



PACIFIC LEGAL FOUNDATION
Rescuing Liberty from The Grasp of Government

Litigation Backgrounder

Forcing Entrepreneurs to Pay for Public Improvements [Unconstitutional Exactions]

*Where once government was closely constrained to increase the freedom of individuals,
now property ownership is closely constrained to increase the power of government.
Where once government was a necessary evil because it protected private property,
now private property is a necessary evil because it funds government programs.
—Justice Janice Rogers Brown¹*

INTRODUCTION

On July 27, 2007, Pacific Legal Foundation filed a lawsuit on behalf of small business owner Janet Auxier, who has been subjected to four years of unwarranted harassment and intimidation by the City of Hesperia. Since 2003, Ms. Auxier and her husband have operated The Rock Yard, a company that provides decorative rock for gardens throughout the desert community. But not long after she opened her business, city officials ordered her to prepare a “site plan” which would include street lights, sidewalks, drainage, and other amenities. Because she did not have a “site plan,” the city fined her \$500, and, in a cooperative spirit, she began preparing a plan that she hoped the government would find acceptable. To her surprise, the City rejected the plan, and then rejected subsequent plans, each time demanding that more features be added to it—and each time fining her for continuing to operate without a plan in place. To date, she has paid more than \$4,500 in fines.

Most astonishingly, it appears that the city’s laws do not actually require her to have a site plan to begin with. Despite her repeated requests, City officials have never explained why she must have such a plan. Instead, they have simply demanded increasingly elaborate concessions—and fined her more money—while ignoring her requests for a hearing or even a simple explanation.

Janet Auxier’s case is unfortunately typical of the way local governments in California—and throughout the nation—are forcing individuals and businesses to shoulder the costs of local improvements that ought to be paid for by the public as a whole. Despite repeated statements by the United States Supreme Court, local bureaucrats continue to abuse their powers, sticking individual property owners with the cost of improvements that bureaucrats think would be a good idea.

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JANET AUXIER'S SMALL BUSINESS DREAM

Janet Auxier opened her rock business in early 2003, hoping to provide consumers with an affordable but aesthetically pleasing way to decorate their driveways and front yards. Because many of the lots in Hesperia are large and the costs of maintaining grass and foliage can often be high, crushed stone and rock are an attractive alternative.

The Rock Yard sits on a 4.74-acre piece of land, surrounded by unimproved lots and construction sites. The property includes a house, which serves as The Rock Yard's offices, and an adjacent parking lot, as well as the delivery yard where rock is received, stored, and put on trucks for delivery to customers. Before purchasing the land, Ms. Auxier checked to ensure that it was properly zoned, and after securing a business license from the City, she bought a dump truck and tractor, got some rock, and went into business.

Only months later, a Hesperia Code Enforcement Officer fined Auxier \$500 for operating her business without a site plan. Strangely, the City Code only requires site plans for "project[s] involving *the change or intensification of land use*"²—yet Auxier has not changed or intensified the use of the land (which was previously used by a business that stored and delivered drywall). The law also requires a site plan when a person "[converts] a residential structure to an office or commercial use," but she did not convert the house to commercial use, since it was being used for a business when she bought it. "We were not changing anything, adding any new structure, or increasing land usage," Ms. Auxier explains.

Although Ms. Auxier repeatedly asked city officials to tell her why she was required to provide a site plan when she was not proposing to undertake any development, the City has never provided her with a justification for its actions. In fact, on July 21, 2006, she filled out a city form requesting a hearing to explain what legal authority the City had for forcing her to complete a site plan. The City has never granted the hearing or even acknowledged receiving the request.

Ms. Auxier, who has lived in Hesperia for over 20 years, says that more than anything else, she feels frustrated. "I could never get a clear answer on why I needed to submit a site plan," she says. And even while she was in the process of submitting a plan, the fines kept coming. "It was like the right hand wasn't aware of what the left one was doing."

HOW DEVELOPMENT IS REGULATED

The Hesperia City Code, like the laws of many cities, imposes certain requirements on developers who seek permits to construct new housing or other developments. One requirement is that a developer must provide a site plan, typically consisting of a detailed description of the land and buildings. Site plans are used to review a proposed project's compatibility with its environment and to assess how development of a site will affect factors such as traffic circulation, public utilities, drainage, and other matters.³

The site plan review process can often be very costly and complicated for a land owner, since he or she must hire outside experts—engineers and architects—to prepare these plans and because owners often have to pay expensive application fees. City planning commissions also may withhold their approval of a given site plan unless the developer commits to various conditions, such as physical improvements of the land, or giving up right-of-way easements to the government. Nevertheless, the requirement of a site plan is a common feature of municipal development codes throughout the United States.

Hesperia’s site plan requirement states that “[n]o person shall undertake, conduct or use . . . any *development projects* which require site plan review” without first preparing a site plan.⁴ The City Code also states that the purpose of the site plan requirement is “to enable the planning agency to ensure that *the proposed development* is in conformance with the intent and provisions of all applicable city regulations and policies.”⁵ The Code does not define the term “development projects,” but another section of the Code defines the term as “[p]rojects involving a *change or intensification* of land use, such as . . . the conversion of a residential structure to an office or commercial use”⁶ But not only has Ms. Auxier never proposed any development, but she has never intensified the use of the land or converted a residence into an office—the house has been legally used as an office since before she purchased it.

City officials seem intent on requiring *all* land owners, not just those proposing expansion or development of their land, to submit site plan applications. At least that’s how the site plan requirement has affected Ms. Auxier and her small business.

THE BUREAUCRATS REACT

Hoping that by cooperating she could induce the City to stop persecuting her, Ms. Auxier hired an engineer to prepare a site plan. But even this process proved fruitless, as bureaucrats repeatedly rejected her applications for lacking various amenities such as sidewalks, gutters, and street lights—requirements which cost hundreds of thousands of dollars, and which the City may not constitutionally demand of her.

Meanwhile, citations for illegal land use were still being issued by Code Enforcement against the property, despite the fact that Ms. Auxier had been sending the Planning Department revised versions of her plan in good faith. “Another example of two departments not communicating with each other and I was paying the price,” she laments. “I was doing the best I could under the circumstances.” By January, 2007, the planning board had returned the site plan proposal to Ms. Auxier for the third time, still insisting on additional “improvements,” now totaling more than \$280,000.

HOW DEVELOPMENT PERMITS ARE ABUSED

Development permits serve an important public purpose in ensuring that development meets the requirements of state and local laws, and that its effects do not injure neighboring property owners. The government’s “police power” enables it to use permit requirements to protect the public’s health and safety. Unfortunately, officials often misuse this power in order to extract money or property from citizens. Rather than protecting the public, local officials sometimes withhold a permit until a property owner gives up money, property, or other rights to the government.⁷

Two decades ago, the U.S. Supreme Court held in *Nollan v. California Coastal Commission*⁸ that local governments may not use land use regulations to exploit land owners. In that case—which was litigated by Pacific Legal Foundation—the Nollan family was forced to give up an easement so the public could walk across their beachfront property in exchange for a permit to build a new home. The Coastal Commission asserted that this requirement was related to the government’s interest in preserving an unimpeded view of the ocean from the road, but the Court disagreed. Government, the Court held, can require certain things from property owners in exchange for permits, but only where the proposed development might affect public facilities or

harm the public in some way, and only where the government demands something that will mitigate that harm. But it cannot exploit its land use regulation power to force property owners to give up their rights. As Justice Scalia explained: “[I]f California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury,” the result would be obviously unconstitutional.⁹ A similar injury occurs in the context of property rights: while regulating or banning harmful development may be warranted, turning that ban into an opportunity to exploit people exceeds the state’s legitimate powers. In fact, as the Supreme Court concluded, this would amount to “an out-and-out plan of extortion.”¹⁰ In order to ensure that government does not “leverag[e] the police power”¹¹ for its own profit, the Fifth Amendment requires that conditions imposed on development must bear some connection to the potential injury caused by a proposed development. This so-called “nexus” test essentially means that although government can require land owners to remedy certain negative consequences of construction, land owners cannot be forced to pay for things unrelated to their projects.

Seven years after *Nollan*, the Court reiterated the point in *Dolan v. City of Tigard*.¹² There the Supreme Court ruled that any such condition must not only be related in *kind*, but also in *amount*, to the effect of a proposed development. In other words, the amount that bureaucrats demand from a property owner must be “roughly proportional” to the potential harm to the public. In *Dolan*, the government required a woman who sought permission to expand her store and parking lot to give up a portion of her property for a bicycle path and other uses. The Court rejected this, noting that government officials “must make some sort of individualized determination that [a] required [condition] is *related both in nature and extent* to the impact of the proposed development.”¹³ This means that the government must present specific findings about what a proposed development will cost the public and how a particular demand will alleviate that cost.

WHY IS THIS LAWSUIT IMPORTANT?

In the decades since *Nollan* and *Dolan* were decided, the Supreme Court has continued to rely on them and elaborate on the Fifth Amendment’s limits on land-use regulations.¹⁴ Yet government officials still routinely defy these decisions, making land owners give up thousands of dollars or provide public facilities like parks or affordable housing in exchange for permission to develop their own private property. This abuse benefits local governments because it allows them to provide the public with benefits, without having to raise taxes. Instead, the cost of these benefits is borne by individual property owners who have little political influence. This unfairness was well described by New York’s highest court thirty years ago. The “ultimate evil” of exactions, the court noted, “is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large. Instead, the accident of ownership determines who shall bear the cost initially.” And when this happens, the real “cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding whether or not they wish to obtain the benefit despite the ultimate economic cost.... In other words, the removal from productive use of private property has an ultimate social cost more easily concealed by imposing the cost on the owner alone.”¹⁵

While Janet Auxier is the most recent victim of this scheme, the consequences of exactions go beyond the injustice suffered by small business owners. Land-use regulations can inhibit the availability of affordable housing by imposing direct costs (such as administrative fees, impact fees, and environmental mitigation requirements) or by constricting the range of allowable development types (such as large-lot zoning ordinances, inflexible building codes, density restrictions, or outright bans on multifamily housing).

Unfortunately, local governments (which usually control land use decisions) often have no incentive to face up to the trade-offs between housing affordability and other legitimate objectives.¹⁶ And the consumer ultimately pays, often in the form of artificially inflated housing prices. Over the past 25 years, in California and elsewhere, many cities have experienced a significant increase in housing prices. Skyrocketing costs are not the result of greedy developers, but of an overall increase in governmental land-use regulations.¹⁷ A recent report from the Thoreau Institute estimates that regulation increased housing costs in all California metropolitan areas by a staggering \$2.7 trillion.¹⁸ Another study conducted at UC Berkeley suggests that new housing construction is lower in more regulated cities compared to less regulated cities.¹⁹ The non-partisan Public Policy Institute of California concluded after a lengthy study that “the fees imposed on new development are substantial In one community, fees and assessments represented 19% of the mean sales price [of a home].”²⁰ Exorbitant development fees have become an increasingly popular source of supplementary finance for local governments. But they are not the cure-all solution to the “spill-over” effects of development as some bureaucrats think. New roads and other public goods financed by these fees discourage development. Reforms that eliminate excessive exactions and fees will encourage development and make real estate more affordable.²¹

This abuse of power has many effects on small businesses, also. It raises the cost of operating businesses by increasing the prices for land and forcing businesses to pay steep fees to the government. This makes it harder for businesswomen like Janet Auxier to pursue the American dream, raises the prices of products and services, and harms job creation. Worst of all, it transforms a government power that was meant to protect the general public from injury—into an unjust scheme for expanding government power, restricting freedom, and encouraging manipulation by ambitious government officials. As Steven Hayward has written, “[t]he new ‘regulation for revenue’ is starting to go well beyond simply paying for growth-related public works such as roads and sewers. The latest wave in this game is to impose ‘linkage’ fees for ‘social infrastructure needs’ such as child care, mass transit, and affordable housing San Francisco, for example, imposes a mass transit fee of up to \$5.00 a square foot on commercial development to help pay the massive tab for BART (Bay Area Rapid Transit) and other red-ink transit projects. Other cities have successfully imposed fees for child care and affordable housing. Such fees have withstood court challenge, under an extremely elastic understanding of the ‘nexus’ principle outlined in the famous *Nollan* case.”²²

Through its Unconstitutional Exactions Project, Pacific Legal Foundation seeks to restore the constitutional balance by preventing government from—in the Supreme Court’s words—“forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²³ Local government should not use its permitting power as an opportunity to exploit home builders or entrepreneurs like Janet Auxier.

LITIGATION TEAM

Pacific Legal Foundation (www.pacificlegal.org) is the largest and oldest public interest law firm dedicated to individual liberty, private property rights, and limited government. Established in 1973, PLF is headquartered in Sacramento, California, and maintains offices in Hawaii, Washington State, and Florida. Through its Unconstitutional Exactions Project, led by PLF Principal Attorney Meriem L. Hubbard, the Foundation defends the fundamental right of all Americans to keep, use, and enjoy the property they earn. Janet Auxier is represented by PLF attorneys Meriem L. Hubbard and Timothy Sandefur. This backgrounder was prepared by Justin Young and Timothy Sandefur.

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Notes

1. *San Remo Hotel L.P. v. City And County of San Francisco*, 27 Cal.4th 643, 692 (2002) (Brown, J., dissenting).
2. Hesperia City Code § 16.12.085 (LexisNexis 2005) (emphasis added).
3. Frequently Asked Questions (FAQ's) Regarding the Site Development Plan and Review Process, http://www.dumfriesvirginia.org/pdf/Site_Plan_FAQs.pdf (Last visited July 25, 2007).
4. Hesperia City Code § 16.12.085 (LexisNexis 2005) (emphasis added).
5. *Id.* at § 16.12.080 (LexisNexis 2005) (emphasis added).
6. *Id.* at § 16.12.085 (LexisNexis 2005) (emphasis added).
7. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY TAKINGS 210 (2002).
8. 483 U.S. 835 (1987).
9. *Id.* at 837.
10. *Id.*
11. *Id.* at 837 n. 5.
12. 483 U.S. 835 (1987).
13. *Id.* at 391 (emphasis added).

14. Timothy Sandefur, *Happy Birthday, Nollan!*, THE RECORDER, May 18, 2007.
15. *Fred F. French Investing Co., Inc. v. City of New York*, 39 N.Y.2d 587, 596-97 (N.Y. 1976) (citation omitted).
16. Margery Austin Turner, The Urban Institute, Transportation and Housing Trends, Congressional Testimony to the House Appropriations Subcommittee on Transportation, Housing and Urban Development, and Related Agencies (February 28, 2007) (transcript available at 2007 WLNR 3914749).
17. Edward L. Glaeser, Joseph Gyourko & Raven E. Saks, *Why Have Housing Prices Gone Up?*, Harvard Institute of Economic Research Discussion Paper No. 2061, at 8 (Feb. 2005), <http://econweb.fas.harvard.edu/hier/2005papers/HIER2061.pdf>
18. Leonard Gilroy, *Regulating California's Housing Crisis*, Reason Foundation, Apr. 13, 2006, http://www.reason.org/commentaries/gilroy_20060413.shtml
19. John M. Quigley & Steven Raphael, *Regulation and the High Cost of Housing in California*, 95 AM. ECON. REV. 323, 327 (2005).
20. MARLA DRESCH AND STEVEN M. SHEFFRIN, WHO PAYS FOR DEVELOPMENT FEES AND EXACTIONS? 74 (1997) http://www.ppic.org/content/pubs/report/R_697SSR.pdf. See also Mary Martinez, National Association of Realtors Field Guide to Development Impact Fees, <http://www.realtor.org/libweb.nsf/pages/fg805>.
21. Jack Estill, Benjamin Powell & Edward Stringham, *Taxing Development: the Law and Economics of Traffic Impact Fees*, 16 B.U. PUB. INT. L.J. 1, 37 (Fall 2006).
22. Steven Hayward, *Planning for Profit*, REASON, July 1994, <http://www.reason.com/news/show/29462.html>.
23. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).