Is Your Multifamily Housing Project Subject to an Impact-Fees Schedule? If So, the Fee Might Be Unconstitutional

May 14, 2024

Categories:

Blogs
Multifamily Matters

Authors:

Yazan S. Ashrawi
Thaddeus M. Boggs
Anthony R. Severyn
S. Bradford Butler

Pre-development costs on multifamily housing projects can be expensive, and many projects in today's market have extremely lean budgets. Compounding this, municipalities routinely seek to collect impact fees from multifamily developers to reimburse the municipalities for their costs related to new (or increased usage of) municipal services, like water and sewer systems, roads, schools, libraries, parks, and recreation facilities. The high costs of certain impact fees can render some projects financially infeasible.

This is especially true when the impact fees are set by a schedule and imposed on all structures of similar classifications. These impact-fees schedules are established by legislation, rather than on an *ad hoc* basis after reviewing the particular development's plans. Because of this, it can be difficult to see a connection between the assessed fee and a specific development's actual impact on the municipality.

On April 12, 2024, the U.S. Supreme Court took the first step in clearing up the confusion. In *Sheetz v. County of El Dorado, California*, 144 S.Ct. 893 (2024) (slip op.), it addressed the following key question: Does the so-called *Nollan/Dolan* exactions test—which has long applied to *ad hoc* permit conditions—apply also to permit conditions imposed by legislation?

The Supreme Court unanimously held that it does. In doing so, it vacated a California appeals court opinion that had declared that the test does not apply to impact-fees schedules and remanded the case for further proceedings not inconsistent with the Supreme Court's opinion.

Thus, under *Sheetz*, all permit conditions must have: (1) an "essential nexus" to the government's land-use interest; and (2) "rough proportionality" to the development's impact on the land-use

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

interest, *i.e.*, they must not require a landowner to give up (or pay) more than is necessary to mitigate harms resulting from the new development. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

If an impact-fees schedule does not satisfy these *Nollan/Dolan* elements, then the assessed impact fees might be requiring payment of just compensation. Why isn't there more certainty? Because the controlling opinion answered only the very narrow question stated above. It did not address whether: (1) the impact fees the plaintiff had to pay were a compensable taking (such that the *Nollan/Dolan* test was applicable in the first place); or (2) legislative permit conditions must be tailored with the same degree of specificity as a permit condition that targets a particular development. It left those questions for the lower courts, and each affects the takings analysis.

Despite its limited scope, the Supreme Court's *Sheetz* opinion has value. It signals to municipal and state officials that their impact-fees schedules must have an essential nexus to their land-use interests and be roughly proportional to the development's impact on those interests. Additionally, it signals to multifamily developers that impact-fees schedules that lack those elements could be unconstitutional unless they receive just compensation.

Frost Brown Todd counsels investors, developers and other key stakeholders on multifamily housing transactions in states across the country. We stay at the forefront of all significant judicial decisions affecting the industry, and we are ready to assist clients in the wake of decisions such as *Sheetz*. For more information, please contact the authors of this article or any attorney on Frost Brown Todd's Multifamily Housing team or Government Services practice.

Multifamily Matters Blog

Providing relevant legal perspectives to keep developers, investors, and lenders at the forefront of the multifamily industry in our footprint.

Subscribe for Updates

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons