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IN THE UNITES STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

JEFF BECK, individually; ROBERT ODENWELLER, individually; TERRI ODENWELLER, individually; AMY WEINBERG, individually, ZAC WEINBERG, individually, ALTA VIEWS, LLC; RIVERVIEW COMPANY, LLC; and on behalf of a class similarly situated persons or entities, Plaintiffs, -vs- CITY OF WHITEFISH, a Montana municipality, and DOES 1-50. Defendants.	Cause No. CV-22-44-M-DLC-KLD **DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

COMES NOW Defendant City of Whitefish ("City") and files this brief in support of its Motion for Judgment on the Pleadings.

I. INTRODUCTION

This matter arises out of the City's assessment of impact fees pursuant to § 7-6-1601, MCA, *et seq.*, Whitefish City Code ("WCC") § 10-2-1, *et seq.*, and Resolutions Nos. 18-44 and 19-15 ("Resolutions"). The City imposes impact fees as part of the development approval process for all developments, remodels, and renovations, to fund the additional water and wastewater service capacity they require. Plaintiffs, through their First Cause of Action for deprivation of constitutional rights under 42 U.S.C. § 1983, claim the impact fees violate the Takings Clause of the Fifth Amendment of the United States Constitution.

Judgment on the pleadings should issue in the City's favor on Plaintiffs' taking claim. Even accepting all material allegations in the Complaint as true, they do not constitute a taking under Plaintiffs' legal theory because they arise from generally applicable legislation.

Moreover, because Plaintiffs have failed to state a valid taking claim, this Court lacks subject matter jurisdiction over any of Plaintiffs' claims, such that their Complaint should be dismissed in its entirety.

II. BACKGROUND

1. Impact fees are, generally, one-time fees charged to new developments, remodels, and renovations as part of the building permit approval process, to compensate for the cost of infrastructure required to provide services to such developments. Doc. 1, ¶ 8.

2. On November 19, 2018, the Whitefish City Council ("City Council"), the City's legislative body, adopted Resolution No. 18-44, which set a schedule of impact fees for water and wastewater services, effective January 1, 2019. *Id.*, ¶ 9.

3. On July 15, 2019, City Council passed and adopted Resolution No. 19-15, which revised the impact fee rates, effective September 1, 2019. *Id.*, ¶ 10.

4. Pursuant to the Resolutions, the City charges impact fees as a precondition to issuing building permits within City limits. *Id.*, ¶ 12.

5. Plaintiffs have sued the City, claiming the impact fees charged pursuant to the Resolutions are unlawful takings in violation of the Fifth Amendment of the United States Constitution. *Id.*, ¶¶ 14, 51-54.

III. LEGAL STANDARD

Under Fed. R. Civ. P. 12(b)(6), a party may make a motion to dismiss for failure to state a claim upon which relief can be granted. Dismissal under Rule 12(b)(6) is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Mendiondo v. Centinela Hosp.*

Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008). When evaluating a Rule 12(b)(6) motion, the Court must accept all material allegations in the complaint, including any reasonable inferences , as true, and construe them in the light most favorable to the non-moving party. *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). The allegations in the complaint must go beyond mere formulaic recitation of the elements of a cause of action and "must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

A failure to state a claim defense may be raised by a motion for judgment on the pleadings after the pleadings are closed, but early enough not to delay trial. Fed. R. Civ. P. 12(c), (h)(2)(B).

IV. ARGUMENT

A. The Impact Fees Do Not Constitute a Taking Under *Dolan* Because They Are Pursuant to Generalized Legislation

The impact fees at issue were assessed pursuant to Montana state and local legislation. *See* § 7-6-1601, MCA, *et seq.*; WCC § 10-2-1, *et seq.*; Resolutions. The Montana legislature established rules for calculating, collecting, and expending impact fees, the City established a framework pursuant to those rules, and the City established a generally applicable methodology and schedule of impact fees pursuant to that framework. *See id.* The impact fees do not involve or invoke federal law in any way. Contrary to Plaintiffs' contention, and irrespective of whether the impact fees were properly assessed and spent, the assessment of the

fees does not constitute a "Taking" under "the Takings Clause" of the Fifth Amendment of the United States Constitution. *See* Doc. 1, ¶¶ 49-54.

The "Takings Clause" prohibits the government from taking private property "for public use, without just compensation." U.S. CONST. amend. V. "A plaintiff seeking to challenge a government action as an uncompensated taking of private property may proceed under one of four theories: by alleging (1) a physical invasion of property, (2) a regulation completely depriving a plaintiff of all economic beneficial use of property, (3) a general regulatory takings challenge pursuant to *Penn Central*, or (4) a land-use exaction violating the standards set forth in *Nollan* and *Dolan*." *McClung v. City of Sumner*, 548 F.3d 1219, 1225 (9th Cir. 2008) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

The only theory Plaintiffs pursue is under *Dolan*. Doc. 1, ¶ 52. Under that case, the Court must analyze (1) whether an "essential nexus" exists between a "legitimate state interest" and the permit condition exacted by the government; and (2) if such a nexus exists, whether the connection between the exaction and the projected impact of the proposed development is "roughly proportional." 512 U.S. at 386, 391. As stated hereafter, however, *Dolan*, does not apply to the impact fees at issue.

In *McClung*, plaintiffs sought to develop their property and the city required, as a condition of issuing them a permit, that they install a new underground storm drainpipe with larger diameter meeting the city's requirement for new developments. 548 F.3d at 1222. The drainpipe diameter requirement was pursuant to a city ordinance applicable to most new developments. *Id.* Plaintiffs sued the city, claiming the city's request constituted a federal Taking. *Id.*

In deciding the framework with which to assess the taking claim, the Ninth Circuit held a "generally applicable development condition that does not require the owner to relinquish rights in the real property, as opposed to an adjudicative land-use exaction," should be addressed under *Penn Central*. 548 F.3d at 1225 (citing *McCarthy v. City of Leawood*, 894 P.2d 836 845 (Kan. 1995) (concluding nothing in *Dolan* supports its application to impact fees) (additional cites omitted)). The Court distinguished *Nollan* and *Dolan* by noting they involved challenges to "adjudicative land-use exactions," defined as "government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Id.* at 1226 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005)). For example, in *Dolan*, a land use board conditioned the grant of a permit on Dolan expanding her store and parking lot and dedicating a portion of the property as a greenway and bicycle/pedestrian pathway. *Dolan*, 512 U.S. at 379-80.

Subsequent cases have reaffirmed the applicability of *McClung* to general land use regulations, as opposed to adjudicative, individual determinations. *See Bldg. Indus. Ass'n - Bay Area v. City of Oakland*, 775 Fed. Appx. 348, 349 (9th Cir. 2019) (holding plaintiff failed to state claim under Takings Clause because claim challenged "a legislative act, rather than an adjudicative land-use determination") (citing *McClung*, 548 F.3d at 1228 n.4, *abrogated on other grounds by Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *see also Better Hous. for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 933 (C.D. Cal. 2020) (holding *Koontz* did not abrogate *McClung*'s rule as applicable to legislative conditions) (citing *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928-29 (2016) (J. Thomas, concurring)), *affirmed by Better Hous. for Long Beach v. Newsom*, 2022 U.S. App. LEXIS 17533, *2 (9th Cir. June 24, 2022) (additional citations omitted).

In *Knight v. Metropolitan Government of Nashville & Davidson County*, plaintiffs challenged an ordinance which required property owners constructing new homes, or substantially renovating or expanding existing homes, to either construct a city sidewalk on their frontage or pay an "in-lieu fee" to a pedestrian benefit fund. 2021 U.S. Dist. LEXIS 221927, *2 (M.D. Tenn. Nov. 16, 2021). This was required as a precondition to issuing a building permit. The county calculated the in-lieu fee based on the applicable number of linear feet, times the average cost

of all new and repair sidewalk projects over the prior three years. *Id.* at *2-3. Plaintiff-property owners sued the county, seeking a declaration that the ordinance violated the federal Takings Clause. *Id.* at *10.

Applying the rationale of *McClung* and *Building Industry Ass'n*, the Court reaffirmed that *Nollan*/*Dolan* do not apply to legislative, generally applicable development ordinances. Rather, those cases are confined to monetary exactions imposed in an "*ad hoc*, individualized context," i.e. individualized adjudicative decisions. *Id.* at *19-20, 22-26 (citing *McClung*, 548 F.3d at 1226-27; *Bldg. Indus. Ass'n*, 289 F. Supp. 3d at 1058). The court held that, although the application of the ordinance pertained to individual applicants and even involved an option for the county to grant variances based on the facts of specific cases, the ordinance was nevertheless "essentially 'legislative'" because it applied to all developments in entire areas of Metropolitan Nashville and the in-lieu fees were determined by a set formula in the ordinance itself. *Id.* at *27. The *Nollan*/*Dolan* standard of review does not apply in such situations. *Id.* at 30; *see also Anderson Creek Partners, L.P. v. Cnty. Of Harnett*, 854 S.E.2d 1, 3-4 (N.C. Ct. App. 2020) (holding county ordinance where county charges landowners "capacity use" fees "for future water or sewer service as mandatory condition" prior to issuing permits for developments to real property imposed generally applicable, non-discretionary impact fees not subject to *Dolan*).

Here, the impact fees derive from legislative ordinances that broadly apply to the general public seeking to develop their property. *See* § 7-6-1601, MCA, *et seq.*; WCC § 10-2-1, *et seq*; Resolutions. They are uniformly calculated based on a preset framework specified in the ordinances and Resolutions, rather than discretionary decisions for individual landowners. Therefore, as a matter of law, the impact fees cannot constitute a taking under *Nollan*/*Dolan*, and Plaintiffs fail to state a valid takings claim.

B. Because Plaintiffs Have Failed to State a Valid Federal Takings Claim, This Court Lacks Subject Matter Jurisdiction and Should Dismiss All Claims.

Plaintiffs claim original and supplemental jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367 exists because "this is a civil action arising under the Constitution and laws of the United States and all claims in this action arising under state law are so related to claims within this Court's original jurisdiction that they form part of the same case and controversy under Article III of the United States Constitution." Doc. 1, ¶ 6. Plaintiffs, however, have no legitimate claim under the Constitution or the laws of the United States because this is purely a state law matter. Therefore, this Court lacks subject matter jurisdiction.

28 U.S.C. § 1331 provides the federal court with jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." Plaintiffs' only federal claim is their First Cause of Action, which involves a claim

under 42 U.S.C. § 1983 for alleged violation of the Takings Clause of the Fifth Amendment of the Constitution. As explained in the preceding section, however, Plaintiffs have no valid takings claim pursuant to *Knight*, *Anderson Creek Partners*, and *Building Industry*. Therefore, their sole basis for original jurisdiction under 28 U.S.C. § 1331 is invalid.

Any pendent claims should also be dismissed. 28 U.S.C. § 1367(a) provides that, if the Court has original jurisdiction over a claim, it has supplemental jurisdiction over all other related State law claims. The Court "may decline to exercise supplemental jurisdiction over a claim under subsection (a) if the Court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Acri v. Varian Assocs.*, 114 F.3d 999, 1001 (9th Cir. 1997) (acknowledging state law claims should be dismissed if federal claims are dismissed) (emphasis added). The reasons for this are "economy, convenience, fairness, and comity." *Id.* This Court should decline to exercise pendent jurisdiction.

Absent a federal question, this Court should not entertain a declaratory judgment claim to resolve purely state law issues. *See, e.g., Cont'l Cas. Co. v. Robsac Indus.*, 947 F.2d 1367, 1369-74 (9th Cir. 1991). This applies to Plaintiffs'

claim for declaratory judgment under 18 U.S.C. §§ 2201, *et seq.*

Because dismissal of Plaintiffs' federal taking claim is appropriate, the Court should dismiss all remaining State law claims based on lack of subject matter jurisdiction and/or pursuant to the Court's authority under 28 U.S.C. § 1367(c)(3).

V. CONCLUSION

For the foregoing reasons, the City respectfully requests that this Court issue judgment on the pleadings in the City's favor and dismiss Plaintiffs Complaint.

Dated this 25th day of July, 2022.

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