PACIFIC LEGAL FOUNDATION

March 20, 2017

VIA EMAIL AND
FIRST CLASS U.S. MAIL

Seattle City Council
PO Box 34025
Seattle, WA 98124-4025

RE: The legality of Seattle's Mandatory Housing Affordability program

Dear Councilmembers:

Pacific Legal Foundation (PLF) and many housing developers and builders have watched with growing concern as the City of Seattle moves forward with the "Grand Bargain," a Mandatory Inclusionary Zoning (MIZ) program that exacts set-asides and in-lieu fees in a manner that violates statutory and constitutional property rights. PLF urges the City to reconsider its Mandatory Housing Affordability (MHA) framework to avoid a legal challenge under the federal and state constitutions, as well as Washington's impact fee statute.[1] We urge the City, as have many others, to focus instead on incentive programs like the Multifamily Tax Exemption (MFTE) program, which has produced thousands of units legally.

PLF is widely respected as an experienced advocate of property rights, particularly in the field of exactions—mandates requiring a developer to abandon a property interest in exchange for a permit. PLF has litigated and won major exaction cases before the Supreme Court of the United States in *Nollan v. California Coastal Commission* and *Koontz v. St. Johns River Water Management District*.[2] Our experience also includes

[1] RCW 82.02.020.
[2] *Koontz v. St. Johns River Water Management Dist.*, _ U.S. _, 133 S. Ct. 2586 (2014); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

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numerous Washington state exaction cases involving the state's impact fee statute.[3] Given PLF's state and federal experience with exactions, we can offer key insight into the legal problems surrounding the Grand Bargain and MHA.

Argument

The Fifth Amendment prohibits government from taking private property without offering just compensation. At its core, the Takings Clause embodies a basic notion of fairness: "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[4] The government enjoys the power to take property for various public purposes, but it may not force private individuals to shoulder the cost.

A taking is not limited to physical seizures of property; land-use regulations also can constitute a taking if they become burdensome enough. The Supreme Court has said, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[5] An abundance of caselaw has sprung up to define this boundary.

I. A city cannot demand that developers abandon a property right in exchange for a permit except under narrow circumstances

One category of cases that go "too far" involves exactions—typically a dedication or fee extracted from a developer in exchange for a permit. The exactions concept stems from the "unconstitutional conditions doctrine," which "vindicates the Constitution's

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[3] *See, e.g., Citizens' Alliance for Property Rights v. Sims*, 148 Wn. App. 649 (2008); *Common Sense Alliance v. GMBH*, 189 Wn. App. 1026 (2015) (unpublished).
[4] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).
[5] *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

enumerated rights by preventing the government from coercing people into giving them up."[6]

Permits are often essential to make any valuable use of property. By conditioning the grant of such a permit on the forfeiture of a property interest, permitting authorities violate the underlying constitutional right to just compensation for a taking of property. So long as the permit exceeds the value of the property sought by the government, permit seekers will tend to abandon a constitutionally protected right in order to secure the permit.[7] Government can thus use permits as leverage to evade compensating property owners—what amounts to "an out-and-out plan of extortion."[8]

Governments may, however, impose exactions under narrow circumstances. All permit conditions must address a direct impact of the proposed development.[9] This narrow exception allows for exactions that satisfy two criteria: (1) the exaction must have an "essential nexus" to a problem directly caused by the project;[10] and (2) the exaction must be roughly proportional in scope to a project's impact.[11] Washington has codified a similar test in its impact fee statute.[12]

Under both the Fifth Amendment and the impact fee statute, Seattle must demonstrate that the affordable housing exaction imposed under the MHA program satisfies this essential nexus and rough proportionality rule. Since new development does not directly harm affordable housing—instead helping to lower prices—and the city hasn't made any individual determinations regarding proportionality, the city satisfies neither the constitutional nor the statutory standard.

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[6] *Koontz*, 133 S. Ct. at 2594.
[7] *Id.* at 2594-95.
[8] *Nollan*, 483 U.S. at 837.
[9] *Koontz*, 133 S. Ct. at 2595.
[10] *Nollan*, 483 U.S. at 837.
[11] *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).
[12] RCW 82.02.020; *see also Sims*, 145 Wn. App. at 796 (applying the federal nexus and proportionality tests under RCW 82.02.020).

A. The nexus and proportionality tests apply to legislative exactions like the MHA program because the legality of a taking does not turn on the type of government entity involved

Some confusion has arisen over whether the exaction doctrine applies to legislative exactions. Under federal and Washington precedent, however, generally applicable laws imposed by a legislative body face the same test as ad-hoc permit conditions imposed by administrative agencies. Indeed, the Supreme Court's major exaction cases each involved an underlying legislative mandate. In *Nollan v. California Coastal Commission*, the unconstitutional condition was imposed under a state law demanding that coastal property owners provide public access across beachfront property as a condition on new development.[13] *Dolan v. City of Tigard* involved a bike path and greenway dedication mandated by a city development code.[14] *Koontz v. St. Johns River Management District*, too, sprung from a legislative mandate that permitting authorities impose conditions on wetlands development.[15]

Washington state caselaw has also applied *Nollan* and *Dolan* to legislative exactions. In *Sparks v. Douglas County*, the Supreme Court demanded that a legislatively mandated road dedication satisfy *Dolan*.[16] Another case, *Trimen Development Co. v. King County*, involved a county ordinance demanding dedication of land for park development or an in-lieu fee as a permit condition.[17] The Supreme Court applied *Dolan*.[18] The court followed the same pattern in *Isla Verde International Holdings v. City of Camas*, applying the statutory exactions framework to an open-space ordinance.[19] Indeed, there, the court held that the uniform application of the open-space law across all

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[13] *Nollan*, 483 U.S. at 828-30.
[14] *Dolan*, 512 U.S. at 377-78.
[15] *Koontz*, 133 S. Ct. at 2592.
[16] *Sparks v. Douglas County*, 127 Wn.2d 901, 910-11 (1995).
[17] *Trimen Dev., Co. v. King Cty.*, 124 Wn.2d 261, 274 (1994).
[18] *Id.* at 274.
[19] *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 747-48 (2002).

development was a reason to *condemn* the law rather than inoculate it from exactions scrutiny.[20]

Nothing in the Fifth Amendment or the impact fee statute implies that an exaction's legality depends on the type of entity that imposes the leverage. If anything, legislative exactions often stray farther from the nexus and proportionality standards than their administrative counterparts, since the former tend to lack flexibility or consideration for individual impact. The MHA program must, therefore, satisfy the exaction tests imposed by statute and the constitution.

B. The MHA program fails the nexus test because new residential development doesn't have a direct, negative impact on housing affordability

Any exaction imposed by Seattle must have an essential nexus to a direct impact. In the language of the impact fee statute, no city can impose an exaction on development unless the city "can demonstrate [that the exaction is] reasonably necessary as a direct result of the proposed development or plat to which the [exaction] is to apply."[21] As the Washington Supreme Court has noted, this demands more than a tenuous relationship between project and impact: "We have repeatedly held . . . that development conditions must be tied to a specific, identified impact of a development on a community."[22] For example, in *Isla Verde*, an ordinance required proposed subdivisions to keep thirty percent of the property as open space.[23] The Court concluded that this "uniformly applied" open-space condition with a "preset amount" could not satisfy the nexus

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[20] *See id.* at 880 ("[The ordinance] says nothing about why an open space set aside is necessitated by a particular proposed subdivision. Instead, the open space condition to obtain plat approval is uniformly applied, in the preset amount, regardless of the specific needs created by a given development."); *see also Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649 (2008) (applying the *Nollan-Dolan* standard to a legislative mandate that limited clearing on rural residential properties).
[21] RCW 82.02.020.
[22] *Isla Verde*, 146 Wn.2d at 761; *see also Honesty in Environmental Analysis & Legislation v. Central Puget Sound Growth Management Hearings Board*, 96 Wn. App. 522, 533-34 (1999) ("Simply put, the nexus rule permits only those conditions necessary to mitigate a specific adverse impact of a proposal.").
[23] *Isla Verde*, 146 Wn.2d at 746-47.

requirement because it wasn't tied to the "specific needs created by the given development."[24]

So far, Seattle has failed to demonstrate that the MHA program is reasonably necessary to mitigate for any direct impact on housing costs. The nexus study relies, for its analysis, on a "prototypical market-rate residential development" to establish the required link between the impact of a development and the problem being addressed.[25] This focus on a broad generalization rather than individual projects defies the Washington Supreme Court's repeated holding that an exaction must "be tied to a specific, identified impact of a development on a community."[26]

The causal chain used by the city's nexus study to demonstrate new housing's impact on the affordable-housing problem is also too attenuated. Exactions can only address a problem that is a "direct result" of the proposed development.[27] Here, however, only a circuitous and thin causal chain ties new housing to decreased affordability, if such impact exists at all.

The nexus study seems to rely on the following rationale:

1. New housing draws new residents to Seattle.
2. These new residents will result in new expenditures.
3. These new expenditures will precipitate job growth.
4. Job growth will attract more people to Seattle.
5. These new residents will not be able to afford market-rate housing.[28]

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[24] *Id.* at 763.
[25] Seattle Affordable Housing Nexus Study (Administrative Review Draft) 5, David Paul Rosen & Associates (September 11, 2014).
[26] *Isla Verde*, 146 Wn.2d at 761.
[27] RCW 82.02.020.
[28] Seattle Affordable Housing Nexus Study at 5-10.

These lengthy and speculative ratiocinations fail to show how new residential development has a "direct" impact on affordability. Indeed, they instead lay bare the indirect and hypothetical nature of such impacts.

The nexus study also doesn't account for the primary causes of the affordability crisis. Limited supply and rising demand that drive prices upward stem from market forces such as job growth and regulatory decisions made by Seattle over decades of managing its housing stock.[29]

The city's effort to force developers to solve an affordability problem that they did not create resembles Seattle's Housing Preservation Ordinance at issue in *San Telmo Associates v. City of Seattle*.[30] There, developers who demolished low-income housing to convert the property to non-residential uses had to pay relocation assistance and replace a percentage of the housing.[31] Our supreme court held that this scheme violated the impact fee statute because developers had not caused the affordability problem faced by displaced tenants: "The City is instead shifting the public responsibility of providing housing to a limited segment of the population."[32] Here, new residential development has even less impact on housing affordability than demolition of low-income housing because new development does not directly displace low-income residents and destroy housing stock. Indeed, new development bolsters supply, easing the strain on the housing market. Viewed alongside the sweeping backdrop of the market and regulatory context, individual residential development projects do not have a direct or measurable impact on increased housing costs. As the Washington Supreme Court has said on multiple occasions, "the problem of the decrease in affordable rental housing in the city of Seattle is a burden to be shouldered commonly and not imposed

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[29] *See Levin v. City and Cty. of San Francisco*, 71 F.Supp.3d 1072, 1084-85 (N.D. Cal. Dist. Ct. 2014) (concluding that a relocation assistance law did not establish a nexus between evictions and housing affordability).
[30] 108 Wn.2d 20 (1987).
[31] *Id.* at 22.
[32] *Id.* at 24; *see also Sintra Inc. v. City of Seattle*, 119 Wn.2d 1, 23 (1992) ("[T]he lack of low income housing was brought by a great number of economic and social causes cannot be attributed to an individual parcel of property.").

on individual property owners."[33] The MHA program cannot establish an essential nexus between increased housing cost and residential development.

C. The MHA program fails to establish proportionality because it doesn't make any individualized determinations regarding the extent of a given project's impact

The proportionality standard set by *Dolan v. City of Tigard* requires that an exaction be tailored to the specific impacts caused by the particular development. While eschewing the need for surgical precision, the Court affirmed that governments need to make an "individualized determination" as to the particular project's impact and demonstrate that the exaction "is related both in nature and extent to [that] impact."[34] The burden of demonstrating proportionality rests with the exacting authority.[35]

Even assuming Seattle could establish an essential nexus between new housing and affordability, Seattle's MHA program cannot satisfy rough proportionality. The set aside and in-lieu fee calculations do not stem from an "individualized determination"[36] regarding the particular project's "specific, identified impact."[37] Instead, the calculation of a particular project's exaction is based on its size and its location in the city. This formula suffers from the same flaw as the open-space dedication in *Isla Verde*. Like *Isla Verde*—which used a fixed thirty percent dedication—the set-aside percentage here is a "preset amount" that is applied uniformly across a zone.[38] Likewise, the fee is preset and fixed by square footage, with no accounting for specific impacts. The city can't paint with such a broad brush if it wants to satisfy proportionality; it must make site-specific calculations of impact. Thus, Seattle has failed to shoulder its burden of proving that these exactions are roughly proportional.

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[33] *Guimont v. Clarke*, 121 Wn.2d 586, 611 (quoting *Robinson v. City of Seattle*, 119 Wn.2d 34, 55 (1992)).
[34] *Dolan*, 512 U.S. at 391.
[35] *Isla Verde*, 146 Wn.2d at 755-56.
[36] *Dolan*, 512 U.S. at 391.
[37] *Isla Verde*, 146 Wn.2d at 761.
[38] *Id.*at 763.

II. The waiver or reduction available under the MHA program does not inoculate the ordinance from facial invalidity

The MHA program allows the city to reduce or waive the fee or set-aside requirements due to inability to use the increased capacity offered under the program or severe economic impact that would result from performance or payment.[39] The city's discretion to alleviate or remove the inclusionary zoning requirements, however, does not solve the legal issues described above.

The city bears the burden of demonstrating nexus and proportionality.[40] It cannot therefore hoist the burden on developers to prove they deserve a reprieve. Plus, the ordinance does not even allow the city to grant a reduction or waiver should a developer demonstrate a lack of nexus or proportionality; the waiver or reduction only applies to developers severely harmed by the MHA requirements or who can't use the increased capacity.[41] The city therefore can't escape constitutional peril now by forcing developers to carry the city's burden later.[42]

III. The exceptions to the impact fee statute do not apply

None of the statutory exceptions to the impact fee prohibition apply here. Washington's impact fee law allows for payments under a "voluntary agreement" so long as the payment is "reasonably necessary as a direct result of the proposed development."[43] Even assuming that offering an option between an in-lieu fee and a set-aside

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[39] SMC 23.58C.035.
[40] *Isla Verde*, 146 Wn.2d at 755-56.
[41] It's also worth noting that, based on economic analysis of the MHA program, almost every project exposed to the program's framework would be eligible for the increased-capacity reduction, rendering the program moot and little more than an inefficient and costly hoop to leap for developers trying to ease the city's housing-supply problem. *See* Dan Bertolet, *Seattle's Flawed Plan for Mandatory Housing Affordability Would Suppress 'Missing Middle' Housing*, Sightline Institute (March 13, 2017), http://www.sightline.org/2017/03/13/seattles-flawed-plan-for-mandatory-housing-affordability-would-suppress-missing-middle-housing/.
[42] *See Building Industry Ass'n of San Diego Cnty., Inc. v. City of San Diego*, No. GIC817064, 2006 WL 1666822 at *2 (San Diego Sup. Ct. 2006) ("Inasmuch as the waiver provision enacted by the City of San Diego does not allow the City to avoid the unconstitutional application of the ordinance, the ordinance on its face results in an unconstitutional taking.").
[43] RCW 82.02.020(3).

constitutes a "voluntary agreement," the MHA program still fails to form a proper nexus between affordability and new development. The increasing affordability problem is not a "direct result" of proposed residential developments for the reason discussed above. Thus, this program is not a valid "voluntary agreement" that can escape RCW 82.02.020.

Nor can the city find harbor in the impact-fee exception for affordable housing incentive programs.[44] That exception allows cities or counties to "enact or expand affordable housing incentive programs providing for the development of low-income housing units through development regulations or conditions on rezoning or permit decisions."[45] In return for a fee or set-aside, a city can offer density or height bonuses, among other things.[46]

This exception, however, does not apply to mandatory schemes. By its plain language, the incentive exception applies solely to programs that developers can choose to forgo. The city may only offer certain benefits in order to encourage developer participation, which necessarily implies choice. If the MHA program could fit into this exception, the word "incentive"—used repeatedly in the statute's wording—would become superfluous. Plus, the exception explicitly states that a developer can choose "not to participate in an optional affordable housing incentive program adopted and authorized under this section."[47] Any program under this subsection must offer an optional incentive only—not a demand. Even though the MHA program grants an upzone as part of the affordable housing initiative, the city's scheme still doesn't qualify as an incentive program because it lacks any element of choice; the developer must perform or pay, regardless of whether they want the increased FAR from an upzone.

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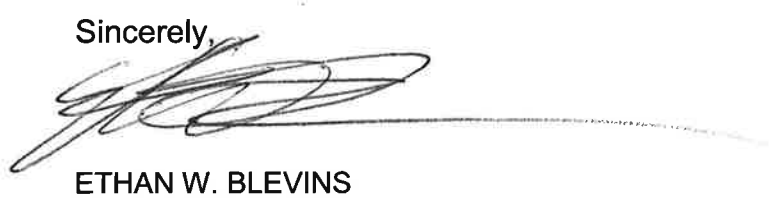
[44] *See id.* (stating that 82.02.020 does not limit municipal authority to implement affordable housing incentive programs).
[45] RCW 36.70A.540
[46] *Id.* (1)(a).
[47] *Id.* (1)(c).

Finally, even if the option of an in-lieu fee rather than a set-aside rendered this mandatory program a "voluntary agreement" under the impact fee statute, the program would still violate the Fifth Amendment's Takings Clause. *Koontz* confirmed that the Constitution forbids exactions even when they offer an in-lieu fee alternative; otherwise, officials could evade *Nollan* and *Dolan* with ease.[48] Thus, the MHA program violates statutory and constitutional law alike.

Conclusion

The Grand Bargain hopes to fix a pervasive problem afflicting Seattle. The city cannot, however, conscript private property to achieve a public purpose without paying for it. Instead, programs that broadly distribute taxes on property to generate revenue for subsidized housing like the housing levy or that forgo tax revenue in exchange for restricting rents like the MFTE program are fair, less costly to the end users of housing, and legal. A public problem demands a public response—not one that places a public burden on private shoulders.

Sincerely,



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[48] *Koontz*, 133 S. Ct. at 2599.