The "Disconnect" in "Connectivity" Legal Issues Concerning Conditions of Development Approval Requiring Private Access Ways between Neighboring Properties

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Imagine the following scenario: Your client owns land she would like to develop commercially. Developed and undeveloped parcels border her property, each with existing access to a public road. One adjacent neighbor with existing public road access nonetheless wants to reach the road at another location by taking access across your client's land. Your client has declined to grant an easement to her neighbor. The neighbor's desire becomes more pronounced when your client makes application for development approvals. The neighbor and city say they want to create better "connectivity" between the properties and suggest to your client that neighbor opposition will end and approvals will become more likely if she "voluntarily" provides the neighbor additional access to the road across the parking areas and drive aisles within her commercial development.

This scenario highlights the frequent collision of public and private interests in the local government entitlement process. The entitlement process aims to protect the public's health and welfare in light of an individual's land uses, but sometimes, the attempt to protect the public unnecessarily encumbers the individual's private property. As an example, the public sometimes oppose new development claiming an increase in the number of cars on the road undermines the public welfare. Local governments may try to address the claim by channeling cars to certain road access locations in an attempt to reduce the number of entry points onto a road – often said to be supportable because of the need for "connectivity" between private properties. In response, local governments have pressed landowners to provide access across their own parcels to neighboring properties, or negotiate access agreements for the benefit of neighboring property owners. Frequently, as in the hypothetical example above, these access arrangements involve private access rights rather than public roadway dedications.

Local governments may violate state and federal law when they require these accesses without providing just compensation to the landowner providing the access. This article provides an overview of some of the pitfalls under federal and Idaho law that may beset such exactions. After considering the issue more generally, this article explores two facets of the question: first, what requirements federal regulatory takings jurisprudence imposes in determining whether access conditions have been validly imposed; and, second, how private benefits and the interests of private parties may affect an attempt to obtain access through the power of eminent domain.

About Conditions of Development Approval Related to Access

Local governments impose the access conditions discussed in this article in a commercial context and allow business invitees to move across one property to a second property on something less than a publicly dedicated road.[1] Just as in the hypothetical above, these access conditions are often imposed even when the neighboring parcel already has independent access to a public roadway (i.e., are not landlocked).[2] In other words, the push for the access often lies not in necessity, but out of a desire to achieve greater "connectivity" between properties or to appease neighboring landowners.

Indeed, this scenario suggests a major pitfall for local governments if they succumb to requests to consider something beyond the specific impacts of the particular application then before the local government. Conditions of approval generated in a land-use entitlement decision, as discussed more fully in Part II below, must mitigate the impacts created by the application, in the context of the local government's rules and ordinances as applied to the application.[3] A local government should be circumspect when considering the complaints of neighboring property owners to gauge whether the complaints invoke a reasonable concern about impacts the proposed use of land has the potential to cause. If, on due consideration, the local government determines the complaints reflect far-fetched hypothetical future impacts[4] or impacts not caused by the particular application, the local government should refrain from imposing conditions that could result in future legal challenges. In such instances, the wise course of action would acknowledge the complaints for what they may be – an attempt to use the governmental process to gain an advantage not available in private negotiations.

A Regulatory Takings Framework for Considering Access Requirements

The first question is whether such an access condition could be supported as an "exaction" within the context of federal takings jurisprudence. Any required exaction, including access to a neighboring property, requires a case-by-case analysis under the so-called "Nollan-Dolan" tests, as crafted by the United States Supreme Court.

The Basic Test for Exactions – Nollan *and* Dolan

Under both the federal and state constitutions, private property may not be taken for public use without just compensation.[5] Federal takings jurisprudence since the landmark cases of *Nollan v. California Coastal Comm'n*[6] and *Dolan v. City of Tigard*[7] has required a two-part test for exactions. First, an "essential nexus" must exist between a "legitimate state [i.e., public] interest" and the condition that the government seeks to impose.[8] Second, the nature and extent of the required condition must provide "rough proportionality" to relieve the impact of the proposed development on the legitimate state interest.[9] The Idaho Supreme Court's recent decision in *City of Coeur d'Alene*

v. Simpson[10] recognizes the two-part "Nollan-Dolan" test as the state of the law in Idaho.

An "Essential Nexus" With a "Legitimate State Interest"

We begin with the "essential nexus" test required by *Nollan*. Courts in other states have confronted access requirements similar to the hypothetical presented above.[11] Several have been critical of imposing such conditions of approval in light of the *Nollan* test.

A case from Washington, *Unlimited v. Kitsap County*,[12] is instructive and similar to the scenario proposed at the beginning of this article. There, a landlocked commercial developer, Berg/Carlson, asked a county to impose a condition of approval on its neighbor, Unlimited, to provide a "50-foot public right-of-way for commercial access..." to benefit the Berg/Carlson property.[13] Unlimited did not receive compensation for the dedication.[14]

The *Unlimited* court described *Nollan* as requiring "an exaction to be reasonable and for a legitimate public purpose."[15] Applying this test, the Washington court considered the access requirement at issue to be an unconstitutional taking because no legitimate public interest existed for the requirement. The Court considered, first, the Berg/Carlson property had no immediate development plans, though that consideration was merely context for the underlying issue—a public interest. Even if the owner of the Berg/Carlson property had immediate plans for development, no public interest exists in providing access for one private property owner across a second private property owner's land, even when the property is a commercial development that the public will frequent:

> There is no expectation that the Berg/Carlson property is to be developed at the same time as Unlimited's development or, for that matter, any time soon. Even if there was, the exaction serves no public interest, let alone a reasonable one. The public has no interest in the commercial development of the Berg/Carlson property, and it is manifestly unreasonable for Kitsap County to exact a commercial access easement to this commercially land-locked parcel as a condition to Unlimited's planned unit development.[16]

In sum, the *Unlimited* court, applying the standards of *Nollan*, found that a requirement of access to benefit a neighboring commercial property cannot stand as a valid exaction because no legitimate public interest exists in such an access.

"Rough Proportionality"

The *Unlimited* case considered whether a legitimate state (or public) interest exists in an access requirement. The later-decided *Dolan* case added an additional requirement – "rough proportionality."[17] Rough proportionality requires an individualized determination that a dedication relates in nature and extent to the impact of the proposed development.[18]

The rough proportionality requirement often arises when a local government claims an access is needed to address future planning needs. Thus, a local government may argue an access should be required in anticipation of future, neighboring development thereby "land banking" the property to address future, potentially undefined needs, despite the fact that the immediate application may not create the impacts the access requirement intends to address.

Such an argument may also fail the requirements of *Dolan*. In fact, the U.S. Supreme Court in *Dolan* relied upon and cited with approval a "land banking" case[19] in crafting its "rough proportionality" test. The case cited by the U.S. Supreme Court, *Simpson v. City of North Platte*,[20] arose when a city passed an ordinance requiring dedications for a street the City had set aside in its comprehensive plan, but for which the city did not have a concrete timeline or funding for land acquisition or construction. The *Simpson* court found the city did not have the ability to acquire an interest in the property, holding it for some planned—but indefinite—future use, holding:

> The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit.[21]

Thus, although the comprehensive plan considered the roadway, "no project was immediately contemplated whereby the street would be constructed...."[22] Meanwhile, no evidence indicated the construction of the project in question would itself create sufficient additional traffic to justify the requirement imposed, leading the Nebraska court to conclude the condition of approval constituted a taking thereby requiring just compensation.[23]

Other courts to consider "land-banking" attempts by local governments have reached similar conclusions.[24] There must be an individualized determination that a "required condition is related both in nature and extent to the impact of a proposed development."[25] Rarely would development of one property create the necessity of providing access to a wholly independent property for possible future development free of charge.

Other Takings Considerations

An access for the benefit of a neighboring private property owner triggers a few additional considerations. First, if a property owner no longer has the right to determine when and on what conditions members of the public may access her property, but is now beholden to a neighboring landowner, then the property owner no longer maintains her fundamental right to exclude. Denial of the right to exclude—a fundamental attribute of property ownership—is generally considered a clear indication of a compensable taking.[26]

Additionally, an access requirement presents the distinction considered in *Dolan* between a legislative land use decision entitled to a presumption of validity, and a quasi-judicial decision imposing an exaction, which is not. Exactions trigger heightened scrutiny not because they simply limit a use to which an owner may put his property, but because they go beyond such limits and may require, as discussed here, that a property owner actually deed portions of her property (or convey or grant an interest therein) to another individual or entity.[27]

Idaho Strictly Limits the Use of Eminent Domain for the Benefit of Private Parties

In the hypothetical first set forth, the local government intends to impose a condition that transfers an interest in private property to a second private property owner, ostensibly for a public benefit. As discussed above, this can lead to consideration of speculative impacts beyond the scope of the application, which is problematic from a regulatory takings perspective.

The transfer of private property to a second private property owner also suggests analysis under the law of eminent domain, particularly in light of the U.S. Supreme Court's decision in *Kelo v. City of New London* and the State of Idaho's response in the form of Idaho Code Section 7-701A. The use of eminent domain in the State of Idaho has a long history. However, while private parties[28] and even local governments may ostensibly use eminent domain to acquire certain property rights, both the Idaho legislature and courts have taken a critical view of transfers to private parties where there is no legitimate public use.[29]

Article 1, section 14 of the Idaho Constitution allows for a right of eminent domain, which grants a power to take private property for "public use" so long as just compensation is paid.[30] Idaho Code Section 7-701 sets forth a litany of "public uses"; however, article 1, section 14 limits public uses to those "necessary to the complete development of the material resources of the state or the preservation of the health of the inhabitants."[31]

In *Cohen v. Larsen*,[32] the Idaho Supreme Court explained that Article 1, Section 14 of the Idaho Constitution[33] limits the exercise of condemnation to uses that (1) involve the exploitation of natural resources and (2) benefit and provide uses for the general public.[34] Even the most creative attorney would encounter considerable difficulty conceiving how a new access for a commercial development would meet the narrow standards set forth in *Cohen*, the Idaho Constitution, and Idaho's eminent domain statutes. Indeed, the *Cohen* decision itself suggests that access for the benefit of one private property owner is "purely a private dispute and, as such, eminent domain is not the appropriate remedy."[35]

Perhaps more significantly, the Idaho legislature recently clarified the proper exercise of eminent domain for public and private uses. Idaho Code Section 7-701A, passed in response to the United States Supreme Court decision in *Kelo v. City of New London*,[36] "limits and restricts the use of eminent domain in the State of Idaho...."[37] In particular, Section 7-701A states the government may not use eminent domain to acquire private property "[f]or any alleged public use which is merely a pretext for the transfer of the condemned property or any interest in that property to a private party."[38] A development condition requiring a developing property owner to provide access to a neighboring property or requiring a developing property owner to negotiate an access agreement with a neighboring property owner could not be supported by Section 7-701A.

Conclusion

Based upon the hypothetical presented above, Idaho and federal law suggest that local governments should be wary of imposing access across one private property for the benefit of a neighboring private property owner, particularly where the neighboring property owner already has independent access to a public roadway.

Such a condition would likely not survive scrutiny under a regulatory takings analysis. Certainly, regulatory takings jurisprudence resides among the areas of law in which it is most difficult to provide certain answers to property owners.

This article proposes that a condition of development approval that encumbers an applicant's property with an access way for the benefit of a neighboring private property owner likely does not satisfy the "rational nexus" requirement of *Nollan* because there is no legitimate state interest in providing alternate access as described in the hypothetical above. Such a condition may also lack "rough proportionality," particularly in cases when the access is required for presently undefined future uses of neighboring property. A local government may not "land bank" an access to mitigate potential impacts of as-yet unplanned future development where the present application does not, of itself, create the impacts to be mitigated.

Finally, even if considered outside the context of regulatory takings, the transfer of a private property interest set forth in the initial hypothetical also suggests difficulty if pursued under the power of eminent domain.

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Endnotes

[1] These accesses constitute something different from a standard street dedication, which a municipality can legitimately require in order to provide access to parcels newly created through the subdivision process. These street dedication requirements internal to a subdivision rest on a more stable legal footing because the dedication serves to mitigate the very need the subdivision creates – access to new lots.

[2] If a local government were to impose a condition that required private access for the private use of a sole neighboring landowner, such an imposition is almost certainly improper. The more difficult case arises when a local government imposes access to a neighboring property that can be used by the general public, despite the fact that the benefits flow to a private commercial enterprise.

[3] *Dolan v. City of Tigard*, 512 U.S. 374, 393, 114 S.Ct. 2309, 2320, 129 L.Ed.2d 304, ___ (1994). This requirement is inherent in the tests for exactions imposed in *Dolan* as well as *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987). *See also Schultz v. City of Grants Pass*, 131 Or.App. 220, 228, 884 P.2d 569, 573 (1994) (using *Dolan* the court struck an exaction because no impact of the application would create a need for the exaction—"only the city's *speculation* as to what other construction

could take place at some time in the future... There is, in short, nothing in the record that provides evidence of a relationship between the conditions the city has imposed and the impact of the petitioners' proposed development.").

[4] *Schultz*, 131 Or.App. at 228.

[5] U.S. CONST. amend. V (". . . nor shall private property be taken for public use, without just compensation."); IDAHO CONST. art. I, § 14 ("Private Property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor.").

[6] 483 U.S. 825 (1987).

[7] 512 U.S. 374 (1994).

[8] *Nollan*, 483 U.S. at 837.

[9] *Dolan*, 512 U.S. at 391.

[10] 142 Idaho 839 (2006). The Idaho Supreme Court's recent treatment of regulatory takings in *Covington* and *Moon*, followed by what appears to be a correction in *Simpson*, suggests that Idaho courts, now recognizing "non-categorical" takings, are aligning with federal regulatory takings jurisprudence. At the same time, the Idaho Supreme Court's decisions in *Ada County Highway District v. Total Success Investments, LLC* and *KMST, LLC v. County of Ada* suggest regulatory takings claims will continue to be a difficult row to hoe for those asserting such claims before Idaho courts.

[11] *See, e.g., Unlimited v. Kitsap County*, 50 Wash.App. 723, 750 P.2d 651 (Wa. Ct. App. 1988); *Paradyne Corp. v. State Dep't of Trans.*, 528 So.2d 921, 13 Fla. L. Weekly 1477 (Fla. Dist. Ct. App. 1988).

[12] *Unlimited*, 750 P.2d 651.

[13] *Unlimited*, at 653.

[14] *Id.*

[15] *Unlimited*, 750 P.2d at 653.

[16] *Id.* at 653-54.

[17] *Dolan*, 512 U.S. at 391.

[18] *Id.*

[19] *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980).

[20] *Id.*

[21] *Id.* at 245.

[22] *Id.* at 246.

[23] *Id.* at 248.

[24] *See, e.g., Unlimited*, 50 Wash. App. at 728 ("... the record discloses that the County has no immediate plans for an extension. Rather, it intends to hold the exacted property until some undefined future time when Randall Way can be extended to connect with other, as yet unbuilt, roads. This uncompensated exaction, too, is invalid."). *See also Ventures in Property I v. City of Wichita*, 225 Kan. 698, 594 P.2d 671 (Kan. 1979) ("... we hold where the proposed platting of land by an owner for residential development is approved by the governing body of a city in accordance with previously approved zoning regulations, subject to the sole restriction that a portion of the land in a defined highway corridor within the proposed plat be reserved in its undeveloped state for possible highway purposes at some indefinite date in the distant future, the governing body has taken property from the landowner for which it is required to respond in damages by inverse condemnation."); *181 Incorporated v. The Salem Cty. Planning Bd.*, 133 N.J.Super. 350, 359, 336 A.2d 501, 506 (1975) ("In short, for the nexus test to apply, making a compulsory dedication constitutionally valid, the nexus must be rational. This means it must be substantial, demonstrably clear and present. It must definitely appear that the proposed action by the developer will either forthwith or in the demonstrably immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements not for the purpose of 'banking' the land for use in a projected but unscheduled possible future use.").

[25] *Dollan*, 512 U.S. at 391.

[26] *See, e.g., Nollan*, 483 U.S. at 419 ("the right to exclude others is one of the most essential sticks in the bundle of rights commonly characterized as 'property.'").

[27] *Dolan*, 512 U.S. at 385 (cited in *Schultz v. City of Grants Pass*, 131 Or. App. 220, 227, 884 P.2d 569, 573 (Or. Ct. App. 1994)).

[28] This discussion also necessarily involves consideration of "private condemnation," a term that is often misunderstood. The phrase "private condemnation" does not generally refer to the right of a private party to condemn property simply to acquire a private right. Rather, the phrase refers to the ability under limited circumstances of a private party—an entity other than the State or its political subdivisions (for example, a railroad)—to acquire a property interest for a public use. *See* IDAHO CONST. art. 1, § 14. *See also* IDAHO CODE §§ 7-701 and 7-701A. *But see* IDAHO CODE § 7-701(5) (defining "public use" to include "byroads, leading from highways to residences and farms."). For example, in *Potlatch Lumber Co. v. Peterson*, 12 Idaho 82, 88 P. 426 (1906), the Idaho Supreme Court upheld the right of a logging company to condemn land belonging to a private individual for use as a storage reservoir for logs because the use was "necessary to the complete development of the material resources of the state or preservation of the health of the inhabitants." *Potlatch Lumber*, 12 Idaho at 84 (quoting IDAHO CONST., art. 1, § 14). In other words, private condemnation has been allowed, but only insofar as it serves the needs of the public of the State as a whole.

[29] *See, e.g., Cohen v. Larson*, 125 Idaho 82, 867 P.2d 956 (1993).

[30] IDAHO CONST. art. 1, § 14.

[31] *Id.*

[32] 125 Idaho 82, 867 P.2d 956 (1993).

[33] IDAHO CONST., art. 1, § 14.

[34] *Cohen*, 125 Idaho at 84 (citing cases approving such public purposes including: logging roads (*Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho 556, 557, 155 P. 680, 684 (1916)); pipelines (*Yellowstone Pipe Line Co. v. Drummond*, 77 Idaho 36, 287 P.2d 288 (1955)); and furnishing of electricity (*Washington Water Power Co. v. Waters*, 19 Idaho 595, 115 P. 682 (1911)).

[35] *Cohen*, 125 Idaho at 85.

[36] 545 U.S. 469 (2005).

[37] IDAHO CODE § 7-701A.

[38] *Id.* (emphasis added).