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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 REPLY BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

COMES NOW Defendant and files this reply brief in support of its Motion for Judgment on the Pleadings.

I. ARGUMENT

A. Plaintiffs Are Bound to the Legal Theories Asserted in the Complaint and Preliminary Pretrial Statement

In February 2022, Plaintiffs filed their Complaint asserting a § 1983 claim for alleged deprivation of constitutional rights. Doc. 1, pp. 18-19. That claim is premised solely on violation of the takings clause of the Fifth Amendment based *Dolan*. *Id.* (citing *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), and *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013). *Id.*, ¶ 39(A) and ¶¶ 52-54. Plaintiffs did not plead due process or any other taking standards. *See*, *generally*, Doc. 1.

Likewise, Plaintiffs did not include such legal theories in their Preliminary Pretrial Statement. Plaintiffs stated, "The following subsections outline the legal theories applicable to each of Plaintiffs' claims," then identified their § 1983 claim based strictly on an alleged taking under *Dolan*. Doc. 19 at pg. 12. *Id.* Like the Complaint, Plaintiffs did not allege violation of due process or other takings standards. *See*, *generally*, Doc. 3.

Now, over six months into this lawsuit, facing a Motion for Judgment on the Pleadings, Plaintiffs seek to insert three additional legal theories into their § 1983 claim to preserve it. The Court should deny that effort.

Dismissal under 12(b)(6) may be based on either "'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'"

Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1121-22 (9th Cir. 2008). In *Kruckenberg v. McKellar Group, LLC*, the Court dismissed plaintiff's claims for failure to adequately connect factual allegations in the complaint to the legal theories asserted, stating:

> … Plaintiff does not articulate the legal theory by which the facts alleged allow this Court to infer that Plaintiff is entitled to relief. As another district court in this Circuit has explained:
>
> > Plaintiffs must identify each legal theory in separate Counts of their Complaint, Plaintiffs must not simply list constitutional violations with no explanation. Plaintiffs must connect each legal theory to the actions giving rise to that legal theory and Plaintiffs must give the individual Defendants … notice of their conduct giving rise to such a claim. For example, Plaintiffs must not simply allege that Plaintiffs due process rights were violated by Defendants. Plaintiffs must identify their due process claim … and facts meeting the elements of such a claim.

2014 U.S. Dist. LEXIS 113958, *9-10 (S.D. Cal. Aug. 14, 2014) (emphasis added)); *see also Better Hous. for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 933 (C.D. Cal. 2020) (dismissing takings claim plaintiffs explicitly based on *Dolan* standard, noting Plaintiffs did not pursue any takings violation under *Penn Central*).

Bell Atlantic Corp. v. Twombly did not hold that Plaintiffs may simply plead facts and omit legal theories the facts support. *See*, *generally*, 550 U.S. 544, 570 (2007). They need to articulate the legal theories and connect them to relevant factual allegations. *See Kruckenberg*, 2014 U.S. Dist. LEXIS 113958, at *9-10; *see*

also Nelson-Ceballos v. Fraser, 2020 U.S. Dist. LEXIS 258992, *9 (C.D. Cal. March 9, 2020) (dismissing complaint for failure to identify cognizable legal theory to give "direction as to what legal theory or cause of action Plaintiffs are alleging").

Regarding the Preliminary Pretrial Statement, the Court's Preliminary Pretrial Order and L.R. 16.2(b)(1) required Plaintiffs to identify the legal theory underlying each claim. Doc. 3, ¶ 7. The Court warned, "The Court intends to implement Rule 1 and Rule 16 of the Federal Rules of Civil Procedure to the fullest extent possible." *Id.*, ¶ 9. Fed. R. Civ. P. 1 directs the Court to administer the civil rules to "secure the just, speedy, and inexpensive determination of every action and proceeding." Holding Plaintiffs to the legal theories in the Complaint and Preliminary Pretrial Statement advances both Rules 1 and 16.

In *Abromeit v. Mont. Rail Link, Inc.*, the Court held:

> Federal Rule of Civil Procedure 26 directs parties to provide broad disclosure regarding the basis for their claims against an opposing party. The Local Rules require a party to file a preliminary pretrial statement disclosing the legal theory underlying each claim. "[D]iscovery is designed to allow the defendant to pin down the plaintiff's theories of liability and to allow the plaintiff to pin down the defendant's theories of defense, thus confining discovery and trial preparation to information that is pertinent to the theories of the case." A court has discretion to exclude a claim if a party fails to include notice of the legal basis of the claim in either its pleadings or a pretrial order.

2010 U.S. Dist. LEXIS 96425, at *4-5 (D. Mont. Sep. 15, 2010) (citations

omitted). Defendant was entitled to rely on Plaintiffs' representations regarding the legal basis for their claims.

Plaintiffs should not be permitted to assert one constitutional violation theory early on then reconfigure it into any "potentially applicable standard" once Defendant briefs a motion. That would be very prejudicial and would reward litigation by ambush. It is particularly inappropriate as to the Due Process claim, which arises from a separate constitutional clause. *Cf. Angelotti Chiropractic v. Baker*, 791 F.3d 1075, 1080 (9th Cir. 2015) (plaintiffs sued state officials asserting separate claims for violations of separate takings, due process, and equal protection clauses). Plaintiffs should be limited to the *Dolan* takings theory they plead.

B. *Dolan* Does Not Apply

Dolan does not apply. As Plaintiffs admit, in *McClung v. City of Sumner*, the Ninth Circuit rejected application of *Dolan* to monetary, as opposed to land, exactions. Doc. 28, p. 16 (citing 941 F.2d 872, 875 (9th Cir. 1991). Plaintiffs also acknowledge that, although *McClung* has been partially abrogated, it has not been abrogated as to the precise distinction Defendant advocates here, i.e., *Dolan* does not apply to general land use legislation, as opposed to individual adjudicative determinations. *Id.*, p. 18 ("the United States Supreme Court has not directly addressed the distinction [Defendant] advocates"). Thus, *McClung*'s rejection of the applicability of *Dolan* to the type of fees at issue here controls.

Plaintiffs' suggestion that Defendant misconstrued *McClung* is incorrect and a red herring. Doc. 28, p. 15. Defendant agrees *McClung* did not establish a general principle of whether monetary exactions in general are legislative or adjudicative in nature, though the exactions at issue there were legislative. *See McClung*, 548 F.3d at 1225-28. What matters is, as Plaintiffs plead in their Complaint, the fees at issue here derive from legislative ordinances that apply to the general public seeking to develop property. Doc. 1, ¶¶ 9-12, 65-66 (citing *See* § 7-6-1601, MCA, *et seq.*; Resolutions); *see also* WCC § 10-2-1, *et seq.* Therefore, Plaintiffs have not plead allegations that would meet the *Dolan* standard.

Plaintiffs attempt to avoid the impact of *McClung* by arguing the Ninth Circuit miscited its own prior decision. Doc. 28, p. 16 (citing *Comm. Builders of N. Cal. v. Sacramento* 941 F.2d 872, 875 (9th Cir. 1991)). Plaintiffs omit, however, that *McClung* cites three other controlling cases for the same point. 548 F.3d at 1228 (citing *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); *San Remo Hotel, L.P. v. S.F. City & County*, 364 F.3d 1088, 1097-98 (9th Cir. 2004), *aff'd* 545 U.S. 323 (2005); *Garneau v. City of Seattle*, 147 F.3d 802, 808 (9th Cir. 1998)). *Commercial Builders* and *McClung* both relied on *Sperry* to support the very holding Plaintiffs contend the Ninth Circuit miscited. It is undisputed *McClung* rejected the application of *Dolan* to monetary exactions, supported by multiple controlling cases Plaintiffs ignore. The Ninth Circuit was correct.

Plaintiffs also claim Defendant relies heavily on decisions in other jurisdictions to support the argument that *Dolan* does not apply to legislative exactions. Defendant only cited those two cases as examples of this principle applied to particularly similar fee ordinances. Again, as Plaintiffs admit, the Ninth Circuit adopted that principle in *McClung*. Doc. 28, p. 15. It remains binding. *See Bldg. Indus. Ass'n - Bay Area v. City of Oakland*, 775 Fed. Appx. 348, 349 (9th Cir. 2019); *see also Better Hous.*, 452 F. Supp. 3d at 933.

None of the cases Plaintiffs cite held *Koontz* abrogated this aspect of *McClung*. At most, *Levin v. City and County of San Francisco* opined *McClung's* holdings about monetary exactions and legislative conditions are intertwined. 71 F. Supp. 3d 1072, 1081-84 (N.D. Cal. 2014). If the Supreme Court wanted to abrogate *McClung* on both issues, it would have.

Indeed, Plaintiffs acknowledge Justice Thomas has since suggested the existence of a taking should not turn on this adjudicative versus legislative issue. Doc. 28, p. 18 (citing *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928-29 (2016) (J. Thomas, concurring); *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116 (1995) (J. Thomas, dissenting)). This confirms *Koontz* did not abrogate *McClung* on that issue. *Better Hous.*, 452 F. Supp. 3d at 933 (holding *Koontz* did not abrogate *McClung*'s rule as applicable to legislative conditions) (citations omitted).

The holding in *McClung* makes sense from a policy perspective because "*Dolan*'s 'rough proportionality' requirement demands an 'individualized determination' that the exacted public benefit 'is related both in nature and extent to the impact of the proposed development,'" which is difficult to apply to "generally applicable regulations, which, by definition, do not involve individualized determinations." *Better Hous.*, 425 F. Supp. 3d at 933. For these reasons, "courts across the country have agreed that *Koontz* did not disturb state and circuit court precedent limiting *Dolan* to adjudicative actions." *Id.* at 933 n.3 (citations omitted).

C. The *Per Se* Takings Standard Does Not Apply

Plaintiff's Complaint neither alleges the legal theory for a *per se* taking nor alleges facts to support one. The law generally recognizes two methods of analysis in takings cases: *per se* analysis and *ad hoc* analysis. *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 854 (9th Cir. 2001). Historically, "The *per se* analysis has not typically been employed outside the context of real property. It is a particularly inapt analysis when the property in question is money." *Id.* It is "artificial to view deductions of money as physical appropriations of property because, unlike real or personal property, money is fungible." *Id.* (citing *Sperry*, 493 U.S. at 62 n.9). Applying this rationale, the Ninth Circuit held an ordinance imposing a fee with the issuance of permits for nonresidential developments to

finance low-income housing does not constitute a *per se* taking. *Id.*

Although *Brown v. Legal Foundation of Washington* set limits on this general principle, it did not render every collection of fees a taking. *Ballinger v. City of Oakland*, 24 F.4th 1287, 1293 (9th Cir. 2022) (citing *Comm. Builders*, 941 F.2d at 875 (every fee provision cannot be a compensable taking). Plaintiffs' argument would make virtually every collection of a fee by the government a taking. Moreover, it would obviate all the caselaw after *Brown* discussing the applicability of *Dolan* to monetary exactions.

As *Ballinger* recognized, *Brown*'s application is limited. The assessment of a fee by the government based on an owner's decision how to use property is not a *per se* taking. *See Ballinger*, 24 F.4th at 1293-94 (citations omitted), *distinguishing Brown*, 538 U.S. at 223-24. Plaintiffs' pleading alleges Defendant charges impact fees based on an owner's decision to develop property. *See*, *e.g.*, Doc. 1, ¶ 12.

Similarly, a *per se* taking does not occur when an individual pays money without protest or appeal, provided the government did not seize the funds. *See McCarthy v. City of Cleveland*, 626 F.3d 280, 284 (6th Cir. 2010) (citing *Eastern Enter. v. Apfel*, 524 U.S. 498, 554 (1998)). Plaintiffs' pleading does not allege they protested or appealed the impact fees. *See*, *generally*, Doc. 1.

Separately, "a general obligation to pay money," as opposed to identification of a specific fund from which money must be paid, is not a *per se* taking.

Ballinger, 24 F.4th at 1295 (distinguishing *Koontz*, 570 U.S. at 614). Such takings, as in *Brown*, involve seizing money in the form of specific, identified property interests to which those persons were already entitled. *Id.* at 1296. In contrast, an obligation to pay money for government benefits, e.g. issuance of a permit, is not a *per se* taking. *Id.* (citing *Sperry*, 493 U.S. at 62 n.9). The Plaintiffs' allegations fit the latter category. *See*, *e.g.*, Doc. 1, ¶ 12.

For these reasons, the Court should reject Plaintiffs' request to expand the *per se* takings analysis to virtually every collection of fees by the government, including the impact fees at issue.

D. *Penn Central* Does Not Apply

Plaintiff's Complaint neither alleges the legal theory for a *Penn Central* taking nor facts to support such a claim. In analyzing whether government action constitutes a taking under *Penn Central*, the Court must note that "Governmental action through regulation of the use of private property does not cause a taking unless the interference is significant." *Wash. Legal Found.*, 271 F.3d at 860 (emphasis added). *Penn Central* uses the following factors to analyze whether a regulation is sufficiently significant to constitute a taking: "(1) the regulation's economic impact on the claimant; (2) the extent to which the regulation interferes with distinct investment-backed expectations; and (3) the character of the government action." *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445,

450 (9th Cir. 2018). None of these factors support a taking here.

Plaintiffs cite no authority regarding the standard for the first factor. "In considering the economic impact of an alleged taking, we 'compare the value that has been taken from the property with the value that remains in the property.'" *Colony Cove Props.*, 888 F.3d at 450 (emphasis added). The Court focuses "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Id*. "If 'an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.'" *Id*.

Plaintiffs do not allege these fees diminished any value in their properties, much less to an extent that would constitute a taking under this factor. *See*, *generally*, Doc. 1. All Plaintiffs cite is the amount of fees charged, which is not what this factor is intended to measure. Doc. 28, pp. 19-20. Moreover, they misconstrue that figure, by citing the total amount charged instead of the amount per plaintiff, to make it seem more impactful than it was. Plaintiffs allegations do not support a taking under this factor.

Plaintiffs also cite no authority regarding the standard for the second factor. *See* Doc. 28, p. 20. It is intended to cover situations where a government passes a regulation that moves the goalpost after a property owner buys a property, substantially impairing plans the owner had for it. For example, in *Pennsylvania*

Coal Co. v. Mahon, 260 U.S. 393, 414 (1922), plaintiffs sold surface rights to parcels but reserved mineral rights, then the government passed a statute that effectively made it unlawful to exploit those mineral rights. That is a seminal example of what this factor is intended to cover.

In contrast, a regulation does not satisfy this factor if it was already in place when plaintiff bought the property. *MHC Fin. L.P. v. City of San Rafael*, 714 F.3d 1118, 1128 (9th Cir. 2013) (citing *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (finding interference-with-investment-backed-expectations factor to be "fatal" to plaintiffs' takings claim where they purchased property with subject rent control ordinance already in place). "'[T]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.'" *Id.*

Here, Plaintiffs bought property and/or paid impact fees since January 1, 2019, after prior iterations of the impact fee resolutions were in place. *See*, *e.g.*, *id.* ¶¶ 21, 37. At most, Plaintiffs allege Defendant amended its methodologies to increase the fees more than it should have. That does not meet this factor either.

Plaintiffs also cite no authority regarding the standard for the third factor. *See* Doc. 28, p. 20. "*Penn Central* instructs that '[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program

adjusting the benefits and burdens of economic life to promote the common good.'" *Colony Cove Props.*, 888 F.3d at 454. There is no allegation that impact fees were a physical invasion. *See*, *generally*, Doc. 1; Doc. 28.

Whether or not Plaintiffs' allegations about the impact fees are true, they admit they are intended to collect "a proportionate share of the cost of new facilities needed to serve the new growth and development." *See* Doc. 28, p. 20. That involves a public program intended to allocate an economic burden to promote the common good and does not meet the third factor.

E. The Due Process Standard

The standard for substantive due process claims is high. The Court must assess whether the government regulation at issue is "rationally related to a legitimate governmental purpose." *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013). "Governmental action is rationally related to a legitimate goal unless the action is 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" *Id.* at 1193. "[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 (2005) (emphasis added). "[T]he Supreme Court has made clear that legislative acts "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality" against

Due Process claims. *Vazquez v. Jan-Pro Franchising Int'l, Inc.*, 986 F.3d 1106, 1117 (9th Cir. 2021).

Plaintiffs' proffered due process claim goes far beyond the bounds of any legal theory or claim they legitimately plead. They have failed to offer any legitimate argument regarding how the facts alleged in the Complaint would satisfy these high thresholds for such a claim to succeed. Therefore, they have failed to failed to plead allegations necessary to support a due process claim.

F. The Court Should Not Allow Plaintiffs to Amend Their Complaint because It Would Be Futile.

Plaintiffs request that, if the Court will not assess their new legal theories because they did not originally plead them, they be permitted to amend their Complaint to include them. As explained herein, however, Plaintiffs' facts alleged would not satisfy those new theories. The Court should deny Plaintiffs' request to amend the Complaint because it would be futile. *See Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1059 (9th Cir. 2018).

Moreover, the deadline to amend is passed. Doc. 25. Plaintiffs have not made their request to amend in a motion, as required. See Fed. R. Civ. P. 15(b)(1) ("request for a court order must be made by motion"). They have failed to establish good cause why leave to amend should be granted, as is required for amendment under these circumstances. *See* Fed. R. Civ. P. 16(a)(2).

II. CONCLUSION

For these reasons, Defendant requests this Court issue judgment on the pleadings in Defendant's favor and dismiss Plaintiffs Complaint.

Dated this 12th day of September, 2022.

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L.R. 7.1(d)(2)(E) Certification

The undersigned counsel hereby certifies that this brief complies with the word count requirements of L.R. 7.1(d)(2)(B), the brief having 3,236 words, excluding caption, certificates of service and compliance, table of contents and authorities, and exhibit index.