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

JEFF BECK, individually; et al.,)	CAUSE NO. CV-22-44-DLC-KLD
)	
Plaintiffs,)	
)	
vs.)	PLAINTIFFS' BRIEF OPPOSING
)	DEFENDANT'S MOTION FOR
CITY OF WHITEFISH, a Montana)	JUDGMENT ON THE PLEADINGS
municipality; and DOES 1-50,)	
)	
Defendants.)	

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Defendant, City of Whitefish ("Defendant" or "the City"), has moved for judgment on the pleadings pursuant to Rule 12(c), F.R.Civ.P. Plaintiffs oppose. For the reasons set forth herein, the Court should deny Defendant's motion.

INTRODUCTION

This matter arises out of Defendant's assessment of unconstitutionally excessive water and wastewater impact fees by the City. Defendant imposes impact fees as part of a permitting process for all developments, renovations, and remodels within the City. Issuance of a building permit is required for development in the City. And, building permits are conditioned upon payment of these same impact fees. Defendant's water and wastewater impact fees are supposed to impose a proportionate share of the cost of water and wastewater facility expansion needed to serve new growth and development. However, the water and wastewater impact fee rates Defendant has been charging the public since January 1, 2019, greatly exceed the actual impacts development has on water and wastewater services. In fact, Defendant has engaged in an unconstitutional money grab in the name of "impact" fees.

Seeking relief from this deprivation of their constitutional rights, Plaintiffs brought this action for themselves and all building permit applicants in the City who were charged impact fees for water and wastewater services by Defendant from January 1, 2019, to the present (the "Putative Class" or the "Class").

In support of its Motion for Judgment on the Pleadings, Defendant argues that Plaintiffs have failed to state a federal question claim for which relief can be granted. However, Defendant's argument is without merit—Plaintiffs have asserted a valid 42 U.S.C. § 1983 claim for relief from a deprivation of their constitutional rights.

BACKGROUND

1. Impact fees are, generally, the City 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; Doc. 27, p. 3.

2. The City has been charging impact fees on new development, remodels, and renovations within city limits and conditioning issuance of building permits upon payment of such fees since 2007. Doc. 1, ¶ 8.

3. On November 19, 2018, the Whitefish City Council ("City Council") adopted Resolution No. 18-44, which set new, higher impact fee rates on new development, remodels, and renovations for, *inter alia*, water and wastewater services in the City, effective January 1, 2019. Doc. 1, ¶ 9.

4. On July 15, 2019, City Council passed and adopted Resolution No. 19-15, which set even higher impact fee rates on new development, remodels, and renovations for water and wastewater services in the City. That resolution went into effect on September 1, 2019. Doc. 1, ¶ 10.

5. In calculating water and wastewater impact fee rates to be charged under these Resolutions, Defendant disregarded evidence of the actual impacts on water and wastewater utility services in the City and, instead, considered phantom, ineligible, or otherwise improperly calculated future public utility projects. Doc. 1, ¶¶ 15-34.

6. Defendant has continuously charged water and wastewater impact fees to property owners seeking building permits for projects not involving any increase in water fixture units or any other aspect of development impacting or increasing service demand on water and wastewater facilities. Doc. 1, ¶ 35.

7. The City's stated purpose in assessing these impact fees is: "that new growth and development should pay a proportionate share of the cost of new facilities needed to serve the new growth and development." Whitefish City Code ("WCC") § 10-2-1 (2018).

8. The impact fees Defendant has charged and continues to charge in the City greatly exceed the actual impacts developments, renovations, and remodels have on water and wastewater service facilities for the City. Doc. 1, ¶ 15.

9. In conditioning grants of building permits on the payment of excessive impact fees grossly disproportionate to the actual impact of proposed developments, renovations, and remodels and sometimes entirely disconnected from any reason that would otherwise warrant rejection of a permit, Defendant, under color of state law,

subjected Plaintiffs and the other Putative Class members to deprivations of their constitutional rights. Doc. 1, ¶ 54.

STANDARD OF REVIEW

"After the pleadings are closed, but within such time as not to delay the trial, any party may move for a judgment on the pleadings." Rule 12(c), F.R.Civ.P. "Rule 12(c) is a vehicle for summary adjudication, but the standard is like that of a motion to dismiss." *Johnson v. Dodson Pub. Sch., Dist. No. 2-A(C)*, 463 F.Supp.2d 1151, 1155 (D. Mont. 2006) (internal citations omitted). Judgment on the pleadings is proper only "when, taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001).

ARGUMENT

I. The well-pleaded facts, taken as true, support a 42 U.S.C. § 1983, deprivation of Constitutional rights claim.

The Federal Rules of Civil Procedure require that pleadings include "a short and plain statement of the claim showing that the pleader is entitled to relief; and a demand for the relief sought." Rule 8(a)(2)-(3), F.R.Civ.P. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the United States Supreme Court considered the adequacy of a complaint alleging that defendants orchestrated an antitrust conspiracy in violation of the Sherman Act. *Twombly* at 555.

The Court observed that the complaint contained no factual allegations of an agreement as needed to establish a conspiracy. *Twombly* at 564. Instead, the pleading rested on legal conclusions premised upon descriptions of parallel conduct. *Twombly* at 564. The Court in *Twombly* held that Rule 8, F.R.Civ.P., requires plaintiffs to include enough facts "to raise a right to relief above a speculative level," and cautioned that "a formulaic recitation of the elements of a cause of action will not do." *Twombly* at 555.

The Supreme Court provided further clarification of the necessary pleading standard in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), where it considered a claim alleging that several high-ranking officials violated the First and Fifth Amendments by purposefully instituting a policy of discrimination that resulted in plaintiff's incarceration at a facility where the conditions of confinement were inadequate. *Iqbal* at 668-69. *Iqbal* explained that "[t]wo working principles underlie" *Twombly*: (1) courts need not accept as true legal conclusions or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements;" and (2) only a complaint that states a plausible claim for relief with well-pleaded facts demonstrating the pleader's entitlement to relief can survive a motion to dismiss. *Iqbal* at 678-79. Because the complaint in *Iqbal* included only conclusory assertions of discrimination without factual allegations that plausibly gave rise to an entitlement of relief, the complaint was fatally defective.

Iqbal at 679-80. The Court explained that plaintiff's allegation that officials "purposefully adopted" a policy of discrimination was inadequate because it lacked factual allegations that could "'nudge[e]' [his] claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Iqbal* at 682-83 (quoting *Twombly*, 550 U.S. at 570).

Taken together, *Iqbal* and *Twombly* require only well-pleaded facts, not legal conclusions, *Twombly*, 550 U.S. at 570, that "plausibly give rise to an entitlement to relief," *Iqbal*, 556 U.S. at 679. The adequacy of a pleading is derived from its well-pleaded factual allegations, not any legal conclusions it may assert. A Rule 12(b)(6), F.R.Civ.P., motion to dismiss for failure to state a claim on which relief can be granted is evaluated based on the factual allegations. Thus, where the standard of review for a motion for judgment on the pleadings is like that of a 12(b)(6) motion to dismiss, this court must also look to the substance of the factual allegations pled in the Complaint, not the legal conclusions it may contain.

Plaintiffs' First Cause of Action states a claim for relief from a "Deprivation of United States Constitutional Rights" pursuant to 42 U.S.C. § 1983, inflicted by Defendant in its assessment of unconstitutional impact fees. Doc. 1, ¶¶ 48-56. Defendant argues it is entitled to judgment because it maintains a particular legal standard used in some Fifth Amendment takings cases applies over the takings standard referenced in the Complaint. Doc. 27, p. 9. While Plaintiffs maintain the

standard referenced in the Complaint applies to this case, regardless, simply arguing a different legal standard applies does not support judgment in Defendant's favor. Even if the Court accepts Defendant's standard, it must still evaluate Plaintiffs' claim under the alternative standard.

Plaintiffs included the legal standard for evaluating the constitutionality of land use exactions set forth in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), within their First Cause of Action section of the Complaint. Doc. 1, ¶ 52. However, this citation to legal authority is simply that—a citation to legal authority Plaintiffs contend applies. Defendant's answer to the legal authority allegations in the Complaint makes this clear—" [t]he allegations contained in Paragraph 52 of the Complaint are a statement of claim and/or legal authority thus [sic] do not require a response from the City." Doc. 23, ¶ 52. Pursuant to *Iqbal* and *Twombly*, Plaintiffs did not need to cite to any specific legal authority in their Complaint as long as the well-pleaded factual allegations, taken as true, plausibly establish that Defendant deprived Plaintiffs of their constitutional rights.

Notably, Defendant only argues that the standard referenced in Plaintiffs' Complaint¹ does not apply in evaluating the constitutionality of Defendant's impact fees. Doc. 27, pp. 4-9. Indeed, Defendant does not argue that Plaintiffs' factual

¹This standard is commonly referred to as the "*Nollan/Dolan*" standard as it incorporates the holdings of two Supreme Court cases analyzing the constitutionality of certain land use exactions—*Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Dolan*.

allegations fail to state a claim for deprivation of constitutional rights. In summarizing *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), Defendant states "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 [the regulatory takings standard set forth in *Penn Central Transp. Co. v. City of New York*, 439 U.S. 883 (1978)]." Doc. 27, p. 6. Further, in Defendant's Preliminary Pretrial Statement, it stated:

Legal Basis: Contrary to Plaintiffs' allegation in their Complaint, ¶ 52, the analysis in [*Dolan*] does not apply. Legislative, generally applicable development conditions that do not require the owner to relinquish rights in real property, such as impact fees, are analyzed under *Penn Central*, not *Dolan*.

Doc. 20, p. 6. Accordingly, Defendant acknowledges that Plaintiffs' factual allegations establish, at minimum, a plausible claim for a constitutional deprivation—even if Defendant believes Plaintiffs' claim should be analyzed under the regulatory takings framework of *Penn Central*.

Regardless of which takings standard applies, the well-pleaded factual allegations of the Complaint remain the same. Defendant is on notice that the impact fees it has been charging are unconstitutionally excessive in a multitude of ways. *See* Doc. 1, ¶¶ 8-35 (listing the facts making plain Defendant's impact fee rates are disconnected from the actual impacts of new developments on Whitefish water and

wastewater utilities). Whichever standard applies, it has no bearing on the relief requested—Plaintiffs seek: refunds of impact fees in excess of the constitutionally permissible amount; invalidation of City Resolutions effecting unconstitutional impact fee rates; and attorneys' fees incurred for bringing this action. If Plaintiffs had omitted ¶ 52 from their Complaint entirely, they would have still adequately stated a claim for relief from deprivation of their constitutional rights. The inclusion of ¶ 52 does not negate Plaintiffs' constitutional claim even if the *Nollan/Dolan* standard does not apply. Plaintiffs have complied with federal pleading requirements and stated a valid 42 U.S.C. § 1983 claim.

II. Plaintiffs' well-pleaded factual allegations, taken as true, establish claim for the deprivation of constitutional rights under any potentially applicable standard.

"[T]he government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983). In *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), for example, the Supreme Court held that a public college would violate a professor's freedom of speech if it declined to renew his contract because he was an outspoken critic of the college's administration. Likewise, in *Nollan* at 836-37, the Supreme Court explained that "[t]he evident constitutional propriety" of prohibiting a land use "disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the

justification for the prohibition." These cases reflect "an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 133 S.Ct. 2586, 186 L.Ed.2d 697(2013). "A predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz* at 612 (pointing to *Rumsfeld v. Forum for Acad. & Inst'l. Rights, Inc.*, 547 U.S. 47, 59-60, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006)).

The crux of Plaintiffs' 42 U.S.C. § 1983 claim is that, "in conditioning grants of building permits on the payment of excessive impact fees grossly disproportionate to the actual impact of proposed developments," Doc. 1, ¶ 54, Defendant unconstitutionally coerced Plaintiffs and the other Putative Class members to pay "impact" fees well in excess of amounts even remotely related to accomplishing the purpose of the fees: "to compensate for the cost of infrastructure required to provide services to such developments." Doc. 27, p. 3; *see also* WCC § 10-2-1 (2018) ("[N]ew growth and development should pay a *proportionate share of the cost of new facilities needed to serve the new growth and development*" (emphasis added)).

While Defendant might constitutionally prohibit developments within its jurisdiction to mitigate the strain they put on existing public utilities, under the

unconstitutional conditions doctrine, Defendant may not condition developments upon payment of an impact fee and then charge amounts much greater than sufficient to compensate for the costs associated with the increased service demand. Plaintiffs well-pled factual allegations are directed at Defendant's utter failure to further the end advanced as the justification for its impact fees.

While Plaintiffs maintain a *per se* takings analysis properly applies to their claim, the Complaint's well-pleaded facts, taken as true, support Plaintiffs' claim, regardless of the legal standard.

A. The Substantive Due Process Standard

The Due Process Clauses of the Fifth and Fourteenth Amendment provide that government shall not deprive anyone "of life, liberty, or property without due process of law." U.S. Const. amend. V, XIV. A statute or regulation violates substantive due process if it is arbitrary or irrational. *Eastern Enters. v. Apfel*, 524 U.S. 498, 539, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998). "[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Although "analysis of legislation under the Takings and Due Process Clauses is correlated to some extent," *Apfel* at 537, if a regulation violates substantive due process, a court need not even reach a takings analysis, *Lingle* at 543 ("if a government action is found to be impermissible—for instance

because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process—that is the end of the inquiry").

The WCC lays out the stated purpose of Defendant's impact fees charged at rates pursuant to the City Resolutions Nos. 18-44 and 19-15. Specifically, the City Council found "that new growth and development should pay a *proportionate share of the cost of new facilities needed to serve the new growth and development.*" § 10-2-1 (emphasis added). Further, the WCC states that Defendant assessed "impact fees for water [and] wastewater" "pursuant to Montana Code Annotated sections 7-6-1601 through 7-6-1604." *Id.*

Charging impact fees "grossly disproportionate to the actual impact of proposed developments, including remodels and renovations, and sometimes even entirely disconnected from any reason that would allow rejection of a permit," Doc. 1, ¶ 54, is contrary to the stated purpose of Defendant's impact fees. In their Complaint, Plaintiffs alleged to multiple violations of the same statutes Defendant purports to have relied upon in assessing these impact fees. Doc. 1, ¶¶ 58-64. For example, calculating arbitrary impact fees for projects that never materialize is a money grab and does not serve any legitimate government objective. Doc. 1, ¶¶ 27-34. Similarly, charging water and wastewater impact fees for development, renovations, and remodels not impacting service demand on water and wastewater facilities likewise does not serve any legitimate government objective. Doc. 1, ¶ 35.

Thus, the well-pleaded facts, taken as true, establish a 42 U.S.C. § 1983 claim that the City Resolutions at issue are arbitrary and irrational and violate Plaintiffs' substantive due process.

B. The *per se* Takings Standard

The Takings Clause of the Fifth Amendment, extended to states through the Fourteenth Amendment, and applies to anyone acting under the color of state law through 42 U.S.C. § 1983. It prohibits the government from taking private property "for public use, without just compensation." U.S. Const. amend. V. "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle* at 537.

In *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003), the Supreme Court addressed the issue of whether the governmentally mandated transfer of interest accrued on funds in an IOLTA account to the Legal Foundation of Washington was an uncompensated taking. The Court determined that a takings claim of this type should be analyzed as a *per se* taking not subject to the *Penn Central* standard. *Brown* at 235. The Court held, outside of the taxing context, transferring private funds to a different owner for a public use would be a *per se* taking requiring the payment of "just compensation" to the original owner. *Brown* at 235.

Brown applied a *per se* approach to the government appropriation of private monetary funds for public use.² Here, Defendant's impact fees confiscate the monetary funds of private landowners. Viewed in this context, the impact fees are *per se* takings requiring just compensation to the developing landowners.

It makes no difference that Defendant has not actively seized private funds but instead conditioned the issuance of building permits on paying improper fees—"[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation." *Koontz* at 607. When Defendant required Plaintiffs to pay impact fees as a condition for obtaining a building permit, any amount greater than the costs associated with extending water and wastewater service became taken private property for which Plaintiffs were not compensated. Thus, the well-pleaded facts, taken as true, adequately establish a 42 U.S.C. § 1983 claim under a *per se* takings standard.

C. The *Nollan/Dolan* Takings Standard

The Supreme Court decisions in *Nollan* and *Dolan* "provide important protection against the misuse of the power of land-use regulation." *Koontz* at 599. "In those cases, [the Court] held that a unit of government may not condition the approval

²While states and local governments have the inherent ability to levy taxes, the Supreme Court has "repeatedly found takings where the government, by confiscating financial obligations, achieved a result that could have been obtained by imposing a tax." *Koontz* at 615.

of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz* at 599 (providing the *Nollan/Dolan* standard).

As an initial matter, Defendant misconstrues *McClung*. *McClung* does not preclude application of the *Nollan/Dolan* land-use exaction standard to Plaintiffs' deprivation of constitutional rights claim. In *McClung*, at 1222, plaintiffs sought to develop their property, and the City of Sumner required, as a condition of permit issuance, installation of a new, increased-diameter underground storm drainpipe meeting the city's specifications for new developments. Plaintiffs sued the city, claiming the city's drainpipe requirement constituted a taking in violation of the Fifth Amendment. *McClung* at 1222. In deciding which legal theory provided the appropriate framework for assessing plaintiffs' takings 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*. *McClung* at 1225.

However, *McClung* did not address whether monetary exactions, such as the impact fees at issue here, are legislative or adjudicative in nature. In fact, the *McClung* court indicated that monetary exactions an entirely separate third category. The court only stated that *Nollan/Dolan* could not apply to monetary exactions

because "[a] monetary exaction differs from a land exaction—'[u]nlike real or personal property, money is fungible.'" *McClung* at 1228 (quoting *U.S. v. Sperry Corp.*, 493 U.S. 52, 62 n.9, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989)).

In *McClung*, the court also miscited its earlier decision in *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 875 (9th Cir. 1991), claiming the decision "reject[ed] application of *Nollan* to ordinance that conditioned the issuance of nonresidential building permits on the payment of a fee used to assist in financing low-income housing." However, contrary to the mischaracterization in *McClung*, the court actually evaluated a takings claim at involving impact fees under the *Nollan* exaction standard in *Commercial Builders*:

Nollan holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld. Where, as here, the Ordinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed, the Ordinance does not suffer from the infirmities that the Supreme Court disapproved in *Nollan*. We find that the nexus between the fee provision here at issue, designed to further the city's legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster.

Commercial Builders at 875. The impact fees at issue in *Commercial Builders* were calculated using a standard formula assessed equally to developers city-wide. While the court found the fees constitutional, it did not "reject application of *Nollan*" but, in fact, applied *Nollan*. *Commercial Builders* at 873. Critically, five years after

McClung, the United States Supreme Court applied *Nollan* to a monetary exaction consistent with the actual holding in *Commercial Builders*, abrogating *McClung*.

Defendant relies heavily upon a few decisions in other jurisdictions which declined to apply *Nollan* in cases involving exactions characterized as legislative as opposed to adjudicative. However, several courts have rejected Defendant's argument as inconsistent with the fundamental purpose of the Takings Clause. See e.g., *Levin v. City and County of San Francisco*, 71 F.Supp.3d 1072, 1081-84 (N.D. Cal. 2014); *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 482-83 (Ny. 1994); *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000). Defendant argues that *McClung* requires this Court to reject *Nollan* and the context of a legislative taking. However, as the Court observed in *Levin*, "*Koontz* abrogated *McClung*'s holding that *Nollan/Dolan* does not apply to monetary exactions, which is intertwined with and underlines *McClung*'s assumptions about legislative conditions." *Levin*, n. 4. Indeed, *McClung*'s assumptions about legislative conditions was based on the mistaken conclusion that *Commercial Builders* "reject[ed] application of *Nollan*," when in fact, *Commercial Builders* applied *Nollan* in the context of a building permit fee.³

³Defendant also cites the Ninth Circuit's unpublished decision in *Building Industry Ass'n - Bay Area v. City of Oakland*, 775 Fed.Appx. 348 (9th Cir. 2019), in support of its position. First, pursuant to Ninth Circuit Rule 36-3, the decision is not precedent. Second, the language on which Defendant relies simply repeats the discussion from *McClung* which is no longer valid and cites *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998), which specifically declined to address whether *Nollan* applies to legislative takings.

Although the United States Supreme Court has not directly addressed the distinction Defendant advocates, one Justice has expressed doubt that “the existence of a taking should turn on the type of governmental entity responsible for the taking.” *California Building Industry Association v. City of San Jose*, 577 U.S. 1179, 136 S.Ct. 928, 194 L.Ed.2d 239 (2016) (J. Thomas, concurring); *Parking Ass’n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 115 S.Ct. 2268 (Mem), 132 L.Ed.2d 273 (1995) (J. Thomas, dissenting).

If the Court applies the *Nollan/Dolan* takings standard, Plaintiffs have sufficiently pled a deprivation of constitutional rights claim under it. Plaintiffs' well-pleaded facts, taken as true, establish that Defendant's impact fees are "grossly disproportionate to the actual impact of proposed developments, including remodels and renovations, and sometimes even entirely disconnected from any reason that would allow rejection of a permit." Doc. 1, ¶ 54.

D. The *Penn Central* Takings Standard

Outside of the *per se* takings categories and land-use exactions, regulatory takings challenges are governed by the standards set forth in *Penn Central*. In *Penn Central*, at 124, the Supreme Court acknowledged that it had hitherto been "unable to develop any 'set formula'" for evaluating regulatory takings claims but identified "several factors that have particular significance." These factors include: (1) "[t]he economic impact of the regulation on the claimant;" (2) "the extent to which the

regulation has interfered with distinct investment-backed expectations;" and (3) the "character of the governmental action." *Penn Central* at 124. A court must weigh these factors to determine whether a regulation essentially amounts to a physical invasion or direct appropriation of property. *Penn Central* at 124.

Although Plaintiffs maintain *Penn Central* does not apply to their claim for the reasons set forth above, even if the Court accepts Defendant's argument, it must still deny Defendant's motion. Defendant makes no effort to establish that its arbitrary and improper impact fees passed constitutional muster under the *Penn Central* factors. Instead, Defendant argues, without any citation to authority, that the Complaint should be dismissed because it does not allege the potential legal standards under which the Court might evaluate Plaintiffs' claim. If the Court were to agree with Defendant's position on the applicable standard, it must still consider whether Plaintiffs' allegations, taken as true, establish a valid claim under the *Penn Central* standard.

Under the first factor, the economic impact of the improper fees was substantial. While proof of the precise amount of overcharges will require extensive evidence, developed through discovery, the Complaint allegations demonstrate massive economic impact. For example, Defendant's improper charges sought to recoup millions of dollars for nonexistent projects and failed to account for the

substantial number of new users served by millions of dollars spent on system upgrades. Doc. 1, ¶¶ 27-34.

The second and third *Penn Central* factors likewise favor a conclusion that Defendant's conduct deprived Plaintiffs' constitutional rights. Property owners, like the Plaintiffs, reasonably expect impact fees to be charged in a manner consistent with their purpose as represented by the City and required by Montana law. The various ways in which Defendant miscalculated and overcharged impact fees cannot reasonably be characterized as consistent with any Plaintiff's investment backed expectation.

Finally, the character of the government action, as alleged in Plaintiffs' Complaint, is indefensible. Defendant fails to even raise a legitimate rationale for assessing charges entirely inconsistent with the purpose of the fees (i.e. requiring new development to pay "a proportionate share of the cost of new facilities needed to serve the new growth and development"). Contrary to the purpose of the fees and applicable state law, Defendant forced Plaintiffs to pay it a windfall disguised by complex but erroneous calculations. Considering the well-pleaded facts of Plaintiffs' Complaint, even under the *Penn Central* factors, Defendant's excessive impact fees constitute takings. *Apfel* at 529-38.

III. Although unnecessary, should the Court have any concern regarding the inclusion of all potentially applicable legal standards in the Complaint allegations, it should allow Plaintiffs to amend, rather than dismiss, their Complaint.

The Court should deny Defendant's motion and find Plaintiffs adequately pled a federal claim for deprivation of their constitutional rights for the reasons set forth herein. As the parties' arguments demonstrate, courts apply a multitude of legal standards when evaluating constitutional claims. Defendant is on notice of the claim and the basis therefore, including a very factually detailed 27-page Complaint. Federal pleading requirements do not mandate that a plaintiff allege each legal framework through which a court may choose to evaluate his or her claim, whether under the due process standard, *per se* taking standard *Nollan/Dolan*, and/or *Penn Central* in this particular case.

However, if the Court agrees with Defendant that Plaintiffs should allege each legal analysis under which their claim might be evaluated, it should grant leave to amend, rather than dismissing, the Complaint. *United Union of Roofers v. Insurance Corp. of America*, 919 F.2d 1398, 1402-03 (9th Cir. 1990); *Shane v. Fauver*, 213 F.3d 113, 115 (3rd Cir. 2000) ("if a claim is vulnerable to dismissal under Rule 12(b)(6), but the plaintiff moves to amend, leave to amend generally must be granted unless the amendment would not cure the deficiency."). Here, although Plaintiffs believe it unnecessary (and on affront to Rule 8(a), F.R.Civ.P.), an amendment addressing the

legal standards discussed herein would not prejudice Defendant or delay the proceedings in this matter which remain in the early stages. If the Court believes Plaintiffs should have alleged different or alternative legal analyses for their claim, it should grant them leave to do so.

CONCLUSION

Plaintiffs have adequately stated a valid 42 U.S.C. § 1983 claim. For the reasons stated above, Defendant's argument in support of its Motion for Judgment on the Pleadings is without merit and the motion should be denied.

DATED this 15th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by WordPerfect X3, is 5,077 words, excluding caption, certificate of service, and certificate of compliance.

DATED this 15th day of August, 2022.

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