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Takings Law & New Urbanism: The Outer-Limits of Land Use & Environmental Regulatory Power[*]

I. Introduction

Over the last quarter century, ideas in the field of urban studies have had greater influence than ever before on local and regional land use regulation. In addition to "smart growth" policies that discourage sprawl, development codes in major metropolitan areas frequently incorporate progressive design standards that reflect recent discoveries about how the built environment affects quality of life and what makes "great places." While these regulations vary significantly in their particulars, some common objectives include:

- active, walkable streetscapes that encourage pedestrian activity and ground-level commerce
- a mix of commercial and residential uses within small areas
- variety in building size & scale
- a wider range of parking strategies and less reliance on single-site parking facilities
- greater connectivity and a higher quality public realm
- income diversity and affordable housing options
- preservation of historic structures and incorporation of historic features in new construction
- transit infastructure
- public art
- sustainable construction and design[1]

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[*] The views expressed here are the author's and do not necessarily reflect the position of the City of Austin or the author's colleagues in the Law Department.

[1] *See generally*, Congress of the New Urbanism, *Canons of Sustainable Architecture and Urbanism: A Companion to the Charter of the New Urbanism*, available at: http://www.cnu.org/sites/files/Canons.pdf

The extent to which New Urbanist objectives like these can be achieved through mandatory regulation depends on a variety of factors, including the type of regulation and the costs of compliance. For exactions, such affordable housing or a "fee in-lieu," it can be difficult to demonstrate the impacts of a particular development precisely enough to support imposing significant conditions. But with other requirements, such as building placement or design standards, new construction could legally be required to comply with more progressive design standards, the cost of such requirements will discourage redevelopment of core urban areas by incentivizing the continued use of older buildings that aren't subject to new regulations.

Faced with these challenges, municipalities across the country have increasingly relied on "density bonuses" and other incentive programs to encourage development that more fully realizes the vision of new urbanism. The idea is essentially to establish a set of base-level entitlements that are available to all development within a particular district and a separate, enhanced set of entitlements available only to development that meets certain conditions or provides greater community benefits. These "voluntary incentive" programs vary substantially both in what they require and in how they require it, with some programs implemented at an administrative or quasi-judicial level and others through legislative zoning decisions.

The core of this paper, in Part III, explores how federal Takings law applies to density incentives and argues that, except in extreme cases, such programs do not constitute a regulatory taking or development exaction. For context, Part II provides a background discussion on the Takings Clause and a brief summary of leading federal precedents.

II. Background on Federal Takings Law

The Takings Clause of the Fifth Amendment, which prohibits government from taking "private property…for public use, without just compensation[,]"provides no guidance for applying its prohibition to land use regulations that do not come close to effecting a seizure of property. Indeed, as Justice Scalia has acknowledged, "early theorists did not believe the Takings Clause embraced the regulation of property." *See Fish, Dams, and James Madison: Eighteenth Century Species Protection and the Original Understanding of the Takings Clause*, 63 Md. L. Rev. 287, fn. 166 (2004).

Nonetheless, over time the Takings Clause has inspired several significant judicial doctrines that seekto define the point at which land use regulation "goes too far" and thus requires that a landowner be justly compensated. The following discussion covers basic principles for the three main categories of takings recognized by courts.

A. *Physical Occupation*

The exercise of eminent domain authority to seize land for public use constitutes a categorical taking, without regard to the extent of the taking or the degree of impact to

the property owner. Accordingly, the landowner must be justly compensated. Likewise, a regulation that results in a "physical invasion" of property constitutes a "per se taking" regardless of the public interest advanced, unless the government can identify "background principles of nuisance and property law" that prohibit the uses the owner intends under the circumstances in which is found. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886 (1992). *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)

B. *Land Use Exactions*

In general, an exaction is a condition on the issuance of a building permit or other development approval that requires a developer to give something up—most often, land or money. The U.S. Supreme Court, in a line of cases initially limited to dedications of land, held that an exaction must meet two basic requirements. First, the condition must bear an "essential nexus" (i.e., logical relation) to the purpose of the condition. *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987). Second, the condition must be "roughly proportionate" in degree to the impacts of the proposed development. *See Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994).

State courts applying these requirements, often called the *Nollan*/*Dolan* or "nexus-proportionality" test, have varied considerably in their approach. For example, some states apply the test to monetary exactions (i.e., impact fees), while others limit its application to dedications of land.[2] Likewise, some courts have limited the test to "site-specific" or "adjudicative" conditions that are tailored to particular projects, while other states also apply the test purely legislative actions, such as a zoning ordinance or fee schedule.[3]

C. *Regulatory Takings*

Beginning in the 1920s, the Supreme Court has held that that a regulation that "goes too far" constitutes a taking even with a physical seizure or occupation of land. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The standards for establishing a regulatory taking, however, have consistently been quite high, and most standard zoning regulations will easily withstand such challenges.

The modern framework for regulatory takings analysis was articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), which found that the designation of Grand Central Terminal as an historic landmark did not constitute a taking

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[2] *Compare Tex. Manufactured House Ass'n v. City of Nederland*, 101 F.3d 1095, 1105 (5th Cir. 1996) (distinguishing Nollan on the basis that its plaintiff was required to dedicate land) and *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995) (repeating merely that Nollan/Dolan are limited to development exactions where there is a physical dedication or its equivalent) *with* Ehrlich v. City of Culver City, 911 P.2d 429, 439 (Cal. 1996).

[3] *Compare Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996); *Home Builders Ass'n of Central Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997); *Rogers Machinery, Inc. v. Wash. County*, 45 P.3d 966, 981-82 (Or. Ct. App. 2002) (limiting Nollan/Dolan to adjudicative decisions) *with Amoco Oil Co. v. Vill. of Schaumburg*, 661 N.E.2d 380, 390 (Ill. Ct. App. 1996) (rejecting the distinction).

even though it prohibited construction of an office tower above the terminal. In reaching this decision, the Court held that regulatory takings claims must be evaluated against three key factors: (1) the character of the regulation; (2) the economic impact on the landowner; and (3) the extent of interference with investment-backed expectations. Each of these factors must be determined on a case-by-case basis.

Regarding economic impact, the Court has held that the proper test is whether the landowner is left with any "reasonable economic use" of the property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992). Denying "highest and best use" of a property, or even substantially reducing its development potential, does not by itself give rise to a taking. For example, if an historic building can he rented out profitably, denying the landowner the ability to demolish it to make way for a high-rise office, thereby reducing the parcel's speculative value, does not constitute a taking. Likewise, many courts have upheld strict floodplain and wetlands regulations that dramatically limit use of the property on the grounds that an owner is able to pursue farming and recreational uses that could produce a reasonable economic return.

III. Development Incentives & Takings Law

Programs that rely on development incentives to secure public amenities or better urban design have largely evaded legal challenge. While developers frequently question the legitimacy of benefits required by such programs, in most cases no legal obstacle prevents a municipality from simply denying additional entitlements and limiting development to existing base-district standards. Under a well-designed incentive program, a developer will find it far preferable to provide the required amenities or design concessions in exchange for the additional height, floor-to-area ratio, or other bonus afforded by the program. Amenities provided under an incentive program will, if properly planned, significantly improve the long-term value of participating properties and create a more desirable urban setting overall.

The case law that does exist generally favors municipalities and provides no direct support for extending strict nexus-proportionality principles to development bonuses. From a municipal perspective, this is a good thing, because community need and urban design—not exaction principles—drive the development of most incentive programs. Many required amenities would fail to pass at least one component of the nexus-proportionality test.

In *Montgomery County v. Woodward & Lothrop*, 280 Md. 686, 376 A.2d 483 (1977), the Maryland Court of Appeals rejected a takings challenge to an ordinance that significantly downzoned properties in the central business district and instituted a bonus review system for development that previously would have been allowed by right. Consistent with the *Penn Central* test, the court found that the ordinance did not deprive the landowner's property of "all reasonable use." Likewise, in *Texans to Save the Capital, Inc. v. Board of Adjustment of the City of Austin*, 647 S.W.2d 773 Tex.App. 3 Dist.,1983), the Austin Court of Appeals upheld the City's interpretation that a downtown zoning ordinance provided a 198-foot height bonus to encourage "unique architecture in

downtown Austin and dissuad[e] builders from constructing box-like structures which create a 'canyon' effect on the street below.

While not a takings case per se, the trial court's decision in *Municipal Art Society of New York v. City of New York*, 137 Misc.2d 832, 522 N.Y.S.2d 800 (N.Y.Supp., 1987) comes the closest of any case to applying exaction principles to a density bonus. The plaintiffs in *Municipal Art Society* sought to invalidate a contract for the sale of New York Coliseum on the grounds that it illegally provided a $57 million reduction in the purchase price if the developer was denied an added 20% floor-to-area ratio under the City's zoning resolution. In ruling that the contract was void, the court reasoned that:

> Here, the major portion of the benefit which the purchaser is willing to pay for the right to construct a building of greater density than is permitted "as of right" is to be paid to the City to be employed for purposes other than local improvements. A proper *quid pro quo* for the grant of the right to increase the bulk of a building may not be the payment of additional cash into the City's coffers for citywide use.
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> Although the members of the [city planning commission] may well in good faith have approved the full 20% FAR bonus as a fair incentive for the developer agreeing to make $35 to $40 million of subway station improvements, the developer and the City officials who approved the contract obviously recognized that this bonus was worth a great deal more. However, government may not place itself in the position of reaping a cash premium because one of its agencies bestows a zoning benefit upon a developer. Zoning benefits are not cash items.

137 Misc.2d at 802.

Commentators have argued that the U.S. Supreme Court's subsequent adoption of the nexus-proportionality standard in *Nollan* and *Dolan* bears some resemblance to the reasoning in *Municipal Art Society*[4] and that, in principle, amenities secured through a density bonus are not unlike other permit conditions that have been likened to exactions *Nollan*/*Dolan* test has been applied.[5] While the Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) suggested that the test was limited to land exactions, subsequent state and lower federal court decisions have extended the test to a wide variety of other development conditions. *See, e.g.*, Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & Pol. 451, 466 (2005).

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[4] *That's Where We Print the Money: Trading Increased Density for Public Amenities*, 15 N.Y.U. Envtl. L.J. 493, 522 (2007), *citing* See Jerold S. Kayden, *Zoning For Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 Wash. U. J. Urb. & Contemp. L. 3, 4-5 (1991).

[5] 3 Rathkopf, *The Law of Zoning and Planning* § 52:7 (4th ed.).

Learned conjecture aside, there is a strong municipal case to be made that density bonuses are not exactions because they are voluntary in nature—a fact that distinguishes them from the kind of compulsory conditions at issue in the *Nollan*/*Dolan* line of cases. If a property enjoys substantial base-level entitlements without participating in a bonus program, a developer that chooses to provide public amenities for additional entitlements is making a market-driven business decision, not a necessary concession for the reasonable use of property. The concern that development conditions not be extortive in character, which animates so much of today's exaction jurisprudence, is only present in two situations.

First, when a municipality conditions existing base-level entitlements on a newly enacted bonus program, the "density bonus program begins to resemble a taking." *See* 15 N.Y.U. Envtl. L.J. 493, 522. But even then, with careful planning a well-structured incentive program that allows a developer to obtain higher value entitlements than the original base-district standards may be sufficient to survive legal challenge. Municipalities considering this approach, however, may need to tailor the required amenities more narrowly to the impacts of the development than might be required if base-level entitlements were left in place.

Second, when a condition is imposed through a site-specific process that allows substantial discretion, it implicates concerns regarding arbitrary government action that echo throughout so many exaction cases.[6] A uniform menu of conditions, adopted by a city council and imposed administratively, "looks and feels" much less like an exaction than a site-specific condition by preventing individual projects from being singled-out or treated differently than similar developments. While it remains unclear whether such "legislative" conditions are subject to lesser scrutiny than site-specific or "adjudicative" ones,[7] the latter approach may better support the case that incentive programs are truly voluntary and should not be regarded as land use exactions.

IV. Conclusion

Neither the text nor history of the Takings Clause suggest that it was intended to apply to land use regulations that do not effect a near seizure of property. From this standpoint alone, voluntary incentive programs that provide for enhanced entitlements should not be subject to Takings-based standards for development exactions. The more deferential "rational basis" test, well-established in the Supreme Court's historic land use jurisprudence,[8] provides sufficient protection against the arbitrary and capricious use of incentive programs.

Nonetheless, the trend towards a more expansive application of exaction principles to land use regulation suggests that municipalities should be careful in how

[6] *See generally*, Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U.L.Rev. 242, 267-71 (2000).
[7] *See* note 3, *supra*.
[8] *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

they design and utilize incentive zoning techniques. In particular, this paper suggests that programs which condition existing base-district entitlements on providing public amenities are particularly vulnerable to challenge and should be approached cautiously. Additionally, the use of a uniform menu of benefits or amenities approved through a legislative process minimizes government discretion and may serve to better distinguish voluntary incentive programs from traditional land use exactions.