

How Green Is My Infrastructure: What You Need To Know About The Law



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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



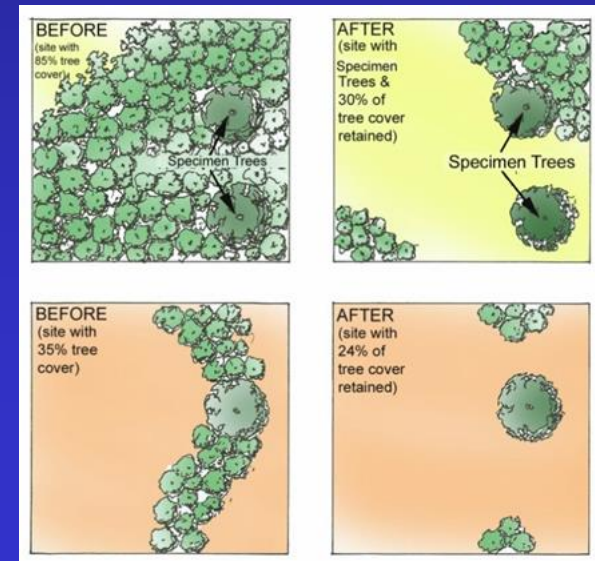
Effective Implementation Tools

- 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!!!



I did NOT Inhale!!



I DID! *inhale!!!*

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 CRITERA:

- 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

