



# How to Protect Property Rights from Improperly Assessed Exactions

Kyle Sweetland and Brian Hodges

**A** growing population requires more housing, but new construction can strain existing public resources. It can increase traffic on roads, for example, or enroll more children in schools. Rapidly growing communities feel these impacts the most, because local governments may require significant funds to expand these resources' capacity.

To pay for needed repairs and upgrades during rapid growth, local governments have been turning away from traditional but politically unpopular sources of public infrastructure financing, such as taxes, levies, or bonds.<sup>1</sup> Instead, local governments have increasingly relied on exactions imposed on home builders as a condition of approving building permits. Exactions include dedications of land for public amenities or, more commonly, one-time fees to pay for the cost of impacts. Generally, courts have

ruled that such demands are within local governments' police power authority, so long as the exaction does not exceed what is necessary to mitigate a project's impacts.<sup>2</sup>

To be lawful, exactions should be carefully crafted, narrowly administered, and proportional to the social cost of new housing. They often deviate from their original impact-mitigation purpose, however, and morph into revenue-extraction tools. Such deviations are problematic for two reasons.

First, though exactions may fund public amenities and infrastructure, they increase homebuilding costs. Improperly assessing exactions hinders construction and may exacerbate the U.S. housing crisis by driving up home prices.

Second, excessive or unrelated exactions turn the permitting process into an opportunity for government

extortion and violate property owners' Fifth Amendment rights.<sup>3</sup> Exactions sometimes do not meet the legal standards of *essential nexus* (requiring that the exaction relate to the home's actual anticipated impact on the community) and *proportionality* (requiring that the exacted money or property not exceed a proposed home's anticipated impacts).<sup>4</sup>

This research in brief shows how exactions grew and increased home construction costs over a 16-year

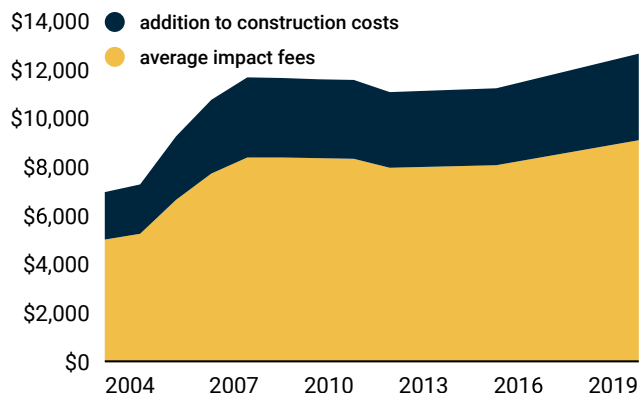
period. It provides a history of exactions, showing how they have frequently moved away from their original impact-mitigation purpose and how that shift in purpose risks violating the Constitution. It illustrates an improperly assessed exaction and provides examples of how exactions have hampered construction during the present housing crisis. It concludes by examining how state legislatures can help set boundaries on local exactions and protect property rights.

## Size and Variety of Exactions

Since 2004, both the size and variety of exactions have grown significantly, according to data from 175 towns, cities, and counties across the country that consistently charged exactions from 2004 through 2019.<sup>5</sup> These localities imposed different exactions for single-family and multi-family homes, so the following analysis average the two. The data cover standard-sized homes and lots and include the estimated dollar value of land dedications where the government seeks real property rather than money.<sup>6</sup>

As figure 1 shows, average total exactions grew from almost \$5,000 per home in 2004 to more than \$9,000 in 2019. The greatest bump occurred from 2005 to 2008. Exactions then moderated slightly until 2012, at which point they started to rise again.

**Figure 1.** Average Total Exactions and Addition to Construction Costs (2004–2019)



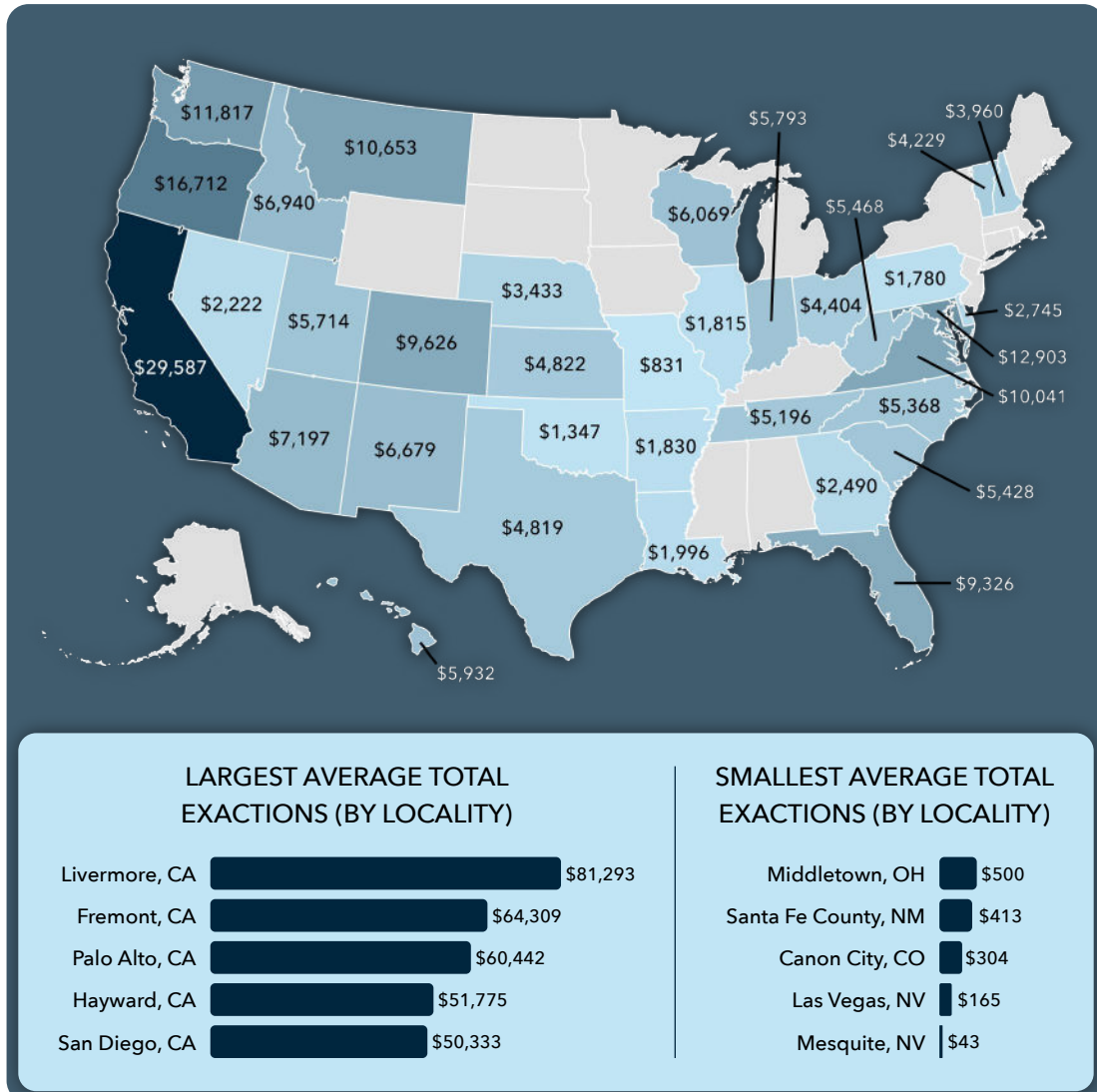
Source: Exactions data come from Mullen's National Impact Fee Surveys: Duncan Associates, "Surveys," ImpactFees.com, accessed February 12, 2025, <https://www.impactfees.com/resources/surveys/>. The multiplier to calculate the addition to construction costs comes from Development Planning and Financing Group, *Impact Fee Handbook* (Washington, DC: National Association of Home Builders, 2016). Both series in this figure are presented in nominal dollars—i.e., not adjusted for inflation.

Taken alone, the impact fees in figure 1 underestimate the full impact of exactions. Exactions portend other costs, such as carrying costs (ongoing expenses of owning property, such as mortgage payments and property taxes), administrative costs, and the costs of putting construction workers and equipment on hold while waiting for permit approval (which is often contingent on satisfying exactions). Research from the National Association of Home Builders (NAHB) shows that every \$1,000 in exactions imposed increases the total costs to builders by \$1,390.<sup>7</sup> Figure 1 also plots these additional costs, which ranged from around \$6,900 in 2004 to nearly \$12,700 in 2019. The NAHB notes that builders pass most if not all this cost on to the homebuyer, so the addition to construction costs likely caused an increase in home prices as well.<sup>8</sup> A study by UC Berkeley's Turner Center for Housing Innovation of seven urban and suburban California cities with strong development activity finds that exactions can add anywhere from 6 to 18 percent to the median home price.<sup>9</sup>

Exactions vary by state and by locality (see figure 2). California localities have the highest average total exactions in the sample, at \$29,587 per home, followed by Oregon (\$16,712) and Maryland (\$12,903). The state with the lowest average total exactions in the sample is Missouri, at \$831 per home. Livermore, California, has the highest average total exactions in the sample, at almost \$81,293 per home, whereas Mesquite, Nevada, has the lowest, at \$43.

Overall, exactions increased over the 16-year study period, owing largely to a proliferation in the types of exactions charged and an increase in their amounts. As

**Figure 2. Average Total Exactions by State and Locality (2019)**



Source: Duncan Associates, "Surveys," ImpactFees.com, accessed February 12, 2025, <https://www.impactfees.com/resources/surveys/>.

figure 3 shows, the percentage of localities charging any type of exaction grew over time. For example, the number of localities charging exactions for fire and police grew by 11 and 13 percent, respectively, from 2004 to 2019. These categories had the largest increases of all exaction types.

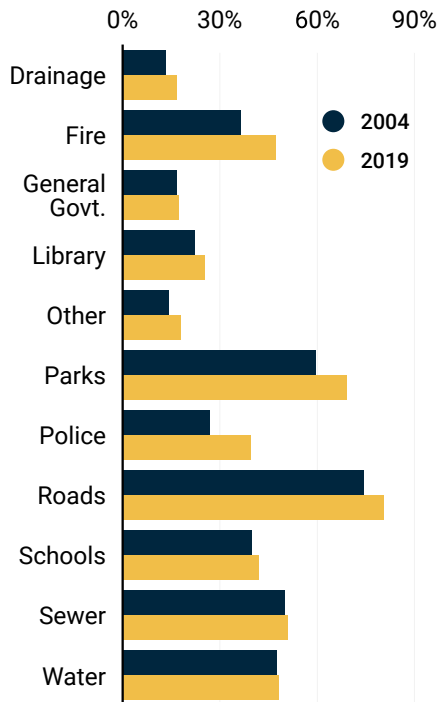
In addition to more types of exactions being charged, the average exaction amounts increased, too, particularly for schools and general government (see figure 4). In these categories, the average exaction nearly doubled or tripled in the 15-year period. Road, sewer, and water exactions also grew considerably.

## How Exactions Started—and How Governments Started to Use Them Improperly

Exactions first appeared in Hinsdale, Illinois, in 1947. As the country experienced a population boom, other local governments followed suit in the 1950s and 1960s.<sup>10</sup> At the time, governments used exactions mainly to fund new water and sewer infrastructure.<sup>11</sup> The idea was to avoid imposing the costs of growth on existing residents.

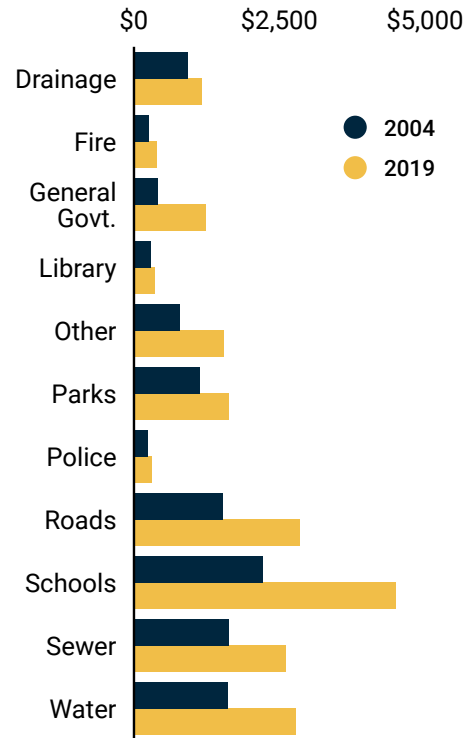
In the 1970s and 1980s, governments began using exactions to address political, economic, and financial

**Figure 3.** Percentage of Localities Charging Different Types of Exactions (2004 v. 2019)



Source: Duncan Associates, "Surveys," ImpactFees.com, accessed February 12, 2025, <https://www.impactfees.com/resources/surveys/>.

**Figure 4.** Average Exaction by Type (2004 v. 2019)



Source: Duncan Associates, "Surveys," ImpactFees.com, accessed February 12, 2025, <https://www.impactfees.com/resources/surveys/>.

constraints. As inflation pushed up home values and property taxes while wages stagnated, an antitax revolution pressured states to limit local property tax increases.<sup>12</sup> Additionally, local governments started to receive fewer federal and state grants.<sup>13</sup> With fewer revenue sources, local governments increasingly relied on development exactions to fund public goods during another population boom.<sup>14</sup>

### Litigation, a Lack of State Guidance, and the Need to Protect Property Rights

In the 1970s and throughout most of the 1980s, states provided minimal guidance concerning the types or amounts of exactions that local governments could impose on development.<sup>15</sup>

It was during this period that the Supreme Court set the first important constitutional limit on exactions. In *Nollan v. California Coastal Commission* (1987), the Court said that local governments must prove an

essential nexus—that the exaction is related to an actual impact that the proposed development would have on community resources.<sup>16</sup> Seven years later in *Dolan v. City of Tigard* (1994), the Court held that local governments must also show that an exaction is roughly proportional to the impact—that it does not exceed an impact-mitigation standard.<sup>17</sup> *Koontz v. St. John's River Water Management District* (2013) confirmed that the nexus and proportionality tests apply to demands for money as well as land, and *Sheetz v. County of El Dorado* (2024) confirmed that these tests apply to demands imposed by all branches of government.

In response to *Nollan* and *Dolan*, states crafted legislation enabling local governments to impose exactions and purporting to guide their proper implementation. As of 2018, 29 states had such enabling acts.<sup>18</sup> Unfortunately, these statutes were poorly crafted in many instances.

Although most restrict the types of exactions that may be imposed on new development, many replace the essential nexus and rough proportionality requirements with a much more deferential standard, and few

provide guidance on establishing maximum fees. And even though *Nollan* and *Dolan* place the burden on the government to justify an exaction, eight states do not require localities to do a written analysis before imposing an exaction.<sup>19</sup> Additionally, some terms and principles—such as “reasonably related impacts”—are

not well defined, leading to localities’ improperly interpreting them to expand their exaction authority. Poor maintenance of public infrastructure, for example, cannot be a sufficiently related impact caused by a new home because the disrepair would exist regardless of the new development.<sup>20</sup>

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## What an Improperly Assessed Exaction Looks Like

**A**lthough constitutionality is determined on a case-by-case basis, three indicators can show that an exaction lacks an essential nexus or proportionality under *Nollan* and *Dolan*. Typically, an improperly assessed exaction will (1) be an outlier in comparison with similar exactions elsewhere, (2) be broadly applied to building projects in an indiscriminate manner, and (3) shift payment for pre-existing problems and problems caused by other development. *Sheetz v. County of El Dorado* provides an example of this type of exaction.

First, George Sheetz argued that the exaction was an outlier: El Dorado, County, California, charged him a \$23,420 traffic impact mitigation fee in 2016 to get a permit to build a small manufactured house for him and his family to live in on his property.<sup>21</sup> The fee was the largest in the country by a significant margin, according to a 2015 national survey of impact fees for single-family homes.<sup>22</sup>

Second, Sheetz argued that the fee was indiscriminately applied and that the amount of the fee was exorbitant and had no connection to actual development impacts. His project was small, and the county made no determinations as to the nature and extent of the traffic impacts Sheetz’s proposed home would have on state and local roads.<sup>23</sup> Instead, it imposed a pre-determined fee pursuant to a legislatively adopted fee schedule, which deemed that all single-family

homes—regardless of size, location, and other factors—have an identical impact on roads.<sup>24</sup>

Finally, Sheetz argued that the fee was used to pay for pre-existing problems and problems caused by other development. The county had barred itself from using tax revenues to offset traffic impacts from new development, so it had been relying on impact fees to fund road improvements.<sup>25</sup> But a county-commissioned study showed that impact fees would discourage nonresidential land uses (such as office, retail, and industrial),<sup>26</sup> so the county shifted most of the fees used to mitigate nonresidential costs onto new residential projects like Sheetz’s house.<sup>27</sup> Despite the study’s finding that residential uses cause 60 percent of vehicle traffic and nonresidential uses cause 40 percent, the county imposed 84 to 94 percent of the fees for addressing nonresidential traffic impacts on new residential projects.<sup>28</sup>

The Supreme Court vindicated Sheetz’s right to challenge the impact fee in 2024 by holding that legislative exactions are subject to *Nollan* and *Dolan*: Local governments and legislatures cannot impose exactions like the one Sheetz was charged to get his building permit unless they can show that the fee satisfied the essential nexus and rough proportionality requirements. However, the Court did not rule on whether the fee was improperly assessed, sending the case back to the California courts to determine whether the fee violated those tests.<sup>29</sup>

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## Exactions, Construction Delays, and the Housing Crisis

**A**s discussed earlier, exactions increase housing costs. Because a building permit’s cost often exceeds its associated impact fees, many developers opt to pay the fees and pass them along

to the homebuyer.<sup>30</sup> However, individuals like Sheetz, who seek to build on their own property for personal use, have no such option. For those owners, paying an improperly assessed exaction is costly—and so is

challenging it, which can delay construction and add holding and litigation costs.

For example, in *Rimmer v. City of Edmonds, WA* (2024), Nathan Rimmer challenged an exaction imposed on the issuance of a permit to build a home on his small lot. He waited nearly two years for a court to declare the exaction unconstitutional and to direct the city to issue the building permit.<sup>31</sup> The delay came from challenging the city's requirement that, as a condition of removing a small ornamental tree in the middle of his property, he must give the city a portion of his land to plant two new native trees on.<sup>32</sup> Rimmer won with the assistance of Pacific Legal Foundation (PLF), but he incurred more than \$140,000 in carrying costs and other damages owing to the delay, which he is currently seeking reimbursement for from the city.<sup>33</sup>

Similarly, in *Pilling v. City of Healdsburg, CA* (2024), Jessica and Chris Pilling waited nearly two years to build a new family home and accessory dwelling unit (ADU) on their property while they challenged (with PLF's help) an affordable housing impact fee of more than \$20,000.<sup>34</sup> Although the city eventually settled,

the family forfeited an estimated \$53,000 in rental income and missed out on favorable construction loan rates.<sup>35</sup> Preventing the Pillings from renting out a new ADU and their existing duplex also did nothing to satisfy the need for additional housing in the city, an ironic consequence of an impact fee designed to expand affordable housing.

The fight against unconstitutional exactions is ongoing. Mike Colosi is still waiting to build on his 5.07-acre property after purchasing it in March 2024. He plans to develop and build a single-family home on no more than two acres while preserving the rest for the land's natural beauty. However, Charlotte County wants to charge Colosi a nearly \$139,000 endangered species impact fee based on the size of all his land.<sup>36</sup> If Colosi's property were just 0.07 acres smaller or if he were charged on just the land he intended to develop, he would pay considerably less—either \$23,000 or \$62,000. With PLF's help in *Colosi v. Charlotte County* (2024), he is arguing the fee is unconstitutional because it is based on an arbitrary fee schedule and property size, not on carefully measured, actual impacts.

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## How States Can Help

Courts have held that requiring owners to mitigate a development's impacts is a valid exercise of the government's police powers, but that exactions that fail to satisfy the standards of essential nexus and proportionality violate individuals' Fifth Amendment rights. Exactions also add to construction costs and can, in turn, increase new home prices. Challenging exactions often delays new construction, which also exacerbates today's housing crisis. State legislatures can help.

First, states can give property owners and builders an easier and faster way than litigation to defend themselves against unconstitutional exactions. States can allow developers to ask local governments for individual determinations of whether an exaction is sufficiently related in nature and extent to a proposed project's specific adverse impacts. The government would have to respond with a written analysis specific to the proposed project. PLF's model bill, the Safe Harbor from Excessive Exactions Act, is a helpful template for legislators interested in this solution.<sup>37</sup>

Second, states can review and strengthen their enabling acts, which have not reliably prevented unconstitutional exactions. Some states may need to set maximum fees that local governments can charge or require localities to provide a written analysis before charging an exaction to a building project. Also, states can better define terms and principles, such as "reasonably related impacts," to be in line with constitutional guardrails.

By following these steps, states can help ensure that their localities are carefully crafting and administering exactions. Doing so will make sure the impacts of building new housing are properly accounted for while not unnecessarily hampering or driving up the cost of construction during the present housing crisis. Taking these steps will also protect property rights from being violated by improperly assessed exactions.

## Notes

1. Development Planning and Financing Group, *Impact Fee Handbook* (Washington, DC: National Association of Home Builders, 2016).
2. W. Andrew Gowder, Jr., and Bryan W. Wenter, "Recent Developments in Exactions and Impact Fees," *Urban Lawyer* 41, no. 3 (2009): 513–28.
3. Justice Antonin Scalia called these unconstitutional fees "an out-and-out plan of extortion." James Burling, "The Constitutionality of Legislatively Imposed Exactions," Pacific Legal Foundation, February 21, 2024, <https://pacificlegal.org/the-constitutionality-of-legislatively-imposed-exactions/>; "Supreme Court Rules against Extortionate Permit Fees," Pacific Legal Foundation, accessed February 12, 2025, <https://pacificlegal.org/case/sheetz-permit-extortion-scotus/>.
4. Brian Hodges and Ethan Blevins, "Development Impact Fees: Frequently Asked Questions," Pacific Legal Foundation, June 11, 2024, <https://pacificlegal.org/development-impact-fees-frequently-asked-questions/>.
5. The sample of 175 localities is distributed as follows: 45 (FL), 28 (AZ), 13 (CO), 9 (MD), 8 (CA, TX, WA), 7 (NM), 5 (OR), 4 (UT, WI), 3 (AR, NC, SC, TN), 2 (GA, ID, KS, NH, NV, VA, VT), and 1 (DE, IL, IN, LA, MO, MT, NE, OH, PA, WV).
6. For other important information on the methodology and assumptions, see Duncan Associates, "Surveys," ImpactFees.com, accessed February 12, 2025, <https://www.impactfees.com/resources/surveys/>.
7. Development Planning and Financing Group, *Impact Fee Handbook*, 28.
8. Development Planning and Financing Group, 28.
9. The seven cities are Berkeley, Fremont, Irvine, Los Angeles, Oakland, Roseville, and Sacramento. Sarah Mawhorter, David Garcia, and Hayley Raetz, *It All Adds Up: The Cost of Housing Development Fees in Seven California Cities* (Berkeley, CA: Turner Center for Housing Innovation, March 2018), 3.
10. Andrew T. Carswell, *The Encyclopedia of Housing*, 2nd ed. (Los Angeles: SAGE Publications, 2012), 384–85.
11. Carswell, *Encyclopedia of Housing*, 384–85.
12. Arthur C. Nelson and Mitch Moody, *Paying for Prosperity: Impact Fees and Job Growth* (Washington, DC: Brookings Institution Center on Urban and Metropolitan Policy, June 2003); Federal Reserve Bank of St. Louis, "Median Sales Price for New Houses Sold in the United States," last updated February 26, 2025, <https://fred.stlouisfed.org/series/MSPNHSUS>.
13. Duncan Associates, "Home," ImpactFees.com, accessed February 12, 2025, <https://www.impactfees.com/>. Click on "read more." Development Planning and Financing Group, *Impact Fee Handbook*.
14. Newport Partners and Virginia Polytechnic Institute and State University, *Impact Fees and Housing Affordability: A Guide for Practitioners* (Washington, DC: US Department of Housing and Urban Development, June 2008).
15. Arthur C. Nelson et al., *Proportionate Share Impact Fees and Development Mitigation* (New York: Routledge, 2022).
16. "Supreme Court Affirms Property Owners' Protections from Illegal Permitting Conditions," Pacific Legal Foundation, accessed February 12, 2025, <https://pacificlegal.org/case/nollan-v-california-coastal-commission/>; "There's No 'Off Site' Exception to Fifth Amendment's Takings Clause," Pacific Legal Foundation, accessed February 12, 2025, <https://pacificlegal.org/case/st-johns-river-water-management-district-v-koontz/>.
17. Dolan v. City of Tigard, 512 U.S. 687 (1994).
18. Clancy Mullen, *State Impact Fee Enabling Acts* (Austin, TX: Duncan Associates, 2018), 1, <http://impactfees.com/publications%20pdf/1stateacts.pdf>.
19. These eight states are CO, FL, HI, ME, MD, NH, WA, and WV. Mullen, *Enabling Acts*, 7, table 4.
20. Mullen, *Enabling Acts*, 2.
21. "Supreme Court Rules against Extortionate Permit Fees," Pacific Legal Foundation.
22. Clancy Mullen, *National Impact Fee Survey: 2015* (Austin, TX: Duncan Associates, 2015). In El Dorado County, California, the traffic impact fee for single-family homes was \$22,404. By comparison, the average traffic impact fee for single-family homes was \$3,562 across all localities in the survey, \$6,272 in California, and \$7,013 in neighboring Sacramento County.
23. Sheetz v. Cnty. of El Dorado, 84 Cal. App. 5th at 394, 402 (2022).
24. Sheetz, 601 U.S. at 272.
25. El Dorado County, *El Dorado County General Plan Traffic Impact Mitigation Fee Program: Draft Supplement to the El Dorado County General Plan Environmental Impact Report*, March 2006, 21, <https://www.eldoradocounty.ca.gov/files/assets/county/v/1/documents/land-use/transportation/tim/2006/tim-fee-dseir.pdf>; Sheetz, 84 Cal. App. 5th at 401–02, 416.
26. El Dorado County, *2004 General Plan Traffic Impact Mitigation (TIM) Fee Program Final Report (Development Fee Technical Report)*, September 14, 2005, 6.
27. El Dorado County, *2004 General Plan Traffic Impact Mitigation*, 6.
28. El Dorado County, 6.
29. Hodges and Blevins, "Development Impact Fees: Frequently Asked Questions."
30. Koontz v. St. John's River Water Management District, 570 U.S. at 605 ("So long as the building permit is more valuable than any just compensation the owner could hope to receive for the right-of-way, the owner is likely to accede to the government's demand, no matter how unreasonable").
31. Rimmer v. City of Edmonds, Plaintiff's Reply in Support of Motion for Summary Judgment re: Liability for Violation of Federal Constitutional Rights Under 42 U.S.C. § 1983, December 11, 2024, 2, <https://pacificlegal.org/wp-content/uploads/2024/01/Nathan-Rimmer-v.-City-of-Edmonds-WA-PLF-Reply-in-Support-of-Motion-for-Summary-Judgement-12.5.2024.pdf>.

## Notes

32. "Defeating Extortionate 'Forever Tree' Permit Conditions to Build Family Home," Pacific Legal Foundation, accessed February 12, 2025, <https://pacificlegal.org/case/rimmer-housing-forever-trees/>.
33. Carrying costs estimate is per settlement communication in the case. Source available upon request.
34. "Entrepreneur Mom Fights Zoning Extortion to Build New Housing in California," Pacific Legal Foundation, accessed February 12, 2025, <https://pacificlegal.org/case/pilling-healdsburg-inclusionary-zoning/>.
35. Rental income loss estimate is per settlement communication in the case. Source available on request.
36. Charlotte County, "Scrub Jay Habitat Conservation Plan (HCP) Fees 2025, news release, December 19, 2024, <https://www.charlottecountyfl.gov/departments/community-development/notices/scrub-jay-habitat-conservation-plan-hcp-fees-2025.stml>.
37. Pacific Legal Foundation, *The Safe Harbor from Excessive Exactions Act*, n.d., <https://pacificlegal.org/wp-content/uploads/2024/11/Safe-Harbor-from-Excessive-Exactions.pdf>.





**Kyle Sweetland** is a strategic research manager at Pacific Legal Foundation. He provides research on issues involving government interference in Americans' constitutional property rights.



**Brian Hodges** is a senior attorney in Pacific Legal Foundation's property rights practice, where he focuses on cases involving liberty-based solutions to the housing crisis and defending the right of individuals to make reasonable use of their property, free of unnecessary and oppressive regulation.

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