 17 of the Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person…." Tex. Const. art. I, § 17. The federal Takings Clause is substantially similar. *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation"). As a result, the Texas Supreme Court relies upon interpretations of the federal Takings Clause in construing the Texas takings provision and analyzes Texas takings claims under the more familiar federal standards. *See*, *e.g.*, *City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234, 239 (Tex. 2002) (considering aircraft overflights takings claim, asserted under Texas Constitution, by reference to federal standard established in *United States v. Causby*, 328 U.S. 256 (1946)); *City of Corpus Christi v. Pub. Util. Comm'n of Texas*, 51 S.W.3d 231, 242 (Tex. 2001) (examining federal precedent to decide the framework for determining whether utility charges constitute a taking); *Mayhew v. Town of Sunnyvale,* 964 S.W.2d 922, 932 (Tex. 1998) ("[W]e assume, without deciding, that the state and federal guarantees in respect to land-use constitutional claims are

coextensive, and we will analyze the Mayhews' claims under the more familiar federal standards.").

Both the Texas and Federal Constitutions recognize a claim for a taking of property. *Mayhew,* 964 S.W.2d at 933; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). There are three general categories of takings claims: (1) physical occupation, (2) exactions and (3) regulatory takings. *Town of Flower Mound, Texas v. Stafford Estates Limited Partnership*, 135 S.W.3d 620 at 630 (Tex. 2004); *Sheffield Development Company, Inc. v. City of Glenn Heights, Texas*, 140 S.W.3d 660 at 671-72 (Tex. 2004); *Mayhew*, 964 S.W.2d at 933.

The U.S. Supreme Court has determined that the first category, a physical invasion or a regulatory activity that produces a physical invasion, will support a takings claim without regard to the public interest advanced by the regulation or the economic impact upon the landowner. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-440 (1982). *See also Mayhew*, 964 S.W.2d at 933 (recognizing physical takings as takings category).

The second category of takings claims is found where an exaction, such as the required dedication of land, is made a condition of development approval. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Nollan v. California coastal Comm'n,* 483 U.S. 825, 836 (1987); *Dolan v. City of Tigard,* 512 U.S. 374, 391 (1994).

The third category of takings claims -- regulatory takings -- encompasses the majority of takings cases and involves the most complex analysis. *See Mayhew*, 964 S.W.2d at 933 (recognizing regulatory takings as category of takings claim); *Sheffield*, 140 S.W.3d at 670-73 (holding that factors relevant to determine whether a regulatory taking has occurred include, but are not limited to, those factors identified by the U.S. Supreme Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), which are (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action).

This paper addresses the second category – commonly referred to as exactions claims— how they have given rise to, and the importance of, impact fees created and imposed by regulating bodies.

A. *Nollan* and *Dolan*

The modern concept of a taking through an exaction stems from two U.S. Supreme Court cases. The first, *Nollan,* 483 U.S. at 836, requires a court to evaluate the nexus between (1) what the municipality seeks to exact from the developer by way of imposing a condition that takes land and (2) the projected impact of the proposed development. In *Nollan*, the Court required in a case that involved a development requirement that land be dedicated, that there be an "essential nexus" between the title condition imposed and the stated police power objective of requiring development to meet the needs created by the development. *Id*., 483 U.S. at 837. Under this test, the dedication must serve the same governmental purpose as the regulation. The Court employed a heightened level

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