

A. Unconstitutional Condition

In *Dolan*, a convenience store owner applied for a permit to expand the store. As a condition of its approval of the project, the city required the owner to dedicate land and to develop a pedestrian and bicycle pathway along an adjacent creek to relieve traffic congestion. The U.S. Supreme Court explained that normally a requirement for a property owner to dedicate private property to the public constitutes a per se taking that requires just compensation. The court further explained that compensation may not be required when a property owner voluntarily seeks approval of a development project, and the dedication is required as a condition of project approval. However, in this case there must be an essential nexus between the dedication requirement and the potential deleterious impacts of the project, and the dedication requirement must be roughly proportional to those impacts. Otherwise, the dedication requirement is extortionate, and constitutes a taking.

The *Dolan* court accepted that the store expansion project would contribute to traffic congestion and that the extension of a pedestrian and bicycle pathway could help alleviate traffic congestion, so that an essential nexus existed between the dedication requirement and the project's impacts. Nonetheless, the requirement to dedicate land and to develop the pathway was out of all proportion with the project's likely incremental impact on local traffic congestion. On that basis, the court held that the requirement was an unconstitutional condition. *Dolan*'s unconstitutional conditions doctrine has not been limited to the requirement to dedicate property to the public.

In *Koontz v. St. Johns River Water Management District* (2013) 570 U.S. 595 ("*Koontz*"), the Supreme Court applied the doctrine in the context of a condition to provide offsite mitigation or to pay an *in-lieu* fee. Long before either *Dolan* or *Koontz* were decided, the court in *Scrutton v. County of Sacramento* (1969) 275 Cal.App.2d 412 ("*Scrutton*") reached a similar decision in holding that a property owner could not be required to provide offsite mitigation as a condition of approval of a rezoning application. There, as a condition of approval of an application to rezone property for multifamily residential use, the county required the property owner to agree to pave an offsite street. Because any benefit of the street paving to the property owner was greatly outweighed by the benefit to the community at large, the court held that the character of the government's action was tantamount to a taking of private property without just compensation.

Like in *Dolan*, *Koontz*, and *Scrutton*, the requirement here to reengineer Wood Road is out of all proportion with the proposed project's impacts. Wood Road is an existing road with several existing residences. The appellant's proposed new home, which will be built to modern fire safety standards, will not create an incrementally significant need for fire service that justifies requiring the applicants to perform the physically and legally impossible and cost prohibitive task of reengineering Wood Road. Also, like in *Scrutton*, any benefit to the appellant's property of the road reengineering would be far outweighed by the benefit to the community at large. Accordingly, the requirement is an unconstitutional condition.

B. Per Se Taking

The requirement to reengineer Wood Road would also constitute a *per se* taking under the United States Supreme Court's analysis in *Lucas*. In that case, a South Carolina environmental law effectively prohibited landowners from developing two vacant oceanfront lots because of the potential impacts of development on adjacent public beaches. Because the law deprived the owners of all economically beneficial use of their property, the court held that the law constituted a *per se* taking in violation of the Fifth Amendment.

The same logic applies here. Again, it is not physically, legally, or financially feasible for the appellants to reengineer Wood Road all the way to their property. To impose such a requirement effectively renders their property undevelopable, thereby depriving them of all economically beneficial use of the property. Therefore, these requirements would constitute a *per se* taking and is unconstitutional as applied to my clients.

C. Regulatory Taking

Finally, the requirement to reengineer Wood Road would constitute a regulatory taking under the test announced by the court in *Penn Central*. In that case, the Supreme Court held that a regulation on the use of private property may constitute a taking even if it does not deprive the property of all economically beneficial use if the regulation "goes too far." The court explained that whether a regulation goes too far depends upon three factors, including: (1) the economic effect on the landowner; (2) the extent of the regulation's interference with investment-backed expectations; and (3) the character of the governmental action.

Applying these factors, the court in *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, held that downzoning a parcel from low density residential to very low density residential constituted a regulatory taking in violation of the Fifth Amendment because new restrictions on the parcel substantially lowered its value and defeated the property owner's investment-backed expectations of what they could do with their property.

Additionally, the parcel was singled out for special zoning regulations because neighboring property owners wanted the land to remain open space for their benefit. In that regard, the downzoning was akin to taking a conservation easement in the property for the benefit of the community and at the expense of the property owner. Thus, the downzoning was in the character of a taking rather than an ordinary exercise of the city's police power.¹ Similarly, here, the cost to reengineer Wood Road would be exorbitant, so that the requirement would have a significant economic effect on the property. The reengineering requirement would also interfere with the appellant's investment-backed expectations because it would effectively make it impossible to develop their land for a single-family home, which was the purpose for which they acquired the parcel. The character of the requirement would be to

¹ Importantly, a regulation may effectuate a regulatory taking even if it offers a potential public safety benefit. The inquiry is not into the legitimacy of the regulation's purpose, but into its character and effect. See *McDougal v. County of Imperial* (1991) 942 F.2d 668, 676.

impose on them a burden that the community as a whole should bear. Several properties along the adjacent stretch of Wood Road in question have already been developed with single-family homes. Those properties would all benefit from the road work, but none of them would be required to contribute to the cost. Plus, the work would be focused on a public portion of Wood Road. Targeting my clients for special burdens in this manner goes beyond an ordinary exercise of the police power and therefore constitutes an uncompensated regulatory taking in violation of the Fifth Amendment.

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