# The impact of the Sheetz decision in Washington State

By Ezra Hammer and Jamie Howsley

On April 12, 2024, the U.S. Supreme Court issued its ruling in *Sheetz v. County of El Dorado, California*,[1] which affirmed and expanded on its earlier decisions that limit both the type and scope of exactions (fees and other requirements) that local jurisdictions can seek from new developments.

The case involved George Sheetz, who applied for a permit to build his modest 1,854 square-foot prefabricated home on his rural property. El Dorado County, California, charged him an astounding $23,420 traffic impact fee, but did not provide any individualized traffic analysis when assessing the fee. Instead the county merely relied on its fee master plan that was previously adopted by the board of supervisors, which serves as the county legislature.

Sheetz first paid the fee under protest, then sued in state court arguing that the fee was an unconstitutional taking. The state court ruled that because the traffic impact fee had been imposed through the legislative process and authorized by state law, the county was exempt from the U.S. Constitution Fifth Amendment takings analysis that would require the determination of both nexus and proportionality between development exactions (here, traffic fees) and development impacts (here, traffic from the new house).

[1] *Sheetz v. El Dorado County*, 601 US_(2024)

Under Washington law (RCW 82.02.020), jurisdictions are permitted to seek development exactions only when they can "demonstrate [the exactions] are reasonably necessary as a direct result of the proposed development." This requirement broadly mirrors nexus and proportionality. In practice the state law has served to limit the scope and scale of exactions and jurisdictions promulgated fee schedules that broadly relate to project impacts such as traffic, water, sewer, etc. However, in recent years, some cities have strayed from this requirement and now seek development exactions that are only – at best – tenuously connected to the new construction.

Additionally, courts tend to interpret RCW 82.02.020 as codifying this nexus and proportionality requirements.[2] Despite the similarities, state law sets a lower threshold for jurisdictions seeking an exaction. The RCW requires reasonable necessary while the Fifth Amendment requires rough proportionality. This gap, while not large, allows enough daylight for the imposition of exactions that while they are necessary, may not be proportional.

Despite this, the decision by Washington courts to read RCW 82.02.020 as ensuring full compliance with the Fifth Amendment, effectively prohibited Washingtonians from challenging system development charges and other exactions under the Takings Clause. Without that opportunity, Washington builders generally lacked the ability to use the federal court system to challenge unreasonable exactions. This is no longer the case going forward, thanks to *Sheetz* and the *Knick* decisions.

[2] See, *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.,* 160 Wash. App. 250, 255 P.3d 696 (2011).

The Supreme Court unanimously ruled for Sheetz, holding that development fees and exactions imposed on a broad class of property owners through legislative action are subject to the same nexus and proportionality analysis as those applied on an ad hoc basis. This potentially opens up a new avenue for challenges for legislative actions that may be justified under RCW 82.02.020, but still not meeting with the Constitutions nexus or proportionality tests.

The *Sheetz* decision does not, however, impact the state's power to engage in land-use planning. Governments retain substantial authority to regulate land use (i.e. zoning generally) where the regulations advance a legitimate state interest. However, the regulations must do so in a manner that is reasonably necessary to effectuate a substantial government interest. Furthermore, development exactions are permissible so long as they both address an impact that the development causes (i.e., there is a nexus between the impact) and are roughly proportional to that impact.

In a lengthy historical review, the Supreme Court showed that the Takings Clause never distinguished between different types of takings and has been applied to physical takings, regulatory takings, and unconstitutional permit conditions. The Supreme Court noted the Takings Clause applies to all branches of government, and historically, it was legislatures that sought exactions from property owners. As the Supreme Court explained, it is immaterial whether the exaction is authorized by legislation or administrative action. The Supreme Court reasoned that "[a] permit condition that requires a landowner to give up more than is necessary to mitigate harms resulting from new development has the same potential for abuse as a condition that is unrelated to that purpose."

Importantly, the Supreme Court did not address whether the underlying traffic impact fee was valid, instead leaving that to the California courts to sort out. This leaves open the critical question of which exactions are reasonable, and which are not. Additionally, the Supreme Court declined to answer whether the nexus and proportionality analysis must occur at the legislative level (i.e. when jurisdictions enact fee schedules) or at the time of permit issuance. However, these unresolved issues did not go unnoticed by the other justices.

In a concurring opinion, Justice Neil Gorsuch took issue with Supreme Court's decision and emphasized nothing "supports distinguishing between government actions against the many and the few" meaning the door remained open on the question of whether, in the context of impact fees, nexus and proportionality analysis should occur at the time of legislation adoption or permit issuance.

Justice Brett Kavanaugh, joined by Justices Elena Kagan and Ketanji Brown Jackson, wrote on this same issue, emphasizing that the prior Supreme Court takings cases involved permit conditions tailored to specific properties. Justice Kavanaugh cautioned that development exactions imposed through "reasonable formulas or schedules that assess the impact of classes of development rather than the impact of specific parcels of property" are a common government practice that *Sheetz* does not prohibit.

Finally, the concurring opinion of Justice Sonia Sotomayor, with whom Justice Jackson also joins, confirms that neither the Supreme Court nor the California courts considered whether the traffic impact fee would be a compensable taking if it was applied

to property owners that were not seeking a permit. In other words, they question whether a traffic impact fee imposed on existing land uses must be accompanied by a takings analysis.

So where does that leave us? We believe *Sheetz* means four things.

First, Sheetz does not invalidate impact fees outright. Rather, it opens them up to challenges under the Takings Clause for lack of nexus and proportionality. We expect that most impact fees will easily pass this test because Washington law already requires careful analysis prior to adopting fee schedules. While this underlying analysis may not call out nexus and proportionality explicitly, it is likely that it suffices and blanket challenges will be unsuccessful.

Second, fees that lack proportionality will likely need revision. Jurisdictions regularly adopt fee schedules (generally for parks) that include facilities far out of scale with the existing system. These massive projects then "justify" high impact fees. However, since they include infrastructure that far exceeds what existing residents have access to, we believe that these fees are vulnerable to challenge. Also in this bucket are tree removal fees that are punitive in nature and wholly unrelated to the cost of replacement trees.

Third, and most likely unconstitutional, are those exactions that fail the nexus test completely. These are fees and requirements that seek to address wider societal problems such as affordable housing or climate change, but that are unrelated to a particular project. For example, construction excise taxes for regional planning and affordable housing, and inclusionary zoning that requires developers to construct affordable housing, appear to fail the nexus test. Since *Sheetz* confirms there is no exemption from

takings rules for legislative action that would allow governments to impose exactions that lack nexus, there is now no doubt that these sorts of legislative exactions may be held unconstitutional.

Fourth, we expect to see a proliferation of development agreements. While these are generally only used for large projects or in unique situations given they can be costly and time consuming, jurisdictions will likely use them to preempt *Sheetz* challenges in situations where they are uncertain whether particular exactions will stand up to judicial scrutiny. Development agreements give jurisdictions a high level of flexibility and allow them to apply conditions (such as exactions that lack nexus and proportionality) that they would otherwise be barred from imposing.

The Supreme Court has repeatedly affirmed, and does so again in *Sheetz*,, that the governmental taking and exaction authority is not unlimited and remains tethered by constitutional bonds. While *Sheetz* has broad implications for the development process going forward by solidifying the application of takings law to legislative exactions, it leaves some of the more salient questions for future discussion; it remains to be seen exactly how this area of law will ultimately settle. As a result, the impact of *Sheetz* will be felt over the coming years as jurisdictions reevaluate their authority to determine the extent to which they are able to require developers to shoulder the costs of public improvements.

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