THE BIG STICK: FEDERAL CLEAN WATER ACT

- ENACTED IN 1948 AS THE WATER POLLUTION CONTROL ACT

- MAJOR REVISIONS IN 1972; RENAMED THE CLEAN WATER ACT

- ADMINISTERED BY THE US EPA, US ARMY CORPS OF ENGINEERS, AND STATES
Clean Water Act And Stormwater Control Regulations

- CWA Regulates Stormwater Quality/Quantity
- NPDES Permits For Point Sources
- Regulates Total Maximum Daily Loads (TMDL) For Impaired Waters
- Combined Sewer (Wastewater and Stormwater) Overflows
- MS4 (Municipal Separate Storm and Sewer Systems) BMPs
US EPA Stormwater Management Approach

• 1987 CWA Amendments Establish Section 319 Nonpoint Source Program
• Current EPA Integrated Planning Approach Promotes Green Infrastructure—Slow It, Spread It, Sink It
• 2019 Water Infrastructure Improvement Act Defines And Promotes Green Infrastructure
Other Relevant Federal Legislation/Regulations

- Safe Drinking Water Act
- Underground Injection Control Regulations
State Legal Requirements/Regulations/Enabling Legislation

- State Agency Administration Of Clean Water Act
  - Soil Erosion And Sediment Control Standards (e.g., Maryland State Stormwater Standards and Stormwater Control Design Manual)
- Green Building Acts (e.g., California, Rhode Island, Washington)
- Soil Erosion Control And Green Infrastructure Enabling Legislation
Local Sources Of Power To Implement Green Infrastructure Programs

- Home Rule (e.g., Denver Green Roof Initiative)
- Zoning/Subdivision/Site Planning
- Floodplain Management
- Stormwater/Soil Erosion Control
Effective Implementation Tools

- Landscaping/Water Conservation
- Tree/Vegetation Protection
- Open Space Set Asides and Exactions/Impact Fees
- Impervious Cover Limits (e.g., maximum parking standards)
- Floodplain Protection
- Stream Setbacks/Buffers
Effective Implementation Tools

- Apopka FL – Landscaping and Tree Protection
  - Added foundation landscaping standards
  - Reduced parking standards with increased interior/perimeter parking lot landscaping
  - Plant diversity standards
  - New standards to protect existing tree canopy
  - Standards to protect specimen trees
#1 Legal Issue: Takings

5th Amendment to the U.S. Constitution

“...nor shall private property be taken for public use without just compensation.”
NOT TO BE CONFUSED WITH THE TOKING ISSUE!!!
Rules of the Takings Game??

• **Penn Central Transportation Co. v. New York City**
  - What is the character of the government action?
  - Is there any economically viable use left of the property?

• **Dolan v. City of Tigard**
  - Is there a “essential nexus” and rough proportionality for any land exaction or impact fee?
Character of the Government Action

PASSING THE ODOR TEST:

• *Allingham v. City of Seattle*

• *Monterey v. Del Monte Dunes at Monterey*
Economically Viable Use

Mere diminution of value is not enough:

– *Landmark Land Company v. City and County of Denver*
Economically Viable Use

BUT THERE MUST BE SOME VIABLE USE!!

• Lucas v. South Carolina Coastal Council
**Dollan Essential Nexus And Rough Proportionality**

EXACTIONS AND IMPACT FEES RELATED TO OPEN SPACE/NATURAL AREAS MUST SATISFY TWO CRITERIA:

- **ESSENTIAL NEXUS**

- **ROUGH PROPORTIONALITY**
Don’t Overlook Local Regulatory Barriers

- Excess Parking Requirements
- Subdivision Street Standards
- Zoning Yard/Setback Standards
- Landscaping/Turf Grass Requirements
- Impervious Paving Standards

See Tackling Barriers To Green Infrastructure, Univ. Of WI
Other Legal Hurdles

- **Western Water Law** (e.g., potential restrictions on rain barrels)
  - Colorado State Rain Barrel Law
  - Utah Rainwater Harvesting Rules
  - Washington
Questions