



# ***Koontz v. St. Johns River Water Management District***

**March 13, 2014**

**Before we go  
too far...**

**Telling the story  
Building a vocabulary**

# Three Types of Regulatory Takings

## Physical invasion (*Loretto*)

- Very simple



## Categorical regulatory taking (*Lucas*)

- Just like physical invasion



## Partial regulatory taking (*Penn Central*)

- Three-part test
  - Diminution of value
  - Investment-backed expectations
  - Balancing of public and private interests



# Vocabulary

- **Nexus**
  - *Nollan v. California Coastal Commission*
- **Rough proportionality**
  - *Dolan v. Tigard*

# ***Nollan v. California Coastal Commission***







# Nexus

## ***Nollan v. California Coastal Commission***

- Does an “essential *nexus*” exist between a legitimate state interest and the permit condition exacted by the city?

# ***Nollan v. California Coastal Commission***

**Harm threatened by development:**  
Cutting of public view of ocean

**Exaction:** Dedication of public right of  
way along dry sand beach

**“[H]ere, *the lack of nexus between the condition and the original purpose of the building restriction* converts that purpose to something other than what it was.”**

**“*[U]nless the permit condition serves the same governmental purpose* as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’”**

# **Rough Proportionality**

## ***Dolan v. Tigard***

- **Has the city made some kind of *individualized determination* that the required dedication is related *both in nature and in extent* to the *impact* of the proposed development?**
- **In other words, are they roughly proportionate?**





# ***Nollan v. California Coastal Commission***

## **Harms threatened by development:**

Increased Traffic

Increased flood risk in stream

## **Exactions:**

Dedication of land within floodplain for storm drainage system

Dedication of land next to floodplain for bike path

- **Breaking down rough proportionality:**
  - The focus is on “impact”  
***Specifically, the impact of the proposed development***
  - The relationship of the condition to the *extent of* the impact is essential  
***Rough proportionality is sufficient***
  - The determination must be an ***individualized*** one

***Koontz v. St. Johns  
River Water  
Management District***

# Koontz: The questions at issue

- Does the essential nexus/rough proportionality test apply to exactions which are proposed in negotiations between a developer and a permitting authority but where there is no final permit because the developer rejects the condition?
- Does the essential nexus/rough proportionality test apply to “monetary exactions” rather than exactions involving dedication of real property to the government?

**“We hold that the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.”**

# The Facts

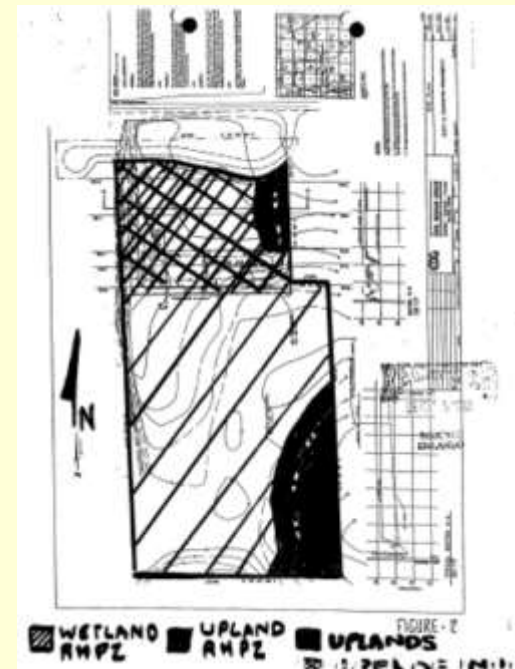
- Undeveloped 14.9 acres east of Orlando
- Near major highway
- Drainage ditch, high voltage lines
- Largely classified as wetlands



- **Management and Storage of Surface Water (MSSW) Permit**
- **Wetlands Resource Management (WRM) Permit**

# Koontz offered...

...Conservation easement on 11 acres

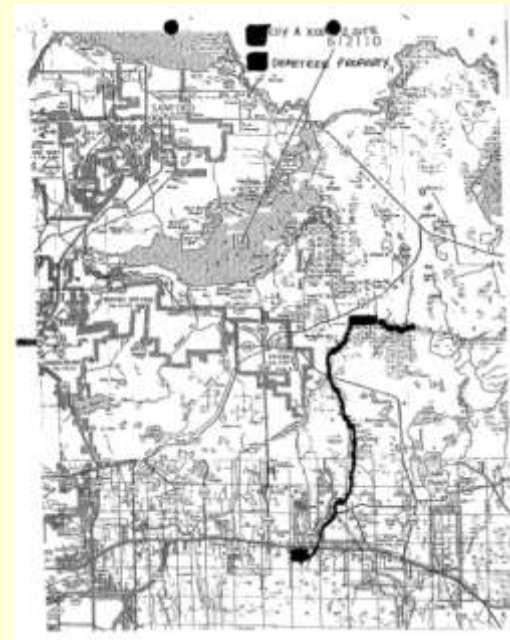


# **WMD counteroffers...**

- **Reduce development to 1 acre**
- **Give easement on remaining 13.9 acres**

## **Alternatively...**

- **Develop 3.7 acres**
- **Make improvements several miles away;  
no particular project**



# **Koontz responds**

- **Refuses counteroffers**
- **Sues in state court**

**What Did the Court  
*Clearly* Decide?**

## **Money exactions subject to *Nollan/Dolan***

**"...we ... hold that so-called  
'monetary exactions' must satisfy the  
nexus and rough proportionality  
requirements of *Nollan* and *Dolan*."**

***Nollan/Dolan***  
**Now Apply To:**

**Mitigation Fees**

**In-Lieu Fees**

**Impact Fees**

## **Property owner/applicant can sue over a denial**

**“The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so. ”**

**“...so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition.”**

**“It is beyond dispute that  
‘[t]axes and user fees . . . Are  
not “takings.”’ ... This case  
therefore does not affect the  
ability of governments to  
impose property taxes, user  
fees, and similar laws and  
regulations that may impose  
financial burdens on property  
owners.”**

**What Questions  
Remain?**

**Are conditions requiring performance of mitigation at permit applicants expense an exaction?**

**Does the decision applies to mandatory inclusionary affordable/workforce housing set-asides?**

**“How concrete and specific a demand must be to give rise to liability under *Nollan* and *Dolan*.”**

**Does the decision apply only to ad hoc exactions or does it reach legislative ones?**

**What is a monetary exaction?**

**What remedies are available?**

**What is the measure of damages?**

# **Implications for Private Sector**

# Private Sector Implications

## Legal implications

- Initial inquiries for developers
- Essential nexus and rough proportionality considerations
- Potential effects on litigation
- State law mechanisms for relief

## Practical implications

Colorado experience: Regulatory Impairments of Property Rights Act (RIPRA) and the Impact Fee Statute

# Private Sector Priorities

Profit is the driving force behind real estate development

Profits are affected by...

- Cost uncertainties (materials, construction costs, consulting fees, etc.)
- Cost uncertainties are in turn driven by uncertain timeframes

In the approval process, developers want...

- Approval
- Speed
- Lowest possible cost

# Setting the Stage

Options for developers when presented with an exaction

- Pay up
- Pay under protest and sue later for a refund
- Sue (after *Koontz*)

These options are affected by...

- Monetary exaction vs. tax or user fee
- Legislative vs. ad hoc exaction
- *Nollan* and *Dolan* analysis
- Remedies and procedures provided by state law

# Legal Implications

Initial inquiry: is this the type of exaction that a developer can challenge?

- Is there a monetary exaction or is it a valid user fee?

Secondary inquiry: is there a *Nollan/Dolan* violation?

- Essential nexus and rough proportionality

# Monetary Exactions vs. User Fees

*“This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws that may impose financial burdens on property owners.”*

## Distinguishing between monetary exactions and user fees

- Cases have addressed the distinction between taxes and user fees
- Cases have not addressed the distinction between user fees and exactions or between taxes and exactions
- What did the Supreme Court mean by “user fees”? Is an impact fee a “user fee”? Are all *legislatively-enacted* fees “user fees”?

# Monetary Exactions vs. User Fees

What we know about the distinction...

- User fees
  - Ex.: government can charge tolls for use of a toll road
  - *“Service charges, tolls, water rates and the like are . . . contractual in nature, either express or implied, and are compensation for the use of another’s property, or of an improvement made by another, and their amount is determined by the cost of the property or improvement and the consideration of the return which such an expenditure should yield. The charge is made, not by virtue of the sovereignty of the governmental unit, but in its business or proprietary capacity.”* – Northern Illinois Home Builders Ass’n, Inc. v. County of Du Page, 649 N.E.2d 384, 393 (Ill. 1995)
- Monetary Exactions
  - Ex.: requiring payment of money for off-site mitigation (*Koontz*)
  - *“An exaction generally requires developers to supply or finance public facilities or amenities made necessary by proposed development.”* – Holmdel Builders Ass’n v. Twp. of Holmdel, 121 N.J. 550, 570 (N.J. 1990)

# Monetary Exactions vs. User Fees

What we don't know about the distinction...

- *“Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative.” – Town of Flower Mound v. Stafford Estates, L.P., 135 S.W.3d 620, 641 (Tex. 2004)*
- Payment into an affordable housing fund was determined to fall into the scope of legislatively-enacted fees (*Holmdel*)
- ...and other difficult questions

# Monetary Exactions vs. User Fees

## Implications of the distinction...

- **User fees:** *“Given especially this specific declaration by Congress that the deductions are intended to reimburse costs incurred by the United States, the burden must lie with [the plaintiff] to demonstrate that the reality of [the fee] belies its express language before we conclude that the deductions are actually takings.”* –United States v. Sperry Corp., 493 U.S. 52 , 60 (1989)
- **Monetary exactions:** *“No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”* –Dolan v. City of Tigard, 512 U.S. 374, 391 (1994)

# Monetary Exactions vs. Taxes

For federal purposes, a county stormwater service fee was held to be a tax in *DeKalb Cty. v U.S.*, 108 Fed.Cl. 681 (2013) (holding Supremacy Clause barred application of fee to property owned by federal government).

- Georgia Supreme Court had determined similar assessment was a fee for state law purposes.
- “Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or Legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.”
- Standard for distinguishing fee vs. tax may change with nature of issue presented.

# Monetary Exactions vs. Taxes

*DeKalb* court rejected test applied in *Massachusetts v. U.S.*, 435 U.S. 444 (1978), which held that a state's implied immunity from federal taxes did not prohibit the federal government from imposing a tax on a state if:

- The tax is imposed in a nondiscriminatory manner
- The tax is a fair approximation of the benefits received by the taxed entity
- The tax does not produce revenues that exceed the cost of the benefit provided.

# Monetary Exactions vs. Taxes

*DeKalb* court instead applied test established in *San Juan Cellular Tel. Co. v. PSC*, 967 F.2d 683 (1<sup>st</sup> Cir. 1992), which addressed question of whether a charge was a fee or tax for purposes of Tax Injunction Act.

Three-part inquiry:

- Which governmental entity imposed the charge? (legislative body or regulatory agency?)
- Which parties must pay the charge? (broad class or narrow group?)
- For whose benefit are the revenues generated by the charge spent? (to benefit general public or provide a particularized benefit).

# Monetary Exaction vs. Tax

“The test used to distinguish between taxes and user fees .... states that user fees are valid as such so long as they: (1) do not discriminate against the constitutionally protected interest (here exports); (2) are based upon a fair approximation of use; and (3) are not excessive in relation to the cost to the government of the conferred benefit.”

*U.S. Shoe Corp. v. U.S.*, 114 F.3d 1564, 1572 (Fed. Cir. 1997) (rejecting argument that harbor maintenance charge was a user fee because it was based on value of goods, instead of extent of use of harbor); *aff'd*, 523 U.S. 360 (1998).

# A Rose is a Rose

When faced with a *Nollan-Dolan* challenge to a monetary exaction, will the defense be that it is an excise tax?

*Cherry Hills Farms, Inc. v. City of Cherry Hills Village*, 670 P.2d 779 (Colo. 1983) (upholding service expansion fee as a valid excise tax).

- Imposed on building permits.
- Based on square footage and type of improvement.

Must have authority to impose an excise tax.

Must comply with procedures for adopting a tax.

# **Nollan**

*“The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury.”*

Test: must have (1) a legitimate state interest, and (2) the exaction must further the state interest

- Is this really heightened scrutiny? Requires a more individualized determination that rational basis, but...

Most exactions probably meet the essential nexus test

## ***Dolan***

*“No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”*

Compares the scope of the exaction to the impact of the proposed development

- Requires the government to make an individualized determination
- Heightened scrutiny: burden on government to show that the cost-impact ratio is roughly proportional

Fact-specific inquiry

Less clear that an exaction meets this test

# Litigation Strategy

## Pleading

- Notice pleading is generally sufficient to establish a claim of an unconstitutional condition

## Summary judgment

- Essential nexus is a question of law
- Rough proportionality is more likely to be a question of fact
- “Heightened scrutiny”
  - Appears to place some additional burden on government, but Supreme Court cases are not clear on the extent...
  - Some states expressly put the burden on the government to establish the validity of the exaction (Colorado requires substantial evidence)
  - “[T]he validity of an exaction in an individual case is not presumed but must be shown by the government.” – *Town of Flower Mound v. Stafford Estates, L.P.*, 125 S.W.3d 620, 639 (Tex. 2004).

## Trial

# Seeking Relief

Requirement for seeking relief under the Takings Clause:  
exhaustion of state remedies (*Williamson County*)

Procedures for relief provided by statute

- Ex: Colorado Regulatory Impairment of Property Rights Act (RIPRA), C.R.S. § 29-20-201 *et seq.*
  - Notification of alleged violation to local government in 30 days
  - 60-day limitations period for filing action in district court

Remedies (what does the developer want?)

- Colorado provides for injunction
- Florida provides for damages
- Takings Clause requires just compensation

# Practical Implications

Negotiating power disparities vary based on the wealth and influence of the private property owner

Larger developers are better able to...

- Negotiate with local governments (i.e. hire lawyers, consultants, etc.)
- Absorb cost of exactions into a project
- Pursue legal remedies against local governments

## Practical Implications

It is clear that *Nollan* and *Dolan* impose a higher bar on governments in the exactions context, but what is that higher bar?

- Maybe the bar is high enough to encourage some local governments not to engage in negotiations over exactions
- Maybe the additional burdens imposed in litigation will encourage the local government to stand down on exactions demands
- Result: landowners now have more negotiating power?

# Practical Implications

Reality: developers want the approval and they want speed

- Larger developers have ability to absorb additional costs of exactions (typically not a large share the total project cost)
- Developers want the ability to negotiate if it furthers these interests

Practical effect: minimal change in developers' willingness to engage in discussions over exactions

# The Colorado Experience

RIPRA has been in place since 2001

Applies *Nollan* and *Dolan* to monetary exactions

Expressly places litigation burdens on government

Does not apply to legislative exactions such as impact fees (C.R.S. § 29-20-104.5 contains affirmative permission for local governments to impose impact fees)

- Conditioning of permit on payment of individualized fees falls within the legislative exactions exception (*Wolf Ranch, LLC v. City of Colorado Springs*, 220 P.3d 559 (Colo. 2009))

Our experience: virtually no effect on developer-local government exaction arrangements

# **Implications for Government**

# **How Might The Land Use Review And Approval Process Change?**

**And maybe there are few ideas  
here that you can use back home!**

# More Pre-application Meetings



# **Gaming – An Ounce of Prevention...**



# Impact Fees

**In-kind exactions are “lumpy”**

**Jim Nicholas, Ph.D**



# Special Tax Districts



## What is a special district?

A special district is a separate local government that delivers a limited number of public services to a geographically limited area (What's So Special About Special Districts?). Three special tax districts in the metro Denver area are: SCFD, RTD, and the football stadium district. The SCFD is viewed as a national model of public support for sustaining a culturally rich community.

# Fees



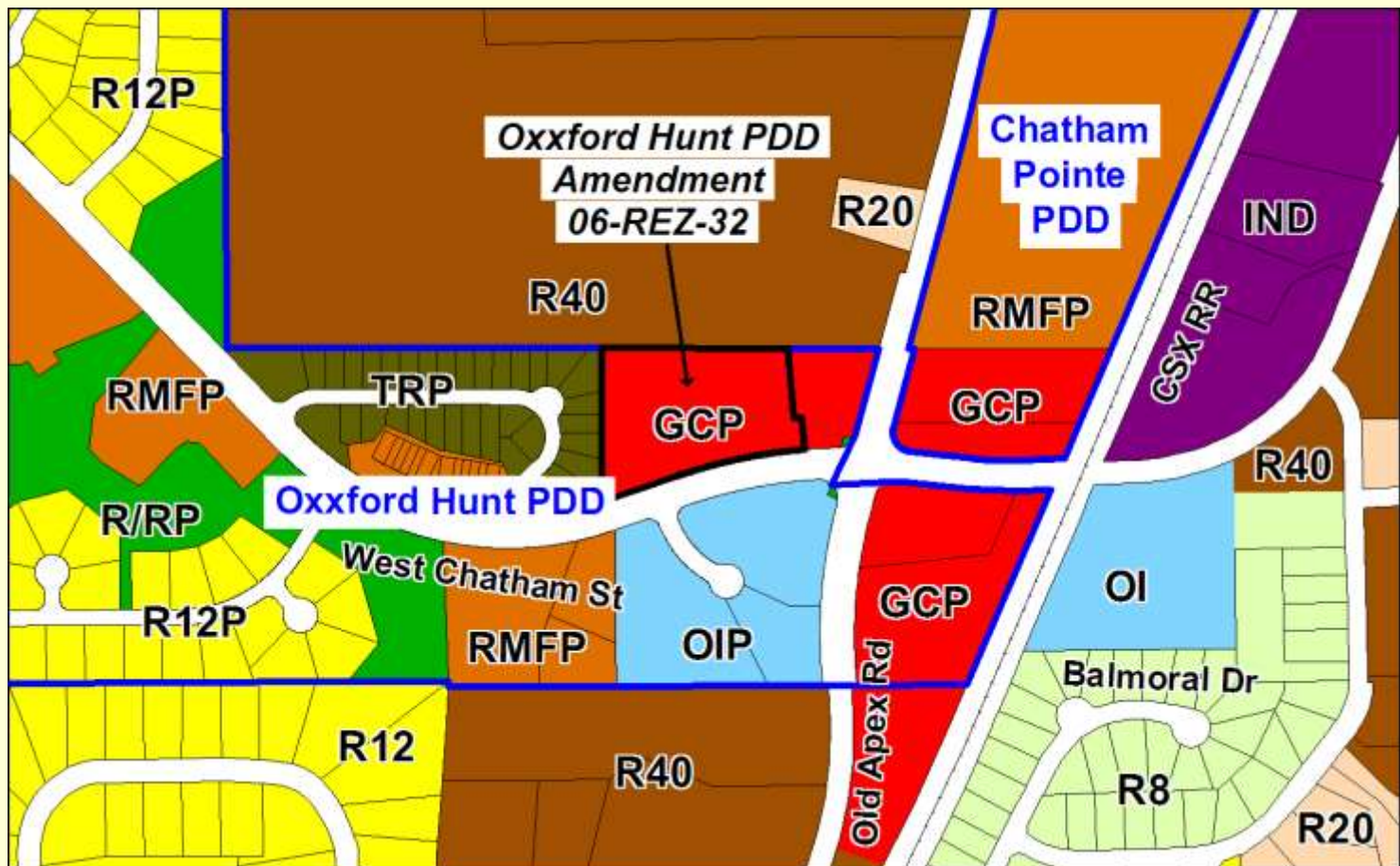
SUBMITTED BY DEPARTMENT / DIVISION:  
PLANNING AND INSPECTION

RESOLUTION NUMBER: 12-7941

APPROVED: 06/12/2012

| DESCRIPTION OF<br>FEE, RATE OR CHARGE | CURRENT<br>FEE<br>and<br>PERIOD | CHARGING<br>DEPT / DIV<br><br>COLLECTING<br>DEPT / DIV  | DATE FEE<br>LAST CHANGED                      |          | FEE DETAIL<br>OBJECTIVE   | COMMENTS |
|---------------------------------------|---------------------------------|---|---|----------|---|----------|
|                                       |                                 |   | ORDINANCE<br>NUMBER & DATE<br>(if applicable) |          | PROP. 26 EXCEPTION<br>(SEE READER'S GUIDE)<br>FULL COST FACTOR                        |          |
| Variance - single family home         | \$ 730.00<br>per application    | Charged By:<br>P&I/Plan<br><br>Collected By:<br>Finance | Date:   | 06/12/12 | Objective: Recover Cost<br><br>Prop 26 Exception: 1,2,3<br><br>Full Cost: \$ 5,769.60 |          |
| Variance - all others                 | \$ 3,010.00<br>per application  | Charged By:<br>P&I/Plan<br><br>Collected By:<br>Finance | Date:   | 06/12/12 | Objective: Recover Cost<br><br>Prop 26 Exception: 1,2,3<br><br>Full Cost: \$ 3,010.85 |          |

# Discretionary Processes - Planned Development Districts



# PDD Exactions

## College Station, Texas

### BioCorridor Planned Development District Ordinance



Unified Land Use, Project Review Processes,  
and Development Standards

#### 6.9 Appeals from Development Exaction Requirements.

##### A. Purpose.

The purpose of a petition for relief from a dedication or public infrastructure requirement is to ensure that the application of uniform dedication and construction standards to a proposed development does not result in a disproportionate burden on the property when considering the nature and extent of the demands created by the proposed development on the municipalities' roadways and other public infrastructure.

##### B. Applicability.

A petition for relief under this Section may be filed by the applicant to contest any requirement to dedicate land or pay fees or to construct or pay for public improvements as required by this Ordinance, the *Bryan/College Station Unified Design Guidelines*, or any other applicable rules or regulations when the applicant believes that same is not roughly proportionate to the proposed development as determined by an engineer licensed to practice in the state of Texas.

# Appeal Process

## Lexington, Kentucky

LEXINGTONKY.GOV

Horse Capital of the World

### Exaction Appeals Committee

Authorizing Legislation: Article 23C of the Zoning Ord. & KRS Ch. 100, KRS Ch. 67A.070



#### Purpose:

The Exaction Appeals Committee reviews imposition of exactions, amount of exactions, credit exemptions, refunds or adjustments or exactions in the expansion Area.

To view LFUCG Charter & Code of Ordinances click [here](#).

#### Exaction Appeals Committee

Dept. of Planning  
200 E. Main Street  
Lexington, KY 40507



Contact: Della Horton  
(859) 258-3160



[dellah@lexingtonky.gov](mailto:dellah@lexingtonky.gov)

# Development Agreements

City of Fontana, California

<http://www.fontana.org/DocumentCenter/Home/View/666>

**The Land Developer will construct or cause to be constructed at his own cost and expenses all necessary permanent improvements on streets abutting his property, all required tests, design work, equipment materials, and labor in order to complete all of the improvements set forth in the total cost estimate as stated in Exhibit “A” to the satisfaction of the City Engineer or as specifically described and shown on Drawing No. , which was approved by the City Engineer and filed in his office on , 20 , and in accordance with applicable provisions of the Standard Specifications and Standard Details of the City of Fontana in effect on the date of this Agreement.**

# The Take Home for RMLUI

--- Development conditions (land and fees) should be established through **general legislation** or rules (though perhaps not necessary, findings and analysis sufficient to justify exactions under *Nollan/Dolan* could provide backstop).

-- Communities should **avoid making “demands” in *ad hoc* proceedings**; passive consideration of proffers apparently OK.

-- To the extent a community negotiates over conditions, it must **engage in detailed fact-finding and analysis** “measuring” project impacts and relating impacts to proposed conditions; communities should direct studies but consider how to have developers pay equitably.

-- **If negotiations fail, communities should deny** applications based solely on totality of unacceptable adverse impacts