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Equalizing Exactions

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Equalizing Exactions

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Date : December 4, 2017

Gregory M. Stein, *Reverse Exactions*, 26 **Wm. & Mary Bill Rts. J.** (forthcoming 2017), available at [SSRN](#).

Some exactions¹ are just bad. By this, I mean that they fail to mitigate the harms they were created to internalize. This struck me recently while I was researching privately owned public open spaces (POPOS), which are often exacted in exchange for a density bonus. Through my research, I determined that POPOS often fail to achieve the goals of good public space, in part because they are often exclusionary. I found myself wondering whether the citizens who were stuck with new dense buildings that block light and air, and who received only a poorly functioning POPOS in exchange, had any legal recourse.

My question, in effect, was whether a neighbor could bring an exactions claim in reverse. I was pleasantly surprised to find that Professor Gregory M. Stein had interrogated this very question in his recent article [Reverse Exactions](#).

Our existing exactions jurisprudence focuses on exactions that are excessive (or, too strong), and thus deprive the project applicant of his or her property rights under the Fifth Amendment. In this creative piece, Professor Stein tackles the opposite situation, wherein a development project is approved subject to exacted concessions, but those exactions are too weak to sufficiently mitigate or internalize the harms associated with the development.

Thus, the project's negative externalities are inflicted on its neighbors, and those neighbors must bear the costs of the harm. In this case, Stein argues, neighbors should have a right to bring what he calls a "reverse exactions claim." This claim would enable these third-party community members to challenge the government's imposition of certain conditions as insufficient, arguing that their property rights have been taken as a result.

Stein begins his article by setting up and critiquing our current exactions jurisprudence. He restates the "essential nexus" and "rough proportionality" tests that the Court has laid out in [Nollan](#) and [Dolan](#), but criticizes the application of these tests. According to Stein, the Court has treated governments that exact conditions as entrepreneurs, instead of as representatives or arbitrators.

Specifically, he takes issue with the [Koontz](#) Court's portrayal of governments negotiating exactions as bad actors. The problem, he suggests, is that governments are not always, or even typically, opportunistically looking to enrich their own communities at the expense of the property owner who is seeking discretionary permits. Rather, governments are more often "functioning as mediators and referees." (P. 19.) Indeed, Stein points out, exactions jurisprudence seems to be unconcerned with the fact that developers often have an incentive to maximize their profits at the expense of their neighbors. Exactions cases are also unique in that they fail to afford the same level of deference to governments that they generally receive in other types of land use decisions.

The problem with current doctrine, posits Stein, is that it leads to governments consenting to development with few or weak conditions that fail to actually mitigate the harms caused by the project. Those governments do this because they are fearful that they will be sued and lose if they propose exactions that are found to be too strong.

Currently, there is no direct way to challenge these overly weak exactions. This leads to an imbalance that favors developers and harms neighbors (and, more broadly, governments). This is where Stein's proposal comes into play.

While he first suggests that the Court could revisit the *Nollan/Dolan/Koontz* line of cases to address the imbalance, he

admits that this is unlikely. Thus, he proposes that instead, courts recognize a reverse exactions claim.

He defines this proposed claim as one that “neighbors can bring against government officials ... [by] argu[ing] that government officials have imposed conditions on an applicant’s development that insufficiently internalize the externalities that the applicant’s project would impose on those neighbors.” (P. 22.) Thus, the neighbors would have a remedy for an “under-exaction,” defined to exist when neighbors are forced to bear those added costs, and thus their property rights are unconstitutionally impaired.

This, it seems, might be the most difficult part of a reverse exactions claim; because it is a type of takings claim, the neighbors must show that they have property rights that are being harmed by the project and its insufficient exactions. For example, Stein suggests that the asserted state interests in *Nollan*, including protecting the public’s beach views and preventing congestion, might not qualify as neighbors’ protected property rights. Thus, in a hypothetical reverse-*Nollan* case, while the neighbors might be able to make out a due process claim, they might not be able to raise a reverse exactions claim.

In contrast, Stein imagines a reverse-*Dolan* situation, wherein the city might allow the Dolans to expand and pave their parking lot while attaching limited exactions that fail to mitigate the increased stormwater runoff that would likely result from the project. In the event that this new impermeable surface directs stormwater onto neighbors’ lots, Stein argues, the neighbors could assert that the city made them give up an easement (allowing the Dolans to flood their land) without compensation. This would constitute the impairment of a property right, and thus the basis of a reverse exactions claim.

Therefore, in order to assert a successful reverse exactions claim—assuming the neighbor can show the taking of a property interest—he or she would first argue (pursuant to *Nollan*) that the proposed exaction fails to substantially advance the goal of mitigating a certain harm that the project would either create or make worse—here, the stormwater runoff. Second, the neighbor would argue that the condition lacks rough proportionality under *Dolan* because it fails to go far enough.

If the court finds that such reciprocal rights exist in a project’s neighbors, and finds that the government has imposed too weak an exaction, Stein suggests a scheme for paying just compensation to the neighbors.

Unlike direct exactions compensation claims, which are paid for by taxpayers, “[a]ny compensation that the government is required to pay to the prevailing neighbors [under a reverse exactions claim] would be charged back to the applicant that benefited unfairly from an exaction that did not adequately offset the negative effect of its project.” (P. 22.) Stein would leave the specific procedures for administering reverse exactions claims to be sorted out by courts and state legislatures.

Through this article, Professor Stein joins the ranks of other creative scholars such as Professors Chris Serkin and Tim Mulvaney, who have suggested that we should not always be so defensive when it comes to takings law, and might instead find ways to use it to reach more progressive ends. Stein does that here; the goal of a reverse exactions claim is that the “fear of litigation from neighbors and not just from applicants may lead to more equitable exactions.” (P. 51.)

1. Exactions are land, fees, or infrastructure that a municipality requires a developer to provide in exchange for a development permit.

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