



PACIFIC LEGAL FOUNDATION
Rescuing Liberty from The Grasp of Government

Litigation Backgrounder

Want A Building Permit? Then Give Up Your Right to Vote!
[Unconstitutional Exactions]

[T]he government has transformed the police power into an efficient way to raise money by regulating political minorities and then selling exemptions from the regulatory scheme.... The government, in effect, says: We have the power; therefore, pay us to leave you alone. By any measure, that is extortion. Moreover, it turns the takings clause on its head. Instead of the government having to pay compensation to property owners, the government now wants property owners to compensate it to get back the fair value of property the government took away....

–Justice Janice Rogers Brown¹

INTRODUCTION

Throughout history, Americans have put a high value on their right to vote, and in particular, their right to vote on tax increases. In California, thanks to Propositions 13 and 218, property owners are guaranteed the right to vote on property assessments. But that hasn't stopped the city of Carlsbad from demanding that property owners who want a permit to renovate their homes to sign an agreement waiving their right to vote on assessments.

On August 14, 2006, the Pacific Legal Foundation filed a lawsuit on behalf of Craig and Robin Griswold, a couple who were forced to sign an agreement not only giving up their right to vote on property assessments, but also giving up that right on behalf of anyone to whom they might later sell or give the property. In a brazen violation of the state and federal constitutions, the city requires homeowners to sign a waiver whenever the city estimates their renovations at more than \$75,000. “This is the very definition of unconstitutionality,” says PLF Attorney Meriem L. Hubbard. “The government simply cannot demand that you to give up a fundamental right, or pay for permission to build on your own property.”

The Carlsbad case is unfortunately typical of the abuses of government's power to regulate land—a situation lawyers call the “exactions” problem. Across America, state and local governments are leveraging their permit powers to demand ever greater payouts from landowners. Although the Supreme Court has criticized these schemes as being “out-and-out plan[s] of extortion,”² local governments are requiring property owners to pay more and more for

Headquarters: 3900 Lennane Drive, Suite 200, Sacramento, CA 95834 (916) 419-7111 Fax: (916) 419-7747
Alaska: 121 West Fireweed Lane, Suite 250, Anchorage, AK 99503 (907) 278-1731 Fax: (907) 276-3887 • Oregon: (503) 241-8179
Atlantic: 1320 South Dixie Highway, Suite 1105, Coral Gables, FL 33146 (305) 667-1677 Fax: (305) 667-7773
Hawaii: P.O. Box 235856, Honolulu, HI 96823-3514 (808) 733-3373 Fax: (808) 733-3374
Washington: 10940 NE 33rd Place, Suite 109, Bellevue, WA 98004 (425) 576-0484 Fax: (425) 576-9565
E-mail: plf@pacificlegal.org • Web Site: <http://www.pacificlegal.org>

their right to build, either by giving up land, or even by paying cash outright. “In this case,” says Hubbard “the city has tried to just make an end-run around the state constitution’s rules about property taxes. Demanding people give up their right to vote? It’s the most extreme form of exaction we’ve seen yet.”

THE GRISWOLDS

Craig and Robin Griswold have lived in their home since 1999, shortly after Craig’s father, who originally owned the home, passed away. But the home has long needed renovation. “It was always way too small,” he says. “The house had never been expanded since it was built in the ‘50s. We have four kids, plus grandkids—one here already, and three on the way—and when they come to visit, we don’t have enough room.” Griswold, a criminal defense lawyer, and Robin, a homemaker and registered nurse, added one room to the house a few years ago, but the city did not believe the renovation cost more than \$75,000, so the city did not require them to sign the “Neighborhood Improvement Agreement” (described below) that waives their right to vote on property assessments.

But that changed when the Griswolds sought permission to expand their home again. Because the city estimated that their renovations would exceed \$75,000, it demanded that the Griswolds pay an assessment for “necessary improvements,” or sign the Agreement. “I think this is just an outrage,” says Criag Griswold. “And it’s not just happening to me. These proposed assessment districts are all over the city. My brother, who lives down the street, was also forced to sign one of these agreements.” The Griswolds contacted the Pacific Legal Foundation, which offered to represent them in challenging constitutionality of the city’s scheme.

HOW CARLSBAD’S “NEIGHBORHOOD IMPROVEMENT AGREEMENTS” VIOLATE THE CONSTITUTION

California’s Constitution sets out very clear standards that local governments have to follow when requiring property owners to pay assessments—which differ from taxes, in that assessments are paid by particular property owners for improvements that benefit those properties. First, the local government must form an Assessment District, which is a government body that makes the decisions on how much property owners in that area must pay. The property owners have the constitutional right to vote on the formation of the assessment district. Second, the property owners also have the right to vote on whether assessments should be charged. The rule is very strict: “No tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership” except under through these procedures.³

But in 2000, the Carlsbad City Council enacted an ordinance⁴ that requires any property owner whose construction or renovation is expected to cost more than \$75,000, to pay the cost of “necessary improvements,” including street and sidewalk upgrades. The city calls this a fee, but in fact it is an assessment—that is, a charge imposed in exchange for improvements which benefit that particular property. Under the California Constitution, the city is required to form an

assessment district before imposing this assessment, but the city requires property owners to pay it before receiving a permit—without forming an assessment district. The city is hoping to avoid the Constitutional requirements by simply calling the assessment something else.

What’s more, the city decides whether the construction or repair costs \$75,000, not on the basis of the owner’s actual costs, but by estimating the square footage of the project and multiplying it by a figure that the city claims represents the average cost of labor in the county. If the city doesn’t think a person’s construction or repair costs \$75,000, that person is not required to pay any “necessary improvement” cost. These costs can be very extreme. When the Griswolds sought permission to add two bedrooms, a bathroom, and a family room to their house, the city ordered them to pay \$114,979 for “improvements” such as paving, sidewalk, curb and gutter construction, and underground and overhead utilities.

REQUIRING PEOPLE TO GIVE UP THEIR RIGHT TO VOTE

Perhaps recognizing that these costs would prohibit most people from building, the city created a waiver, called a “Neighborhood Improvement Agreement.”⁵ The Agreement explains that under the California Constitution, property owners like the Griswolds are entitled to vote both on the creation of an assessment district and on whether that district imposes assessments—but requires the Griswolds to give the city the right to cast their votes for them as a “proxy.” The Agreement declares:

In consideration for the approval of the Development Permit prior to the construction of the improvements, Owner hereby consents to and approves of...

A. the inclusion of the Property in an assessment district which may be formed by the City Council of the City for the purpose of financing the construction of the improvements (the "Assessment District");

B. the levy of an assessment against the Property....

Owner hereby grants to the City a proxy to act for an on behalf of Owner, the Owner's successors, heirs, assigns, and/or transferees for the limited purpose of completing and submitting an assessment ballot in support of the levy of the Assessment in the proceedings to form the Assessment District...⁶

The Agreement doesn’t just apply to the property owner who signs it, but also to “each and every” person who later buys or receives that land, and “shall be irrevocable.”⁷

And the Agreement even requires property owners such as the Griswolds to promise not to sue:

Owner hereby waives Owner’s rights under the Assessment Law to...submit an assessment ballot in support of or in opposition to the imposition of the Assessment...[or to] file or bring any protest, complaint, or legal action of any

nature whatsoever challenging the validity of the proceedings to form the Assessment District and/or the validity of the imposition of the Assessment on the Property.⁸

HOW DEVELOPMENT PERMITS ARE ABUSED

Building permits are nothing new. Government requires them to ensure that construction is performed safely, and in an orderly manner. It's part of the government's "police power": the power to protect the public's health and safety. But sometimes government officials are tempted to use that power to extract money or property from citizens instead. In the 1987 case of *Nollan v. California Coastal Commission*, for example, the Nollan family was ordered to give up an easement—allowing the public to walk across beachfront property—in exchange for a permit to construct a new home. The Supreme Court declared that this was unconstitutional extortion. "[T]he situation," the Court said, "becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury."⁹

The *Nollan* decision explained that although government may require property owners to pay certain costs that are associated with construction—for example, they may be required to "mitigate" problems that their projects cause in the neighborhood—they cannot be required to pay for things that are unrelated to their projects. For example, if a homeowner wants to construct a new house, he might be required to pay for the installation of a new driveway, but the city can't use this as an opportunity to extort the homeowner into paying for the construction of a new theater, because such a condition would not be related either in nature or in extent to the impact of the development. Likewise, if a developer wants to construct a hundred new homes in a city, the city may require as a condition that the developer pay some of the costs for new road construction to handle the increased traffic. But the developer can't be required to construct a new airport, or to pay for a new city hall, or simply to hand over a large amount of money to the city, because these would not be related to—or, in the Supreme Court's terminology, would have no "nexus" with—the burden on society created by the development. If the government required these kinds of conditions, it would be taking property from people without just compensation.

The Supreme Court clarified in *Dolan v. City of Tigard*¹⁰ that not only must the conditions on a building permit have some relationship to the burden created by development, but the amount that government charges for a building permit must also be limited. Government officials "must make some sort of individualized determination that the required [condition] is related both in nature and extent to the impact of the proposed development," said the Court.¹¹

In short, the *Nollan* and *Dolan* cases mean that government is not allowed to exploit its power to require building permits as an opportunity to force property owners to give up money or their land. "The Supreme Court has made it clear that bureaucrats can't use their permitting powers as an opportunity to make money," says PLF Attorney Timothy Sandefur.

Unfortunately, local officials routinely ignore these legal standards. "Politicians don't want to be blamed for raising taxes, so they just require individual property owners to shoulder these costs. That's not fair. The costs of government are supposed to be borne by everyone equally." In one recent case, the city of Elk Grove, California demanded that landowners

Jeanette Banzon and Muhammed Ahmad pay \$240,360 and dedicate a portion of their land for municipal landscaping in exchange for a permit to build one single-family residence on their land.¹² (After Pacific Legal Foundation filed a lawsuit on behalf of Banzon and Ahmad, the city backed down and settled the case.) In another case, the California Coastal Commission has demanded that the owners of a condominium complex pay \$1.5 million for the permit to construct a seawall needed to prevent the complex from falling into the sea. That case is now before a superior court judge in Monterey.¹³

HOW THE FEDERAL CONSTITUTION PROTECTS THE RIGHT TO VOTE

The Fourteenth Amendment to the Federal Constitution declares that no state may deprive any person of the equal protection of the laws. Among other things, this clause forbids states from interfering with the right to vote, a right that the Supreme Court has repeatedly declared to be a fundamental right. In addition, the Twenty-Fourth Amendment, which was enacted in 1964, prohibits states from using poll taxes to interfere with a person's right to vote in federal elections.

In the 1966 case of *Harper v. Virginia State Board of Elections*,¹⁴ the Supreme Court declared that the Fourteenth Amendment forbids states from using poll taxes even in state elections. The Equal Protection Clause prohibits states from "mak[ing] the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth."¹⁵

But the Carlsbad Ordinance makes wealth a qualification for voting. People who can afford to pay for "necessary improvements" upfront are allowed to keep their right to vote on property assessments, while people who cannot are required to sign the Neighborhood Improvement Agreement and waive their right to vote. "The agreement requires homeowners to pay a ransom for their right to vote," says Sandefur. "The Griswolds were essentially told, 'pay us \$140,000 and you can exercise your right to vote on assessments, and if you can't afford it, then you have to give up that right.' That's a poll tax, and it's unconstitutional."

WHY IS THIS LAWSUIT IMPORTANT?

The right to private property means that people should have the freedom to do with their land what they want, so long as they don't harm other people. Government can ensure that people don't violate their neighbors' rights, but it should not be free to use that power as an opportunity to extort money out of homeowners. As former California Supreme Court Justice Janice Rogers Brown noted, when government orders property owners to give up their land or to pay exorbitant amounts of money as a condition for receiving a permit, it is "transform[ing] the police power into an efficient way to raise money by regulating...and then selling exemptions from the regulatory scheme.... The government, in effect, says: We have the power; therefore, pay us to leave you alone. By any measure, that is extortion."¹⁶ This is the very definition of abusive government.

The Supreme Court has explained that the Fifth Amendment "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.”¹⁷ When city officials force property owners to give up their money or their land in exchange for a permit, they are forcing particular individuals to pay the costs of government by themselves—costs which ought to be shared equally by everyone in society.

What’s more, when government imposes expensive conditions on development permits, homes become more expensive to construct. In fact, recent research shows that the single largest reason for the high cost of homes in America is the cost of permission to build.¹⁸ And the burden of this increased cost falls on people looking to fulfil the American dream of home ownership. In California, the median price of a house was more than \$509,000 in May, 2005, an increase of more than 12.5 percent in a single year. In some counties, the cost of new homes has increased by more than 60 percent in three years.¹⁹ Yet while the price of home has exploded, the cost of the labor and materials that go into constructing them has not increased significantly. Instead, the rising cost of housing is due to the cost of permits.

In California, exorbitant development fees have become routine. One state government report noted that “permit fees, development fees, dedications, in-lieu fees, and exactions” have become an “integral part of California’s fiscal landscape.”²⁰ In 1999, residential development fees cost *between \$4,000 to \$60,000 per house*,²¹ and are usually between \$20,000 to \$30,000 per dwelling.²² In Contra Costa County, the construction of a 45-unit apartment building costs \$920,000 in development fees alone!²³ These fees account for an average of ten percent of the price of the average single family house. And these fees are higher in lower-cost homes than in expensive neighborhoods.²⁴

Costs like these make homes more expensive to build, and therefore restrict the supply of new housing.²⁵ In fact, the cost—and the delays—involved in getting permits is so high that, as economists John M. Quigley and Steven Raphael of U.C. Berkeley recently concluded, “cities with the greatest increase in housing demand experienced the lowest increases in new housing supply.”²⁶ And the burden falls hardest on low and middle income families. As economists Brett M. Baden and Don L. Coursey point out, permit conditions “not only...represent a higher percentage of the sale cost of a lower-priced home than a higher-priced home, but they also may encourage developers to build higher-priced houses, thus pricing lower-income families out of suburban neighborhoods.”²⁷

THE UNCONSTITUTIONAL EXACTIONS PROJECT

The Pacific Legal Foundation has been at the forefront of this issue since 1987, when PLF attorneys represented the Nollan family in the groundbreaking case of *Nollan v. California Coastal Commission*. Since then, PLF attorneys have participated in every major case involving building permit exactions. Under the leadership of Principal Attorney Meriem L. Hubbard, PLF’s Unconstitutional Exactions Project seeks to stop government from imposing punishing costs on property owners who wish to develop their property.

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. The Griswolds are represented by PLF attorneys Meriem L. Hubbard, Timothy Sandefur, and Scott Sommerdorf. This backgrounder was prepared by Timothy Sandefur.

For more information, or to arrange interviews with PLF attorneys and their clients, please contact:

Harold E. Johnson
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, CA 95834
Phone: (916) 419-7111
Fax: (916) 419-7747
E-mail: hej@pacificlegal.org

Notes

1. *San Remo Hotel L.P. v. City And County of San Francisco*, 27 Cal.4th 643, 697-98 (2002) (Brown, J., dissenting).
2. *Nollan v. California Coastal Com'n*, 483 U.S. 825, 837 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584 (1981)).
3. Cal. Const. Art. XIIIID § 3.
4. Ordinance NS-555 (2000).
5. City Resolution 2000-237 § 2(G) (July 25, 2000).
6. Agreement, §§ 3.01-3.02.
7. *Id.*
8. *Id.* §§ 4.02(A)(1) and (2).
9. *Id.* at 837.
10. 512 U.S. 374 (1994).

11. *Id.* at 391.

12. *See*

http://www.pacificlegal.org/view_SearchDetail.asp?tid=Release&sField=ReleaseID&iID=313.

13. *See*

http://www.pacificlegal.org/view_SearchDetail.asp?tid=PLFCase&sField=CaseID&iID=388

14. 383 U.S. 663 (1966).

15. *Id.* at 666.

16. *San Remo Hotel*, 27 Cal.4th at 697-98 (Brown, J., dissenting).

17. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

18. Edward L. Glaeser, *et al.*, “Why Have Housing Prices Gone Up?” *American Economic Review* (2004) available at

http://post.economics.harvard.edu/faculty/glaeser/papers/Housing_Prices.pdf; “Sheltered Market,” *The Economist*, Feb 10th 2005,

http://www.economist.com/finance/displayStory.cfm?story_id=3645178.

19. “Median Price of A Home in California Breaks \$500,000 for First Time in April, Sales up 2.7 Percent, C.A.R. Reports,” California Association of Realtors, May 24, 2005

<http://www.car.org/index.php?id=MzQ5NjE=>.

20. Department of Housing and Community Development, *Pay to Play: Residential Development Fees in California Cities And Counties* (Aug. 2001), p. 1,

http://www.hcd.ca.gov/hpd/pay2play/fee_rpt.pdf

21. *Id.*

22. Public Policy Institute of California, Research Brief No. 9 (June 1997) p. 1

http://www.ppic.org/content/pubs/rb/RB_697SSRB.pdf

23. *Pay to Play*, p. 2.

24. *Id.*

25. As Professor Paul Boudreaux writes, “new construction has slowed precipitously. In the 1950s, they find, the rate of new construction was about 40 percent in 102 selected metropolitan areas. By the 1990s, however, the rate had fallen to 14 percent and was, ironically, only about half that high in some of the highest-priced markets: Los Angeles, San Francisco, and New York.” Paul Boudreaux, “The Three Levels of Ownership: Rethinking Our Restrictive Homebuilding Laws,” *Urban Lawyer* vol. 37 pp. 387-88 (Summer, 2005).

26. John M. Quigley and Stephen Raphael, "Regulation And The High Cost of Housing in California." http://www.aeaweb.org/annual_mtg_papers/2005/0107_1430_0201.pdf.

27. "An Examination of The Effects of Impact Fees on Chicago's Suburbs," http://harrisschool.uchicago.edu/About/publications/working-papers/pdf/wp_99_20.pdf pp. 2-3.